

SUPREME COURT OF NOVA SCOTIA

Citation: *R. v. Buckley*, 2018 NSSC 1

Date: 2018 01 19

Docket: CRBW No. 461375

Registry: Bridgewater

Between:

Her Majesty the Queen

v.

John Buckley

DECISION: *VOIR DIRE* 1

Hart Application

Restriction on Publication: Section 486.5

Judge: The Honourable Justice Joshua M. Arnold

Heard: October 16, 30, 31, 2017; November 1, 2, 3, 6, 8, 9, 10, 2017;
January 2, 2018, in Bridgewater, Nova Scotia

Written Decision: February 14, 2018

Counsel: Peter Craig and Leigh Ann Bryson, for the Crown
Patrick MacEwen, for the Defence

By the Court:

Overview

[1] Victoria Rae Brauns-Buckley was killed in her family home on March 1, 2012. John Buckley, her eighteen-year old son, who grew up in that home, was charged with second-degree murder on March 13, 2012. He was remanded. His preliminary inquiry was scheduled for five days in January 2013. He received Crown disclosure in the normal course of preparing to meet the charge.

[2] On December 18, 2012, the Crown withdrew the charge of second-degree murder. Mr. Buckley was released from custody. The Crown was clear that the investigation was ongoing and requested an extension to March 1, 2013, allowing them to retain all exhibits.

[3] In 2015-2016, the police conducted a Mr. Big operation entitled Operation Hackman. John Buckley was the target. The first scenario of Operation Hackman took place in early October 2015 and the final scenario occurred in April 2016. In total the police conducted 77 scenarios, accumulating between 700 and 1000 hours of audio recordings. The operation was so complex that its forecasted budget was in excess of \$300,000.

[4] Scenario 75, the Mr. Big interview, also referred to as the “crime boss confession”, took place on April 6, 2016. During the Mr. Big interview, John Buckley confessed to killing his mother. Scenario 76 involved Mr. Buckley traveling with the fictitious criminal organization to Nova Scotia to re-enact the murder on April 7, 2016.

[5] Mr. Buckley was arrested on April 8, 2016, by way of a traffic stop during Scenario 77. During a cautioned statement taken later on April 8, 2016, he eventually told the police that he killed his mother. He was there upon charged with first-degree murder. His trial is scheduled to start on January 22, 2018.

[6] The Crown wants to rely on the Mr. Big confession as evidence at Mr. Buckley’s trial. In *R. v. Hart*, 2014 SCC 52, the Supreme Court of Canada ruled that Mr. Big confessions are presumptively inadmissible. In this case, the onus is on the Crown to prove that the probative value of the Mr. Big confession outweighs its prejudicial effect.

[7] This is a companion decision to the decision on admissibility of the cautioned statement. I have found it necessary to make reference to that other statement in this decision. In arguing for admissibility of the Mr. Big confession, the Crown relies on the cautioned police statement as supporting evidence. At the same time, the Mr. Big confession is a central element of the background to the giving of the cautioned police statement. In *R. v. Buckley*, 2018 NSSC 2, I ruled the cautioned statement inadmissible.

Publication Ban

[8] The Crown made an application pursuant to s. 486.5 of the *Criminal Code* requesting a time-limited publication ban of the identities of the undercover and cover operators in this matter. The Crown has requested the use of initials rather than the actual names of the officers involved. The Crown suggests the ban remain in place for three years. The request was not opposed by Mr. Buckley, nor was it opposed by members of the media, including CBC and the Chronicle Herald, who were given proper notice and were present for the application.

[9] The Crown's request was supported by a detailed affidavit from a senior member of the R.C.M.P., who explained that the time-limited ban was necessary to protect officers who were currently involved in undercover operations and/or were in a pool of potential undercover operators. These officers could be called on at any time to take part in an undercover operation.

[10] The Supreme Court of Canada has directed that when a discretionary ban is requested, the court must apply the *Degenais/Mentuck* test. This refers to the decisions of *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 and *R. v. Mentuck*, [2001] 3 S.C.R. 442. The test was explained by Iacobucci J., in *Mentuck*, at para. 32:

A publication ban should only be ordered when:

(a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and

(b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

[11] Unlike the decision in *R. v. Derbyshire*, 2016 NSCA 67, leave to appeal refused 2016 S.C.C.A. No. 529, wherein the undercover operators had been involved in abusive behavior, in this case Mr. Buckley has proceeded exclusively on the first-prong of *Hart* and alleges no abusive police behaviour.

[12] I agree that in applying the *Degenais/Mentuck* test, the time-limited, three-year publication ban as requested by the Crown should be imposed in this case as it is in the interest of the proper administration of justice to allow non-abusive undercover operators to remain available for this type of policing. The publication ban alleviates any possible risk that the officers would suffer harm as might be the case should their identities be disclosed. A limit of three years on the ban prevents the creation of a secret police force where officers are not ever accountable or identified. A three-year ban in these specific circumstances is a fair balance between the competing rights in this case.

[13] Therefore, when it is necessary to refer to specific undercover operators in this decision, I will only use initials.

The Mr. Big Operation

[14] In October 2015, the police made their first attempt at contact with Mr. Buckley, in Montreal, where he was living. According to evidence on the *voir dire*, at the time the Mr. Big operation started, the police were aware that:

- Mr. Buckley was living in Montreal;
- Mr. Buckley was on social assistance;
- Mr. Buckley was working part-time at a coffee shop, possibly as a bus boy;
- Mr. Buckley had no fixed address, was living in a rooming house and was transient;
- Mr. Buckley might have a girlfriend;
- Both of Mr. Buckley's parents were deceased;
- Mr. Buckley had a strained relationship with his only sibling, his sister;
- Mr. Buckley did not have a large social circle; and

- Mr. Buckley did not appear to be involved in any extra curricular activities.

[15] In this first attempt at contact in October 2015, the undercover operator “bumped” into Mr. Buckley and asked him to help find his step-brother for pay. That initial attempt to engage Mr. Buckley in an effort to lure him into a Mr. Big operation was unsuccessful. Mr. Buckley rejected the approach from the undercover operator.

[16] In October and November 2015, the police made a new plan to bring Mr. Buckley into their fictitious criminal organization. In early November, knowing where Mr. Buckley went to cash his welfare cheque, undercover personnel approached him and enticed him with a “job fair”-type opportunity. Mr. Buckley was subsequently interviewed and offered a job with a fictitious company.

[17] Once hired, Mr. Buckley was initially paid \$20 per hour. He started off working in a warehouse, but quickly moved up in the organization. He soon was travelling around Quebec, and elsewhere, doing pick ups and deliveries for the company. He then moved further up in the organization and travelled to the Yukon and Newfoundland for work. He stayed in hotels and ate in restaurants with other members of the fictitious criminal organization during these road trips, all at the expense of the organization. Sometimes evening drinking sessions were paid for by the organization. Mr. Buckley worked with, and became friends with, various members of the organization. The cast of main characters of the fictitious criminal organization included the following individuals:

- P.I. – Mr. Big/Crime Boss;
- B.M. – Vice President;
- S.M. - Vice President; and
- M.L. – John Buckley’s superior and co-worker.

[18] Mr. Buckley most often worked and travelled with M.L., who quickly became his co-worker, gym partner and best friend. M.L. estimated that over the course of the six-month operation, he spent approximately 700 hours with Mr. Buckley. M.L. worked out with Mr. Buckley, ate with him, traveled with him, and even socialized with him by going to bars on occasion. During one scenario M.L. took Mr. Buckley to a Montreal Canadiens game and gave him a Canadiens jersey.

[19] The idea that the criminal organization was like a family was repeated to Mr. Buckley throughout the operation. The need for honesty and loyalty was emphasized to him by various members of the undercover operation. All of the members of the organization were portrayed as living comfortable lifestyles, which could include vacation homes, recreational vehicles and early retirement. Mr. Buckley was shown that if he fit in and did what he was asked there was room for advancement.

[20] It was explained to Mr. Buckley that P.I. was the big boss of the entire organization. This was repeated to Mr. Buckley many times throughout his involvement with the fictitious criminal organization. Mr. Buckley had occasion to meet or see P.I. during selected scenarios, all staged to create an aura of power and control around P.I.

