CANADA / JUDGMENT

R. v. Balbar

2014 BCSC 2285

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2014 BCSC 2285 R. v. Balbar

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. Balbar,

2014 BCSC 2285

Date: 20141203

Docket: 84027

Registry: Kamloops

Between:

Regina

And

Robert Donald Balbar

Ban of Publication made pursuant to s. 486.5(1) and s. 486.5(9) regarding any information identifying police undercover operators. Ban of Publication made pursuant to s. 648(1) of voir dire evidence heard in the absence of the jury

Corrected Judgment: The whole of these reasons have been amended for publication purposes to further anonymize the names of police undercover operators and to redact any other information which could identify them in any way.

Corrected Judgment: the text of the judgment was corrected at paras. 21, 22, 23, 25(5), 25(7), 44, 55, 109, 117, 131, 137, 138, 160, 161, 207, 210, 211, 213, 215, 223, 224, 225, 230, 231, 234, 241, 242, 249, 254, 284, 292, 293, 294, 304, 310, 312, 319, 320, 331, 333, 359, 365, 384, 385 and pp. 29, 55, 59, 60, 61, 62, 66, 70, 72, 73, 74, 75, 76 as per the Corrigendum dated January 6, 2015.

Before: The Honourable Madam Justice E.A. Arnold-Bailey

Reasons for Judgment on Mr. Big Voir Dire

Counsel for the Crown:

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Joseph J. Blazina

Place and Dates of Hearing:

Kamloops, B.C.

September 8, 9, 10, 15-19, 23-26, 29, 30, October 1, 2, 6-10, 15, 16, 17, 20- 24, 2014

Place and Date of Judgment:

Kamloops, B.C.

December 3, 2014

I. Introduction

[1] These are reasons on the voir dire held in this case to determine the admissibility at trial of evidence gained through a Mr. Big investigation carried out by the RCMP in 2007 in relation to the accused, Robert Donald Balbar. Counsel were advised of the outcome of the voir dire on November 7, 2014 and a jury trial commenced on November 12, 2014.

[2] The admission of a confession by Mr. Balbar to Mr. Big and the associated evidence is to be determined under the new regime set out by the Supreme Court of Canada in R. v. Hart, 2014 SCC 52 [Hart]. Since Hart, the Supreme Court of Canada has decided R. v. Mack, 2014 SCC 58 [Mack 2014], which provides some additional guidance regarding Mr. Big confessions, particularly in terms of jury instructions.

[3] The accused, Mr. Balbar, is charged with one count of second degree murder in relation to the death of Heather Hamill, alleged to have occurred between July 24, 2003 and August 1, 2003. Ms. Hamill's body was retrieved by police from the east bank of the North Thompson River near Indian Point in Kamloops, BC, on August 1, 2003.

[4] The Mr. Big technique has become widely used in Canada to investigate serious crimes, mainly homicides, which remain unsolved. The RCMP officers who testified in the present voir dire refer to this technique as the Major Crime Undercover Homicide Technique ("MCUHT").

[5] Typically, the evidence against an accused gathered in a Mr. Big investigation includes at least one confession and other evidence of the accused's bad character. Evidence of an accused's bad character that would otherwise be inadmissible at trial arises from his participation in the undercover operation during which he or she was enlisted to join a fictitious criminal organization and took part in various staged scenarios (usually of increasing criminality and exposure to violence) that culminated in the target being interviewed by the boss of the fictitious criminal organization, who is an undercover police operator.

[6] The professed purpose of the interview is usually to determine the target's suitability to participate in a large upcoming operation to be conducted by members of the fictitious criminal organization, who are also undercover police officers. In the interview with the crime boss, the target typically confesses to the commission of the offence under investigation to demonstrate to the boss that he is capable of carrying out work that involves violence and that his past potential problems with the police are no longer a concern that will draw "heat", meaning police attention, to the organization. The fictitious crime boss offers to assist the target by making past criminal investigations disappear by eradicating evidence or through his connections with police and others in the criminal justice system. However, in order for the crime boss to assist the target, the target needs to provide details of the offence.

[7] Typically, the Mr. Big operation starts with a planned encounter between the target and the primary undercover operator, called "the bump". Subsequent scenarios involve a great deal of contact between the accused as target and the primary undercover operator, with other undercover operators fulfilling secondary roles or making cameo appearances.

[8] The operation is carefully planned and staged, and often includes much travel and other opportunities for bonding and conversation between the target and the primary undercover operator. The fictitious criminal organization covers expenses for meals, drinks, hotels and entertainment, all designed to increase the target's bond with the primary undercover operator and, over time, with the fictitious criminal organization. Scenarios often involve picking up and delivering packages of contraband, and assisting in threatening, robbery and extortion scenarios where the co-participants and victims are other undercover police officers. Payments are made to the target for services rendered to the organization as the operation progresses to hold out the promise of future financial remuneration.