[21] Fairly early in the deception, Mr. Buckley became aware that the organization was involved in non-violent crime. Over the course of the operation, Mr. Buckley was mainly exposed to such activities as insurance fraud, illegal cigarette sales, illegal gold transactions, and the like. However, it was implied to Mr. Buckley by his co-workers that the organization had ties to dangerous criminal organizations, such as “bikers” and “Italian” organized crime. The undercover operators told Mr. Buckley variously that they “had done things in the past that they were not proud of” and that they had “done things that would give Mr. Buckley nightmares.” These types of statements could only imply that they had criminally violent backgrounds. The operators said they did this to make Mr. Buckley feel comfortable telling them he had done violent things. Of course, these types of comments could also have another impact, such as creating fear in Mr. Buckley. Mr. Buckley did not testify on this *voir dire* so his feelings are not in evidence. During the various scenarios there was no indication that Mr. Buckley ever expressed fear.

[22] As Mr. Buckley worked his way up through the organization he was sent on more significant trips, such as flying to Newfoundland and the Yukon. The operators wanted to convince him that they had crime links all over Canada. Mr. Buckley was paid for his time away. He stayed in hotels and ate at restaurants. The organization bought him necessities when needed (winter clothes, overnight kit, etc.) and invited him to parties. He was involved in numerous scenarios where he believed he was conducting illegal business. Of course, none of the crimes during the scenarios were actually being committed.

[23] During one of the scenarios the undercover operators told Mr. Buckley that a biker, who was in prison, owed P.I. a favour. Mr. Buckley was given to understand that P.I. had paid off a debt to the Italians to assist the biker and was taking his motorcycle as part payment. The operators wanted Mr. Buckley to see that there was a biker in prison who owed P.I. a favour.

[24] During one scenario Mr. Buckley was asked to count \$10,000 in cash. He told M.L. that the job was too good to be true. During one trip involving a gold scam, Mr. Buckley was allowed to count \$240,000 in cash. During another trip he was asked to transport gold nuggets. This was a far cry from his living on welfare.

[25] During another scenario Mr. Buckley participated in creating a false alibi for an undercover operator who was trying to avoid being charged with an impaired driving/accident related crime. A corrupt employee of a hospital falsified records to support the story. The operators wanted Mr. Buckley to see that they could manipulate and obstruct justice.

[26] One scenario involved a cash bribe being given to a corrupt U.S. border officer. The operators wanted Mr. Buckley to see and believe that they had crime links in Canada and the U.S.A.

[27] Another scenario involved targeting a police officer who was looking into the criminal organization's bank accounts. Mr. Buckley participated with other members of the organization in breaking into that police officer's vehicle to steal his briefcase, covertly capturing on video that police officer having sex with a stripper and then blackmailing that police officer to subvert any police investigation into the criminal organization. The undercover operators told the police officer that if he did not do what they wanted him to do they would send the video to the police officer's wife, his employers and the media. The undercover operators told Mr. Buckley that the blackmailed officer now worked for them. They wanted Mr. Buckley to see and believe that they could corrupt a police officer and that they had contacts within the R.C.M.P.

[28] During that scenario, B.M. told Mr. Buckley that if he had to "tune somebody up" then he would, but would not involve Mr. Buckley. During his testimony, B.M. agreed that "tuning someone up" was equivalent to beating someone up or intimidating them. Clearly, this was a reference to potential violence. B.M. stated during direct examination:

A: ... So I asked him to go over there and try to locate him there. I tell him the only thing I want I want is locate him. There's no other thing. I just want you try to identify him and identify the vehicle he's driving. And I, I told him, I go, I tell John if there's anything this you don't have to worry there's nothing that's going to happen. We just want to locate him. If there's something that has to be done, I'm not going...**if I have to tune up, I told him if I have to tune up anybody**, don't worry, I'm not going to take you. That's what I told him.

Q: Okay, so when you say you have to tune somebody, I'm not going to take, what do you mean by that?

A: Probably, probably intimidate him, you know something of that nature. It wasn't, it wasn't very clear there, I just said it, it just came out like that. So I said our goal is to locate him because he's fooling around with our bank records and we're going, we going to take care of it there. That was the first part the scenario. I said that, I told him not to worry, we're not going to, I want no contact with him, you guys are not going to talk with him. We just want to locate him. Let's do phase one first and then we'll see what happens. That was the instructions that was given to them. After that I told him to go over there to the vacant stop and try to locate him. That was the instructions that were given to him. ... [Emphasis added]

[29] And during cross-examination, B.M. said:

Q: And during these scenarios there was a mention, I think it was just today, of the tune up comment. If the guy needs to be tuned up I'll get somebody else to do that.

A: Yes.

Q: Don't worry about that. Now, you'd agree with me that, and I don't think this is a language thing, **to tune somebody up means to beat them up, correct?**

A: Yeah, yeah, **intimidate, beat them up.**

Q: Well, you'd agree with me there's a difference between to intimidate somebody and beat them up, correct?

A: Well, yeah, I guess. Well you could, you could, you could beat up somebody and intimidate them also.

Q: Well, maybe it's a...

A: No?

Q: If you're beaten up, you're probably intimidated, but you can certainly intimidate somebody without physically touching them?

A: Absolutely.

Q: But when you're talking about tuning somebody up, what that means, it's slang for beat somebody up?

A: Yes, it could be.

Q: Well, I'm going to suggest to you that's what it is. It has a definite meaning.

A: It's a, it's an interpretation thing there. It could be. I'm not saying it's not, but said it could be. All depends.

Q: Okay, well you were speaking English at the time?

A: Oh yes, absolutely.

Q: And Mr. Buckley as far as you were aware was predominately an Anglophone. He only spoke English.

A: Yes.

Q: Fluently anyway.

A: Yes.

Q: So the term to tune somebody up is to beat somebody up, correct?

A: Yes. It could be. I said yes. I'm not going to say it's a hundred percent. It all depends on the interpretation. Tune somebody up. You can take him by the collar, maybe that's going to do the job. Maybe you can intimidate him and you're going to tune him up. So...

Q: Well, you're a police officer and if you saw somebody grabbing somebody else by the collar, you'd agree with me you'd likely arrest him for assault, correct?

A: Yes. If he was taken by the collar it doesn't mean you're going to beat him up.

Q: No, fair enough. But it would be a form of violence?

A: Yes. [Emphasis added]

[30] During one scenario, in Mr. Buckley's presence, M.L. gave a man four phones to smuggle into jail for a biker. The operators wanted Mr. Buckley to see that they could communicate with people in prison.

[31] M.L. said that Mr. Buckley told him that he was having trouble collecting his mother's life insurance due to problems with his sister. The topic of Mr. Buckley's interest in, and problems with, collecting on his mother's life insurance came up on multiple occasions. M.L. offered to ask P.I. for assistance on Mr. Buckley's behalf, but Mr. Buckley declined.

[32] S.M. said that Mr. Buckley became emotional on more than one occasion when praised for his work. S.M. told Mr. Buckley that the organization did

background checks on its employees. In March 2016, Mr. Buckley told S.M. that the police in Nova Scotia felt he was a person of interest in his mother's death. He told S.M. that he had previously been arrested, charged, sent to jail and released from jail. Mr. Buckley proclaimed his innocence. He said he had nothing to do with his mother's death, but that it was something that was always on his mind. Mr. Buckley told S.M. that the police were looking in the wrong direction and the killer could be running free. When S.M. discussed the possibility of the organization offering some sort of assistance, Mr. Buckley cried and asked why he would be worth helping.

[33] During some of the scenarios Mr. Buckley said that he was interested in improving his education and was going back to school on a part-time basis. He worked on obtaining his full driver's licence. He was interested in health and fitness and often went to the gym. He had a girlfriend. He said at times that he would eventually leave the criminal organization, would not stay in that job forever and was interested in more education or joining the military. On other occasions Mr. Buckley expressed interest and enthusiasm in working his way up through the criminal organization.

[34] Mr. Buckley was periodically short on cash, had no known friends (aside from his girlfriend) or close family and told M.L. that he would be spending Christmas 2015 alone.

[35] Over the course of the six-month operation, Mr. Buckley was paid approximately \$15,000 in cash as salary. He worked 622.5 hours for the organization. His total benefits (travel expenses, clothing, meals, drinks, accommodations) exceeded his base salary. In total, he received pay and benefits in excess of \$31,000. The organization bought Mr. Buckley clothes as he seemed to be wearing the same outfit repeatedly. They bought him hygiene products for the road trips. They lent him money when he was short on his rent. They paid for his meals, drinks and hotel when he was working for them on the road. They took him to a high-end getaway in the Yukon and to an NHL game.

[36] Although described essentially as an introvert, Mr. Buckley invited M.L. to work out with him and to socialize with him. Mr. Buckley frequently thanked various members of the criminal organization for his employment throughout the six-month operation and told them that he loved his job. He was described as being emotional on occasion when thanking the organization. He told them that he had never been treated better and felt blessed by M.L.'s friendship. He told them

how happy he was and how lucky he felt to have found their company. During a scenario that took place on February 22, 2016, Mr. Buckley stated:

BUCKLEY: Right.

UC2: Okay. And just be, keep that in mind.

BUCKLEY: 'Kay.

UC2: And if ever you're not happy with the job or you want to leave, you can leave anytime you want.

BUCKLEY: Yup.

UC2: You know you're not obligated to work with me. I'm, I'm happy you work for me.

BUCKLEY: Yeah, I'm happy I work for you.

UC2: Okay. But you can leave.

BUCKLEY: No, I'm not gonna (unintelligible).

UC2: You know the door, the door is there, you can leave anytime you want to leave.

BUCKLEY: (Unintelligible). I'd, I'd be much happier walking (unintelligible).

UC2: But you understand, you understand what I am telling you?

BUCKLEY: Yeah. I do.

UC2: If you wanna leave, you can, right now, you can go home. I, I'll drive you back home. Understand that?

BUCKLEY: Yup.

UC2: Okay.

BUCKLEY: I do.

UC2: Okay.

BUCKLEY: I feel like a really lucky guy to have got this job. I've, so happy that you guys found me. It's a fucking blessing. You know what I'm saying. Like, it's huge, huge, huge. Like how much have you guys paid me since I started working? And I got to go to Newfoundland (unintelligible). Maybe you're not directly, you know, involved with me. Meeting my girlfriend or all these things with family, but you know, it's there. (Unintelligible) connection.

UC2: Okay. 'Cause I just want make, I just wanna make things clear.

BUCKLEY: Yup.

UC2: Okay.

BUCKLEY: It's good.

UC2: Like if ever you're, you're not happy, you want to leave, you can leave anytime you want.

BUCKLEY: Yeah, I'm open to (unintelligible).

UC2: Okay. Well then there's, like I said, there's no bullshit.

BUCKLEY: Right.

UC2: No bullshit between each other and we got to know everything what's going on.

BUCKLEY: Right.

UC2: If there's something wrong, I got to know. Alright?

BUCKLEY: (Unintelligible).

[37] Mr. Buckley was told that he could leave the criminal organization at any time with no repercussions. He was also told that if he was caught lying then he would be fired, again with no further repercussions.

[38] Prior to the Mr. Big interview, Mr. Buckley was told by S.M. that through P.I.'s police contacts he was given a heads up that Mr. Buckley was not just being actively investigated by the police again in relation to his mother's murder, but that he was about to be arrested and charged for his mother's murder. S.M. said that Mr. Buckley looked upset by this news.

[39] Mr. Buckley had spent nine months on remand prior to the charges being withdrawn in 2012. He told the undercover operators that if he went back to jail he would kill himself. S.M. and P.I. conducted the Mr. Big interview. They offered Mr. Buckley a solution to his problem. They said that if Mr. Buckley confessed to killing his mother and provided every detail to them, then they would communicate those details to a biker who was in prison for multiple murders. This biker owed P.I. a favour and, if provided the requisite details, would falsely confess to having killed Mr. Buckley's mother.

[40] Mr. Buckley initially told the undercover operators that he had not killed his mother but, through the disclosure he had received in 2012, he could provide all necessary details to them for the biker. The undercover operators said that such comments were not good enough and explained that Mr. Buckley would have to actually confess to them in order for this to work. Mr. Buckley was told that unless he confessed, the organization would have no choice but to sever all ties with him. If he did confess, there would be significant benefits to him: 1) he would not be charged with his mother's murder, he would not have to go back to

jail and his name would be cleared as the biker would take the blame for the murder; 2) he could continue to work for the organization; and 3) he could collect the insurance money from his mother's death.

[41] During the Mr. Big interview, S.M., implied that he himself had committed a murder:

... You don't know that much about me but you don't know my background, ok, I got a fucked up background too, ok? So, I've done things that I'm not fuckin' ah, proud of right? That I'm ashamed off [sic], it would be hard to talk about, ok? But I'm not sitting in a fuckin' jail cell for 25 fuckin' years, ok? Because of that, ok? Is that, is that...it's not ah, like some people hurt it's not ah, ahm something that ah, I care to you, easy to talk about, ok? But it's not e...and I could, it's not easy for...

[42] The operators implied histories of violence in their backgrounds on other occasions during the Mr. Big interview:

S.M.: ...do not be ashamed I don't care, I've done worse than this. Ok, Mister [REDACTED]'s done worse than this we don't card [sic], we don't give a shit, ok?

...

S.M.: You didn't have blood on your hands?

JB: (Inaudible)

S.M.: Impossible, impossible, I'm not an idiot I've been through shit that you fuckin' would have nightmares of, so where was the blood because that's fuckin' important

[43] When discussing Mr. Buckley's sister, the operators said:

S.M.: You know what? I'm going to tell you something we're going to fuckin' clean this thing and then you know what you're going to do because she's a fuckin' bitch, you're going to go bash her face and say 'What did I fuckin' do?' Do you hear me? (Inaudible) fuckin' done, are you going to be capable of doing that?

[44] Mr. Buckley initially denied any involvement in his mother's death during the Mr. Big interview. He said that he had the Crown disclosure (from his 2012 charge) so he could provide those details to P.I. for the biker:

Ok, I know what happened, I read disclosure I saw my mom's body

I mean my lawyer gave me full disclosure but, but honestly I just don't know how she was killed. I thought if I ever told anybody that they'd go to the cops and, and say like 'Hey, look he confessed to me, and this is what he did' But I guess it doesn't matter now, because either way, it's either way, it's either this or there's no way, like...

[45] Mr. Buckley also told the operators during the Mr. Big confession:

JB: March 1st is when they found it, when I told the police, it was March 1st but I found it the night before. I found it the night before, she was ah, she was by the computer in the living room, it was...I thought she cut her throat I thought she killed herself and I didn't handle the situation very well, I just ah, I just walked away, sat down, had this, so I sat there all night, I just, the next morning I just, I walked to my sister's place. I couldn't pick up the phone, ah I told her that ahm, it doesn't matter any more

...

JB: (Inaudible) I really didn't think you guys could do this

1: So there's no doubt (inaudible) ok, so March ah, so what are you looking for?

JB: The last day of February

1: The last day of February is, or was a Wednesday the 29th and then Thursday the 1st of March...

JB: This is what I put down

1: Ok, so here's the thing though, so ahm, we're, I'm not going to take the risk on Mister [REDACTED] ok, ah will be, I need you to think this is, this is...

JB: This is what happened

1: Ok. So, so bas...just so I'm clear, just so that I'm absolutely clear, right? Is, is if you did not do this, if you didn't do it then you have nothing to worry about to try to fix it, ok? Let, let it work itself out, you go, but they're still looking at you ok? So we, we have to talk, talk ok? Because they only way that the guy can say he did it, is if he knows, I have to be talking to the person that did it, ok? So you can't, if, if you didn't...

JB: I know what happened, I know what happened

1: Yeah but you said you saw disclosure, and that' how you, ah, you're not going to get it from disclosure, you're not going to be able to, I mean they have disclosure too ok? So you know like...

JB: He can say this is my confession

1: No I want the, at the end of the day John I want the truth

JB: This is, this is...

1: Alright I, I, you know we don't tolerate bullshit so if we're going to step into this, and we're going to do this, right? It's either you did it or you didn't if you didn't do it, right? Then you know that, you know that, if you did do it and you think you can handle this on your own, and if you think like that you're smarter than the cops and everything else that they've got going for them, if you do this do not be fuckin' embarrassed ok, do not be ashamed I don't care, I've done worse than this. Ok, [REDACTED]'s done worse than this we don't care [sic], we don't give a shit, ok? You're actually more like me than I thought, but if you didn't do it then walk away, you know because it's, we're not going to get it done, it will be 90% done, because you've seen disclosure, it will be 90% that 10% will bite us in the ass so hard that...

JB: I, I was there when it happened

1: How do you know?

JB: Because I did it

1: Is, is that the truth?

JB: Yeah

[46] Mr. Buckley eventually told S.M. and P.I. that he had killed his mother. During the Mr. Big confession, Mr. Buckley told the undercover operators that he killed his mother with a hammer. His description of the hammer varied during the interview. At different times he said it had a metal handle and a wooden handle. Mr. Buckley also told S.M. on one occasion that he did not know where to find the hammer:

JB: But this is, this is very, very...it wasn't hit with the hammer, (inaudible) forget the hammer, you're not going to find it

1: Why?

JB: I don't know where it is

1: What do you mean?

JB: I don't know where it is

[47] Mr. Buckley later took the undercover operators to where he said he threw the hammer and told them that he either threw it into the ocean or threw it into the area in front of his mother's house, short of the ocean. The area in front of the house had been excavated and landscaped since the murder.

[48] During the re-enactment for the operators on April 7, 2016, the following exchange took place:

S.M.: So, here's the thing, okay? 'Cause you mentioned you got disclosure and [REDACTED] um, ya know late last night, like he, he was on this all night and he's uh, so super grumpy today. Sort of doesn't uh, doesn't want, wants me to deal with this, okay? But he wants to know, 'cause you mentioned you got disclosure. So, he said, are, are you simply repeating what you know from there, okay? Because if so, we're gonna find out 'cause because were gonna get that and we'll see

JOHN: No

S.M.: And it's not gonna help you in the end. It's, we're all gonna go down for this

JOHN: I know

S.M. All of us

JOHN: I know

S.M. So, I'll be sitting in a jail cell next to you, [REDACTED] will be in the next fuckin' cell, okay?

JOHN: Yeah, I know

S.M. Okay. So

JOHN: It's not

S.M.: Because it won't, it won't we won't be able to put together

JOHN: No, I'm giving you exactly what I did

S.M.: Okay. So, is there anything that was in disclosure, that you're, that's not, like is there a gem that, what's not in disclosure?

JOHN: The hammer

S.M.: The hammer?

JOHN: Yeah, there was no hammer in disclosure. There was blunt force trauma to the head, multiple blows. That was it

S.M.: Multiple blows? Um

JOHN: _____ what else _____

S.M.: What's that?

JOHN: I'm just thinkin' what else was in the disclosure

S.M.: _____

JOHN: A bunch of bullshit, witness statements that people said just random shit, like, ya know, yeah, I saw him at the grocery store two days ago

[49] Mr. Buckley's explanation to the undercover operators was not always internally consistent. For example: his explanation of what happened to the clothes

he was wearing at the time of his mother's death was unclear and inconsistent during the Mr. Big interview. He said, at various times during the Mr. Big confession:

2: What about the clothes?

JB: (Inaudible)

2: But where, where was those clothes that you had I hope you were smart enough to do something with it

JB: I was wearing them, I was wearing them the next day

...

2: Yeah, (inaudible) ahm, so the pigs didn't fuckin' take your clothes?

JB: No, I think they took some clothes the next day but it wasn't the clothes that I was wearing that night, that's just...

2: What did you do with those clothes, did you just toss them or what? It's, you know what did you do with those clothes?

JB: I think my sister did some laundry the next day

2: (Inaudible)

JB: Yes

2: Smart

1: Do you still, do you still have those clothes?

JB: Yeah I was wearing them the entire week

2: This week?

JB: No, this is 2 years ago

2: Would you still have them now though?

JB: No

2: So what happened to them?

JB: (Inaudible) but ahm, at that time (inaudible)

2: But you don't know that

JB: I...

2: You don't know if there's blood on your clothing, because the pig will fuckin' get it, do you know what I'm saying?

JB: Yeah

2: You can't say that for sure though. Was that the clothes you were wearing when you went to the store?

JB: Yeah, but I didn't change

2: Is it possible that the fuckin' pig got that fuckin' clothing?

JB: Yeah

2: Do you know what I'm saying because I think they're (inaudible) and I mean I'm still waiting to see what it is but ah, from what we were reading they're sending something to the States to get analysed

JB: Right

2: Is that possible it's that fuckin' clothing?

JB: No

2: Why? You know why is it impossible that (inaudible) I need to know what it is, because my guys says 'Fuck I did it' but they found the blood on your clothing that's going to be...so you're 100% sure that they can't have your clothing?

JB: Yeah, yeah

2: How is that? Do you know what, why can you be 100% sure, convince me?

JB: They haven't took my clothes, they ah (inaudible)

2: Ok, so the clothing was at your sisters?

JB: Yeah

2: Is it possible that your sister gave it to the pig?

JB: No

2: Why?

JB: Because I, well I was wearing it so they, no, (inaudible)

2: So what did you do with it?

JB: Put it in the laundry

2: And now where is it?

JB: It's gone

2: It's gone where?

JB: Maybe the cops have, the cops wouldn't take it

2: Eh? The cops what?

JB: Ahm...

2: Cop (inaudible)

JB: The cops ah, they investigated as more ah...

2: What?

JB: What, what is it about my clothing?

2: I'm concerned that that might be a fuckin' problem, you know? You're not concerned?

JB: No?

2: There is absolutely no chance they find blood on that fuckin' clothing? I'm going...

JB: You know they could do anything they could, they could take samples from the crime scene and put it on my clothes, they could have, they took a sample of mine when I was in jail they took a sample of my blood you know and I worried...

...

2: You either tell me where that clothes is, or not and I'll fuckin' leave because I've had enough

JB: It's evidence

2: So that's what they see, that what the [sic] picked up from you

JB: Yeah

2: That was the fuckin' clothes that you were wearing?

JB: Yeah

2: Ok

...

1: Is it possible that your sister had those clothes

JB: Yeah

1: It's possible that she had the clothes?

JB: Yeah

1: Was it, so she...

JB: Yeah they give me, they give me a shirt wear [sic]

1: Who did?

JB: Her boyfriend

1: So...

JB: (Inaudible)

1: So, so the shirt you were wearing that night

JB: Yeah I gave it to her

1: You gave it to your sister?

JB: Yeah and they give me a change of clothes

1: And what did they do with the clothes? Did you take them do you remember or did you...?

JB: No the police took them (inaudible)

1: Ok, hold it, just something...

JB: They took so much stuff up there it was just unbelievable what they took

1: Yeah, but just so I'm clear in my head, you go to your sister's the next day. You're, at that time you're wearing the same clothes you had on the night before when this took place, so there's nothing on there that you can see, like no blood or anything? And then but your sister gives you a (inaudible) is it possible that those clothes ever got turned over to the police? Would the police have gone to her?

JB: Yeah

1: Ah, so could, because I think there would be blood that you wouldn't even know

JB: Yeah it's possible the cops have my clothes from that day. Yeah they have to

...

JB: No the police took the clothes

2: Took these clothes

JB: Yeah the clothes that I was wearing, the [sic] took the clothes and said 'We need to test your clothes' I have a warrant for ah, for the clothing

1: Yeah when did they do that?

JB: The [sic] came and knocked on the door like the next day and they said ah, you know 'We're going to have to take you [sic] clothes' and ah...

[50] The accused was unclear when explaining to the undercover operators whether or not he was wearing shoes in and around the time he killed his mother:

1: Do you remember what you had on your feet? Because that's super important, do you remember what you had on your feet at the time?

JB: I was wearing my shoes I just, I put on my jacket and I left

1: Ok, did you have your shoes on? Do you always wear your shoes in the house that day was that something that you guys, because some people take their shoes off when they come in, I never do but some people do, ahm...

JB: Yeah I know

1: You guys, yeah I know what? You guys used to wear them or?

JB: Yeah, no I was wearing my shoes, yeah. No I didn't want her to hear me so I wasn't wearing my shoes that day, (inaudible)

2: What was that?

JB: I didn't want her to hear me so I wasn't wearing my shoes that day, I snuck up behind her

1: So you did, you took your shoes off?

JB: Yeah, yeah I wasn't wearing my shoes. A bit [sic]

1: Ok so you remember that you weren't wearing them (inaudible) but it would be your sock feet, do you know what I mean?

2: Did you step in the blood?

JB: No

Previous disclosure

[51] Mr. Buckley received disclosure when he was arrested in 2012. At that time, Mr. Buckley told the police that he lived in the home where Ms. Brauns-Buckley died and that he had discovered his mother's body. Therefore, whether or not he was the perpetrator, he would have been fully familiar with the location of his mother's body, the details of the crime scene, and the details of the investigation. There was no holdback evidence such that the police held back from disclosing during their investigation certain specific evidence known only to the perpetrator and the investigators.

[52] The type of object used to kill Ms. Brauns-Buckley became a prominent issue during this *voir dire*. Constable Patricia Davis, the lead investigator, testified that in 2012 the investigators did not know what object was used to kill Ms. Brauns-Buckley. They could only say she died from blunt force trauma. The Medical Examiner's Report of Dr. Erik Mont was not disclosed to Mr. Buckley in 2012. That report was not provided to the police until August 2015. However, in the Crown Brief Synopsis disclosed in 2012, the police wrote that "Dr. MONT was able to tell investigators that the preliminary cause of death Y (sic) was homicide as a result of blunt force trauma to the head from an unknown object." Part of the

2012 Crown disclosure included a Forensic Identification Occurrence Report that referred to the opinion of Dr. Mont and stated:

Dr. MONT advised there was some areas of bruising on the body and hands and there was also a bruise on the back of the head near the neck. I photographed the neck bruise with a scale as it appears there is a pattern of sorts visible. There was also a linear type pattern on the forehead area, to which I also photographed with a scale. There was **eight lacerations** (photographed with scale) to the right side and back area of the head. **Dr. MONT advised that these lacerations were caused by blunt force from an object similar to that of a hammer. Dr. MONT was not saying that the injuries were exclusively caused by a hammer but that the injuries certainly resembled those typically caused by the blunt end of a hammer.** Several of the lacerations breached the skull bone. I photographed the fractures to the skull and had Mike TREFRY cut out a portion of the skull on the right side which possibly could be used for a future physical match. Cst. DOANE seized this cut out piece of skull. Dr. MONT advised that the cause of death was blunt force trauma to the head. I spoke with Cst. McKENNA while at the autopsy and he advised me to obtain finger and palm impressions for both hands but bare foot impressions were not necessary. I obtained the fingerprints and palm impressions of both hands.

On 2012-03-05 I attended 84 Borgels Point Road and met with Cst. McKENNA and S/Sgt. JORY. I briefed them both on the autopsy results and showed them photographs of the injuries. It was agreed upon that the house and exterior grounds had to be fully searched for a possible weapon. MCU and SCEU members were brought in to assist with the search. [Emphasis added]

[53] The object used to kill Ms. Brauns-Buckley was never located by the police. The 2012 disclosure clearly indicated that, according to Dr. Mont, the likely murder weapon was a hammer, specifically the blunt end of a hammer.

[54] During the Mr. Big interview Mr. Buckley said he used a hammer and then threw the hammer from the front of his home toward the water. Constable Davis testified that in 2016 a R.C.M.P. dive team searched the water area and Ground Search and Rescue scoured the property. The area in front of Mr. Brauns-Buckley's house had been excavated and landscaped since her murder. No hammer was found.

[55] Mr. Buckley said during his Mr. Big confession that he struck his mother two or three times with the hammer. The Forensic Identification Occurrence Report stated that there were eight lacerations to the right side and back of Ms. Brauns-Buckley's head. The 2015 Medical Examiner's Forensic Report suggested

that she had been struck nine times with a blunt object. The autopsy photos, disclosed in 2012, show more than two or three injuries to her head.

[56] During the Mr. Big confession Mr. Buckley said that he had taken his shoes off to sneak up on his mother before he hit her, that he had no blood on his clothes afterward, and that hitting her head with the hammer made a particular sound. Mr. Buckley also provided details as to what he did after he killed his mother, including walking to a store by a specific route and taking money from her.

[57] The Crown adduced no further evidence (aside from Mr. Buckley's own statement) on the *voir dire* going to the following points:

- (1) the murder weapon: there was no evidence as to whether the murder weapon was a hammer or some other blunt object, and no evidence of a murder weapon being recovered;
- (2) the circumstances of the murder: there was no evidence as to whether the killer was wearing shoes, whether the victim saw her killer, or as to what, if any, sound accompanied the blows; additionally, there was no evidence reconciling the number of blows noted by the medical examiner with Mr. Buckley's own descriptions;
- (3) Mr. Buckley's clothing: there was no evidence respecting the recovery of or the condition of Mr. Buckley's clothing, and particularly as to whether there was blood on his clothing after his mother was killed and whether that was actually of significance.

Analysis

[58] In *R. v. Hart*, 2014 SCC 52, Moldaver J., writing for the majority, developed a new common law rule relating to Mr. Big confessions. He explained that such confessions are presumptively inadmissible and can only be admitted when the Crown can prove that their probative value outweighs their prejudicial effect. He also explained that the confession's probative value is a function of its reliability:

10 Against that background, I am of the view that a principled rule of evidence is required to assess the admissibility of Mr. Big confessions. For reasons that follow, I would propose that where the state recruits an accused into a fictitious criminal organization of its own making and seeks to elicit a confession from him, any confession made by the accused to the state during the operation should be treated as presumptively inadmissible. This presumption of inadmissibility will be

overcome where the Crown can establish, on balance, that the probative value of the confession outweighs its prejudicial effect. In this context, the confession's probative value is a function of its reliability. Its prejudicial effect stems from the harmful character evidence that necessarily accompanies its admission. If the Crown is unable to demonstrate that the accused's confession is admissible, the rest of the evidence surrounding the Mr. Big operation becomes irrelevant.

[59] *Hart* was decided in 2014. Operation Hackman took place in 2015-2016. The Mr. Big operation in this case was created after *Hart*. The police who conducted Operation Hackman were alert to the ruling in *Hart* and reduced the feigned violence during the operation as compared to pre-*Hart* Mr. Big operations. Violence was not a necessary part of P.I.'s organization's business model. Additionally, in keeping with *Hart*, the police recorded all of the Operation Hackman scenarios. Otherwise, Operation Hackman followed the general approach for such Mr. Big operations as described by Moldaver J. in *Hart*:

1 When conventional investigations fail to solve serious crimes, police forces in Canada have sometimes used the "Mr. Big" technique. A Mr. Big operation begins with undercover officers luring their suspect into a fictitious criminal organization of their own making. Over the next several weeks or months, the suspect is befriended by the undercover officers. He is shown that working with the organization provides a pathway to financial rewards and close friendships. There is only one catch. The crime boss -- known colloquially as "Mr. Big" -- must approve the suspect's membership in the criminal organization.

2 The operation culminates with an interview-like meeting between the suspect and Mr. Big. During the interview, Mr. Big brings up the crime the police are investigating and questions the suspect about it. Denials of guilt are dismissed, and Mr. Big presses the suspect for a confession. As Mr. Big's questioning continues, it becomes clear to the suspect that by confessing to the crime, the big prize -- acceptance into the organization -- awaits. If the suspect does confess, the fiction soon unravels and the suspect is arrested and charged.

[60] The final Mr. Big interview with P.I. was similar to that described in *Hart*:

60 Once the stage is set, the operation culminates in a meeting, akin to a job interview, between the suspect and Mr. Big. Invariably during these meetings, Mr. Big expresses concern about the suspect's criminal past and the particular crime under investigation by the police. As the meeting unfolds, it becomes clear that confessing to the crime provides a ticket into the criminal organization and safety from the police. Suspects may be told that Mr. Big has conclusive evidence of their guilt and that denying the offence will be seen as proof of a lack of trustworthiness. In another variation, suspects are told that Mr. Big has learned from contacts within the police that a prosecution for the offence is imminent

based on new evidence. The organization offers to protect the target through a variety of means -- by offering to eliminate a witness or by having someone else confess to the crime -- if the suspect confesses to Mr. Big. Throughout the interrogation, any denials of guilt are dismissed as lies, and Mr. Big presses for a confession (see, e.g., C.L.A. factum, at paras. 7-8; Keenan and Brockman, at pp. 19-21).

...

68 First, because of the nature of Mr. Big operations, concerns arise as to the reliability of the confessions they produce. The purpose of these operations is to induce confessions, and they are carefully calibrated to achieve that end. Over a period of weeks or months, suspects are made to believe that the fictitious criminal organization for which they work can provide them with financial security, social acceptance, and friendship. Suspects also come to learn that violence is a necessary part of the organization's business model, and that a past history of violence is a boast-worthy accomplishment. And during the final meeting with Mr. Big -- which involves a skillful interrogation conducted by an experienced police officer -- suspects learn that confessing to the crime under investigation provides a consequence-free ticket into the organization and all of the rewards it provides.

[61] Justice Moldaver provided a clear path for analysis regarding a Mr. Big confession. There is a two-pronged approach to deal with the admissibility of this type of evidence:

84 In this section, I propose a solution that, in my view, strikes the best balance between guarding against the dangers posed by Mr. Big operations, while ensuring the police have the tools they need to investigate serious crime. This solution involves a two-pronged approach that (1) recognizes a new common law rule of evidence, and (2) relies on a more robust conception of the doctrine of abuse of process to deal with the problem of police misconduct.

85 The first prong recognizes a new common law rule of evidence for assessing the admissibility of these confessions. The rule operates as follows. Where the state recruits an accused into a fictitious criminal organization of its own making and seeks to elicit a confession from him, any confession made by the accused to the state during the operation should be treated as presumptively inadmissible. This presumption of inadmissibility is overcome where the Crown can establish, on a balance of probabilities, that the probative value of the confession outweighs its prejudicial effect. In this context, the confession's probative value turns on an assessment of its reliability. Its prejudicial effect flows from the bad character evidence that must be admitted in order to put the operation and the confession in context. If the Crown is unable to demonstrate that the accused's confession is admissible, the rest of the evidence surrounding the Mr. Big operation becomes irrelevant and thus inadmissible. This rule, like the confessions rule in the case of

conventional police interrogations, operates as a specific qualification to the party admissions exception to the hearsay rule.

86 Second, I would rely on the doctrine of abuse of process to deal with the problem of police misconduct. I recognize that the doctrine has thus far proved less than effective in this context. While the problem is not an easy one, I propose to provide some guidance on how to determine if a Mr. Big operation crosses the line from skillful police work to an abuse of process.

87 The purposes of this two-pronged approach are to protect an accused's right to a fair trial under the *Charter*, and to preserve the integrity of the justice system. Those are the ends that must ultimately be achieved. This approach strives to reach them by ensuring that only those confessions that are more probative than prejudicial, and which do not result from abuse, are admitted into evidence.

88 However, it must be remembered that trial judges always retain a discretion to exclude evidence where its admission would compromise trial fairness (see *R. v. Harrer*, [1995] 3 S.C.R. 562). This is because "the general principle that an accused is entitled to a fair trial cannot be entirely reduced to specific rules" (*ibid.*, at para. 23). It is impossible to predict every factual scenario that could present itself. As such, I do not foreclose the possibility that, in an exceptional case, trial fairness may require that a Mr. Big confession be excluded even where the specific rules I have proposed would see the confession admitted.

89 In practice, this two-pronged approach will necessitate that a *voir dire* be held to determine the admissibility of Mr. Big confessions. The Crown will bear the burden of establishing that, on balance, the probative value of the confession outweighs its prejudicial effect, and it will be for the defence to establish an abuse of process. Trial judges may prefer to begin their analysis by assessing whether there has been an abuse of process. A finding of abuse makes weighing the probative value and prejudicial effect of the evidence unnecessary.

[62] Mr. Buckley only relies on the first prong outlined by Justice Moldaver. Therefore, I do not need to consider the second prong involving abuse of process.

[63] Because Mr. Buckley relies solely on the first prong of the *Hart* analysis, the Crown bears the burden of proving that the probative value of the confession outweighs its prejudicial effect on a balance of probabilities throughout the *voir dire*. In *Hart*, Moldaver J. emphasized that as gatekeeper, a trial judge is only deciding the threshold question of "whether the evidence is worthy of being heard by the jury" and not "the ultimate question of whether the evidence should be accepted and acted upon":

98 Undoubtedly, weighing evidence in this way thrusts trial judges into a domain that is typically reserved for the jury. The jury, as the trier of fact, is ultimately responsible for weighing evidence and drawing conclusions from it.

The overlap of roles cannot be avoided, but this is not problematic as long as the respective functions of the trial judge, as gatekeeper, and the jury, as finder of fact, are fundamentally respected. In conducting this weighing exercise, the trial judge is only deciding the threshold question of "whether the evidence is worthy of being heard by the jury" and not "the ultimate question of whether the evidence should be accepted and acted upon" ...

[64] In *Hart*, Moldaver J. identified possible areas of consideration in assessing the reliability of a Mr. Big confession:

102 Confessions derive their persuasive force from the fact that they are against the accused's self-interest. People do not normally confess to crimes they have not committed... But the circumstances in which Mr. Big confessions are elicited can undermine that supposition. Thus, the first step in assessing the reliability of a Mr. Big confession is to examine those circumstances and assess the extent to which they call into question the reliability of the confession. These circumstances include -- but are not strictly limited to -- the length of the operation, the number of interactions between the police and the accused, the nature of the relationship between the undercover officers and the accused, the nature and extent of the inducements offered, the presence of any threats, the conduct of the interrogation itself, and the personality of the accused, including his or her age, sophistication, and mental health.

...

104 In listing these factors, I do not mean to suggest that trial judges are to consider them mechanically and check a box when they apply. That is not the purpose of the exercise. Instead, trial judges must examine all the circumstances leading to and surrounding the making of the confession -- with these factors in mind -- and assess whether and to what extent the reliability of the confession is called into doubt.

[65] The circumstances in which the Mr. Big confession was elicited must therefore be closely examined.

Circumstances of the Mr. Big Confession

The length of the operation

[66] Operation Hackman lasted approximately six months. This was a lengthy and complex operation, similar to that in *Hart*. Mr. Buckley became entrenched with the undercover operators and regularly travelled with them for days at a time. Once the operation was under way, the only significant break in contact between Mr. Buckley and the operators was over Christmas 2015.

The number of interactions between the police and the accused

[67] The operation involved 77 scenarios. The Mr. Big confession took place during Scenario 75. Mr. Buckley sometimes worked eight-hour days. Road trips could have him traveling with members a week at a time. During the road trips, Mr. Buckley had little contact with anyone other than undercover police. He was permitted to return to his own life when not working or away on road trips. During this off-time, Mr. Buckley maintained a relationship with his girlfriend, went to a gym to exercise, and (inferred from some of his comments during the scenarios) worked on obtaining his full driver's licence and upgraded his education.

The nature of the relationship between the undercover operators and the accused

[68] Other than his girlfriend, Mr. Buckley had no obvious social circle during this operation. Both of his parents were deceased, and he had a strained relationship with his sister. During the six-month operation, he spent approximately 700 hours with M.L., who became his closest friend. The members of the organization stressed to him on more than one occasion that they were like a small family. They stressed the need to be honest. If Mr. Buckley followed their rules they would look after him. He became emotional when they praised him. While Mr. Buckley was introverted, socially distant and independent in many ways, he was deeply attached to the undercover operators.

The nature and extent of the inducements offered

[69] Mr. Buckley went from collecting social assistance to working for a successful criminal organization. He earned over \$15,000 cash during the operation. He flew around the country, ate in restaurants and stayed in hotels. He went to hockey games and visited fishing camps. He was exposed to large amounts of cash and gold. He was told that the organization was like a family. Mr. Buckley had no other family aside from his sister, with whom his relationship was strained. He had an "on-again off-again" relationship with his girlfriend over the course of the operation. The members of the organization lived comfortable lifestyles without much apparent effort. Because of changes within the organization, if he confessed to his mother's murder and stayed on with the group, he was in line for a promotion.

[70] Mr. Buckley discussed improving himself, continuing his education and possibly moving on to another career during the course of the operation. At no

time was continuing with the criminal organization his only option, but it certainly was an enticing option.

[71] Mr. Buckley was told by the undercover operators that the police were coming to arrest him again for the murder of his mother. He was told that if he confessed to P.I., with sufficient details, then a biker who owed P.I. a favour would confess to the murder. This would result in Mr. Buckley living free from suspicion forever.

The presence of any threats and/or violence

[72] Mr. Buckley was told that if he did not confess he would be ousted from the organization with no strings attached and no threat of violence. The undercover operators created a scenario where another employee was “fired” for not being truthful with no repercussions or threat of violence to expose Mr. Buckley to this possibility.

[73] Despite the *voir dire* testimony of the various undercover police officers that post-*Hart* they eliminated violence from this type of operation, there was an undercurrent of violence over the course of the scenarios with Mr. Buckley, as there might be with many criminal organizations. The operators implied that they had done very bad things. During the operation there were multiple references to the organization’s close connections with “bikers” and “Italian” criminals. There was reference to “tuning” someone up, specifically a police officer. There was reference to the organization being involved in blackmail and the obstruction of justice. There were no threats of violence to Mr. Buckley or other feigned violence during the scenarios.

[74] Although, he did not testify, Mr. Buckley did not appear to be concerned with the criminality, nor with the inference of possible violence, when recorded during the various scenarios.

The conduct of the interrogation itself

[75] The conduct and manner of the Mr. Big interview was not overtly oppressive taken in isolation. The undercover operators were not threatening, loud, abusive or violent. However, they highlighted the various inducements and were persistent in their questioning. Initially, Mr. Buckley said he could tell the jailed biker what to say because of his familiarity with Crown disclosure.

[76] Mr. Buckley was told that if he did not confess to having killed his mother, he was on his own and would be charged with murder. If he did confess to the murder, someone else would take the blame, he would be able to live without fear of being suspected or charged, he would likely collect the insurance money and could continue with the organization, likely with a promotion. Of course, Mr. Buckley could have walked away from the Mr. Big interview, but considering his personal circumstances, the inducements offered were significant.

The personality of the accused, his age, sophistication and mental health

[77] In *Hart*, Justice Moldaver commented in particular on the specific characteristics of the accused. He said:

103 Special note should be taken of the mental health and age of the accused. In the United States, where empirical data on false confessions is more plentiful, researchers have found that those with mental illnesses or disabilities, and youth, present a much greater risk of falsely confessing ... A confession arising from a Mr. Big operation that comes from a young person or someone suffering from a mental illness or disability will raise greater reliability concerns.

[78] Mr. Buckley was in his early twenties. He had no parents, no close friends other than his girlfriend, was transient, had little contact with his sister, had no obvious social circle, had limited education, was on social assistance and had been charged with the murder of his mother and jailed for nine months in 2012. He was independent in certain ways. He could be assertive and speak up for himself. No mental health issues were identified on this *voir dire*.

Markers of reliability in the confession

[79] In *Hart*, Moldaver J. explained that the next stage in analysing the admissibility of a *Hart* confession, once the circumstances of the making of the confession are considered, is a consideration of reliability indicators in the confession:

105 After considering the circumstances in which the confession was made, the court should look to the confession itself for markers of reliability. Trial judges should consider the level of detail contained in the confession, whether it leads to the discovery of additional evidence, whether it identifies any elements of the crime that had not been made public (e.g., the murder weapon), or whether it accurately describes mundane details of the crime the accused would not likely have known had he not committed it (e.g., the presence or absence of particular objects at the crime scene). Confirmatory evidence is not a hard and fast

requirement, but where it exists, it can provide a powerful guarantee of reliability. The greater the concerns raised by the circumstances in which the confession was made, the more important it will be to find markers of reliability in the confession itself or the surrounding evidence.

Level of detail contained in the confession

[80] The confession contained detail. Mr. Buckley explained precisely how he killed his mother. His explanation was consistent in many ways with the Crown disclosure that he had received in 2012. He lived in the home where his mother was killed. In 2012, he told the police he had nothing to do with her death, but had merely discovered her body. Many of the details Mr. Buckley provided in the Mr. Big confession would have been known to Mr. Buckley whether or not he was the killer. Some of those details could be found in the 2012 Crown disclosure. Others, such as knowledge of the home through living there or discovering his mother's body, were not independently confirmed.

[81] The Crown says that the court cannot speculate as to whether Mr. Buckley was merely repeating what was in the Crown disclosure because he did not testify. However, in the Mr. Big confession – the Crown's own evidence – Mr. Buckley said at times that he obtained his knowledge through Crown disclosure:

JB: Yeah, well what do you need from me?

1: I need to know what the fuck happened

JB: Ok, I know what happened, I read disclosure I saw my mom's body. I mean my lawyer gave me full disclosure but, but honestly I just don't know how she was killed. I thought if I ever told anybody that they'd go to the cops and, and say like 'Hey, look he confessed to me, and this is what he did' But I guess it doesn't matter now, because either way, it's either way, it's either this or there's no way, like...

...

1: The last day of February is, or was a Wednesday the 29th and then Thursday the 1st of March...

JB: This is what I put down

1: Ok, so here's the thing though, so ahm, we're, I'm not going to take the risk on Mister _____ ok, ah will be, I need you to think this is, this is...

JB: This is what happened

1: Ok. So, so bas...just so I'm clear, just so that I'm absolutely clear, right? Is, is if you did not do this, if you didn't do it then you have nothing to worry about to try to fix it, ok? Let, let it work itself out, you go, but they're still looking at you ok? So we, we have to talk, talk ok? Because the only way that the guy can say he did it, is if he knows, I have to be talking to the person that did it, ok? So you can't, if, if you didn't...

JB: I know what happened, I know what happened

1: Yeah but you said you saw disclosure, and that's how you, ah, you're not going to get it from disclosure, you're not going to be able to, I mean they have disclosure too ok? So you know like...

JB: He can say this is my confession

1: No I want the, at the end of the day John I want the truth

JB: This is, this is...

...

1: ... So like would there be anything in there that they will be able to prove that she would have had that's gone from there even the littlest detail because that could help us

JB: Yeah

1: What?

JB: She ah, this is in the report, I didn't know this, she went to the bank that day and ah, they asked me why the, why she didn't have it (inaudible)

[82] Mr. Buckley also said that he obtained this information through Crown disclosure in his cautioned statement on April 8, 2016:

GR: You're more than a suspect, you're responsible for the death of your mother.

JB: I didn't do it.

GR: You're responsible, you just, like, listen bud. I know you know that you said it, OK, and I can play this all day, right. You provided intimate details in relation to what happened. Intimate details that only the person responsible would know.

JB: I read that in a disclosure.

GR: OK, that only the person responsible would know.

JB: Fuck you man.

GR: Only the person responsible, intimate details OK, including what was used to cause the death of your mother.

JB: On the advice of my lawyer I choose not to speak.

[83] Accordingly, the concern that Mr. Buckley could have learned the details of the murder from the Crown disclosure material is not mere speculation. There is a basis in the evidence for such a concern.

Did the confession lead to the discovery of additional evidence

[84] No additional evidence was discovered as a result of the Mr. Big confession.

[85] The disclosure suggested that a hammer was the likely murder weapon. Mr. Buckley said that he used a hammer to kill his mother. No hammer was located. Mr. Buckley on one occasion told the undercover operators that the hammer could not be located, and at other time he told them where the hammer might be found. The object used to kill Ms. Brauns-Buckley was never found.

[86] If discovered, other evidence might have supported the reliability of Mr. Buckley's confession to S.M. and P.I. However, no such additional evidence was actually located.

Did the confession identify any elements of the crime not made public

[87] There was no holdback evidence in this case. In his Mr. Big confession Mr. Buckley said that he had snuck up on his mother in sock feet, without shoes. This could not be independently confirmed. Mr. Buckley said he had used a hammer. This could not be independently confirmed. Mr. Buckley said hitting his mother with a hammer made a certain noise. This could not be independently confirmed.

[88] Mr. Buckley also said he did not have blood on his clothing after the killing. The Crown put forward evidence that the police spoke to Dr. Mont who they say opined that the murderer may not necessarily have had blood on their clothing. Dr. Mont was not called on the *voir dire*. Cst. Patricia Davis, the lead investigator, merely referred to Dr. Mont's possible, untested testimony in this regard. Dr. Mont was the medical examiner, not a blood splatter expert. Even if his evidence, that the murderer may or may not have had blood on his or her clothing was admissible, it would not add anything to the analysis. Without more, Mr. Buckley's statement about not having blood on his clothing adds nothing to the reliability of his Mr. Big confession.

Did the confession accurately describe mundane details of the crime the accused would not likely have known he had not committed it

[89] Mr. Buckley lived in the home where the crime took place. He told the police in 2012 that he had discovered his mother's body. He had Crown disclosure. Mr. Buckley said that he had taken money from his mother. Missing money was suggested by the 2012 Crown disclosure. Mr. Buckley said he walked to the store that evening. This was not new information; it was referred to in the 2012 disclosure, and is not a mundane detail that he would likely only have known if he had committed the murder. Similarly, in the 2012 Crown disclosure the investigators suggest that Ms. Brauns-Buckley may have been missing a small amount of cash, and that Mr. Buckley had cash that was not explained to their satisfaction. Again, because this information was contained in the 2012 disclosure, Mr. Buckley's referring to the cash in the Mr. Big statement is not a mundane detail that he would not likely have known if he had not committed the crime.

[90] Having had the 2012 disclosure, in short, Mr. Buckley provided no mundane details of the crime in the Mr. Big confession that he would only have known if he had committed the crime.

What is the value of the cautioned statement Mr. Buckley provided after he gave the Mr. Big confession?

[91] On April 8, 2016, after his arrest, Mr. Buckley gave a cautioned statement to the police. If a cautioned, inculpatory statement is provided after a Mr. Big confession, depending on the circumstances, this could provide a strong marker of reliability. In this case, however, Mr. Buckley's cautioned statement itself is not reliable. In that statement, he did eventually confess to his mother's murder, he then reiterates much of what he said in the Mr. Big confession, he writes apology notes and he takes the police to look for the hammer.

[92] However, Mr. Buckley only provided the cautioned statement after the police exposed to him the Mr. Big operation, played him his Mr. Big confession and told him that confessing would not make his situation any worse. Mr. Buckley then repeated much of what was in his Mr. Big confession. Some details were added, but nothing that was independently confirmed. He took the police to two completely different locations where he supposedly threw the hammer: one in front of his house in Chester Basin and one in the woods some distance away. No hammer was found. During that excursion, Mr. Buckley briefly escaped from the police, and while fully dressed and handcuffed, ran down a pier and jumped into

the frigid waters of the Atlantic Ocean. He had to be pulled out of the water by Constable Daley of the R.C.M.P.

[93] The cautioned statement could be a marker of reliability if it was reliable itself and if it was admissible. That cautioned statement is not admissible. Even if it were admissible, in these unique circumstances it is essentially no more than a repetition of the Mr. Big confession.

Prejudice vs probative value

[94] Before undertaking the weighing of prejudice and probative value, I note that the parties relied upon an array of post-*Hart* caselaw from trial and appeal courts, applying the *Hart* analysis. I have read and considered this body of law. However, as Crown counsel agreed in written submissions, the specific issues of concern on this application are not ones on which any persuasive guidance is found in the caselaw. As such, I have limited the legal discussion to *Hart* itself.

[95] In *Hart*, Justice Moldaver explained the analysis of probative value in a Mr. Big operation as follows:

109 Determining when the probative value of a Mr. Big confession surpasses its potential for prejudice will never be an exact science. As Justice Binnie observed in *Handy*, probative value and prejudicial effect are two variables which "do not operate on the same plane" (para. 148). Probative value is concerned with "proof of an issue", while prejudicial effect is concerned with "the fairness of the trial" (*ibid.*). To be sure, there will be easy cases at the margins. But more common will be the difficult cases that fall in between. In such cases, trial judges will have to lean on their judicial experience to decide whether the value of a confession exceeds its cost.

110 Despite the inexactness of the exercise, it is one for which our trial judges are well prepared. Trial judges routinely weigh the probative value and prejudicial effect of evidence. And as mentioned, they are already asked to examine the reliability of evidence in a number of different contexts, as well as the prejudicial effect of bad character evidence. They are well positioned to do the same here. Because trial judges, after assessing the evidence before them, are in the best position to weigh the probative value and prejudicial effect of the evidence, their decision to admit or exclude a Mr. Big confession will be afforded deference on appeal.

[96] Here, Mr. Buckley lived in the home where the crime occurred. He told the police in 2012 that he discovered his mother's body. He was arrested, charged and provided Crown disclosure in 2012. He was remanded for nine months while

awaiting his preliminary inquiry. He was released. He told the undercover operators that he would kill himself if he had to go back to jail. The Mr. Big confession was given under circumstances where the inducements were strong. The Mr. Big confession did not result in locating independent or confirmatory evidence that satisfies me of its reliability. The Mr. Big confession added nothing of substance to the information in the previous disclosure, or to that which Mr. Buckley would have known from living in the house and finding the body. The subsequent cautioned statement provided by Mr. Buckley provides no satisfactory markers of reliability and is itself inadmissible.

[97] The unique circumstances of this case call the reliability of the Mr. Big confession into doubt. The Mr. Big confession has very limited probative value.

[98] As Moldaver J. explained in *Hart*, the prejudicial effect of a Mr. Big confession will be fairly constant when dealing with a jury:

106 Weighing the prejudicial effect of a Mr. Big confession is a more straightforward and familiar exercise. Trial judges must be aware of the dangers presented by these confessions. Admitting these confessions raises the spectre of moral and reasoning prejudice. Commencing with moral prejudice, the jury learns that the accused wanted to join a criminal organization and committed a host of "simulated crimes" that he believed were real. In the end, the accused is forced to argue to the jury that he lied to Mr. Big when he boasted about committing a very serious crime because his desire to join the gang was so strong. Moral prejudice may increase with operations that involve the accused in simulated crimes of violence, or that demonstrate the accused has a past history of violence. As for reasoning prejudice -- defined as the risk that the jury's focus will be distracted away from the charges before the court -- it too can pose a problem depending on the length of the operation, the amount of time that must be spent detailing it, and any controversy as to whether a particular event or conversation occurred.

107 On the other hand, the risk of prejudice can be mitigated by excluding certain pieces of particularly prejudicial evidence that are unessential to the narrative. Moreover, trial judges must bear in mind that limiting instructions to the jury may be capable of attenuating the prejudicial effect of this evidence.

How are Probative Value and Prejudicial Effect Compared?

108 In the end, trial judges must weigh the probative value and the prejudicial effect of the confession at issue and decide whether the Crown has met its burden. In practice, the potential for prejudice is a fairly constant variable in this context. Mr. Big operations are cut from the same cloth, and the concerns about prejudice are likely to be similar from case to case. As a result, trial judges will expend much of their analytical energy assessing the reliability of the confessions these operations generate.

[99] Considering the low very probative value of the Mr. Big confession, a jury instruction in Mr. Buckley's case would not be sufficient to address the strong prejudice that would result from its admission. The probative value of the Mr. Big confession is so low that no instruction could provide the necessary safeguard to ensure a fair trial for Mr. Buckley. The prejudicial effect of admitting Mr. Buckley's Mr. Big confession far outweighs any nominal probative value.

Conclusion in relation to the *Hart voir dire*

[100] The Supreme Court of Canada has determined that Mr. Big confessions are presumptively inadmissible. The presumption of inadmissibility can only be overcome when the Crown can prove, on a balance of probabilities, that the probative value of the confession outweighs its prejudicial effect. The confession's probative value turns on an assessment of its reliability. The prejudicial effect flows from the bad character evidence that must be admitted in order to put the operation and the confession into context.

[101] In this case, the Crown has not proven on a balance of probabilities that the probative value of Mr. Buckley's Mr. Big confession outweighs its prejudicial effect. A unique constellation of circumstances in this case calls the reliability of the Mr. Big confession into doubt. The Mr. Big confession is not reliable. At the threshold level, as gatekeeper, I do not believe the Mr. Big confession should be heard by the jury. The Mr. Big confession has nominal probative value and, as noted in *Hart*, would have a significant prejudicial effect. The Crown is unable to demonstrate that Mr. Buckley's Mr. Big confession is admissible, therefore, the rest of the evidence surrounding the Mr. Big operation is irrelevant and inadmissible.

Arnold, J.