[9] The primary operator and, at times, other undercover operators stress the themes of honesty, loyalty and trust within the organization in conversations with the target, as well as the theme that the target may disengage from the organization at any time without negative consequences. Another prevalent theme is that the boss of the organization takes good care of his people and they look out for each other. The members of the fictitious criminal organization typically appear to be well paid, flash wads of cash and may drive expensive vehicles or display expensive jewellery or other signs of affluence as a sign that they are successful in their criminal activities.

[10] The Mr. Big investigation conducted against Mr. Balbar is such an operation.

[11] Mr. Balbar confessed his involvement in the homicide of Ms. Hamill to a fictitious crime boss, an undercover operator ("H."), on December 17, 2007 at the Grand Hotel in Kelowna, BC. Mr. Balbar's confession was the culmination of a police undercover operation of several months' duration named "Project Eventail" in which Mr. Balbar was the target. It included scenarios conducted by undercover officers in BC and Quebec designed to cause the accused to believe that he had become involved in a criminal organization and needed to be interviewed by the crime boss in order to participate in a large upcoming criminal enterprise. Because Mr. Balbar was continuing to attract the attention of the police in relation to Ms. Hamill's death as part of the Mr. Big operation, a meeting was scheduled to discuss how the matter was to be cleared up by the crime boss. Prior to the confession, Mr. Balbar made a number of incriminating comments to the primary undercover officer that foreshadowed his confessed involvement in the homicide under investigation.

[12] This is a retrial ordered by the Court of Appeal in R. v. Balbar, 2013 BCCA 315, for reasons unrelated to the Mr. Big evidence. Mr. Balbar has elected trial by judge and jury.

[13] Although the Crown led a large body of evidence in relation to the Mr. Big operation during this voir dire, in the event that the Court finds this evidence to be admissible at trial, the Crown only seeks to place before the jury the evidence contained in Scenario 30 (audio from December 6, 2007, after the "Crime Boss Cameo", Exhibits 42 and 42B), Scenario 33 (audio from December 11, 2007, after the "Traffic Stop", Exhibits 44 and 44A) and Scenario 36, the video-recorded "Crime Boss Interview" between Mr. Balbar and H. (December 17, 2007, Exhibits 21 and 21A).

[14] Defence counsel has advised that in the event the Mr. Big evidence is admitted into evidence at trial, he will likely seek to place in evidence before the jury certain other portions of the evidence from the Mr. Big operation.

[15] In this voir dire, the Court has had the benefit of excellent advocacy and final submissions, including thorough and detailed written submissions.

II. The position of the Crown

[16] The Crown relies upon the Mr. Big confession to prove identity - that Mr. Balbar was the person who killed Ms. Hamill - and the actus reus in relation to her death. The Crown submits it can point to other evidence to prove mens rea.

[17] The Crown's position is that it has met the burden upon it to satisfy the Court that the probative value of the Mr. Big evidence significantly outweighs its prejudicial effect, and therefore it ought to be admitted. The Crown submits that the probative value of the Mr. Big evidence it seeks to place before the jury is strong because of the detailed nature of the accused's confession to Mr. Big, accompanied by various indicia of reliability.

[18] The Crown further submits that the defence has failed to establish that the Mr. Big undercover operation carried out in this case constitutes an abuse of process such that the evidence ought to be excluded on that basis. It submits that the police did not prey on the vulnerabilities of the accused and nothing about the operation viewed in isolation or cumulatively may be said to amount to an abuse of process. Rather, the Crown's position is that it was "a considered and calibrated response to an exceedingly serious offence which fell well short of becoming abusive".

III. The position of the Defence

[19] The position of the defence is that the Crown has not met the burden upon it to prove on a balance of probabilities that the Mr. Big evidence ought to be admitted because of the vulnerabilities of the accused, the inducements offered to him during the undercover operation, the high level of violence in some scenarios and his significantly reduced level of intellectual functioning.

[20] In particular, the defence points to the evidence of the two psychologists called on behalf of the accused regarding their testing and diagnoses of Mr. Balbar's limited intelligence and functioning. The defence submits that these aspects of the evidence serve to seriously undermine the reliability of inculpatory comments made by the accused to the primary undercover operator ("C.") and his confession to H., the fictional crime boss. Furthermore, the defence points to various inconsistencies between Mr. Balbar's confession to Mr. Big and other evidence called by the Crown on the voir dire such that it cannot be regarded as sufficiently reliable for its probative value to outweigh its prejudicial effect.

[21] The defence submits that aspects of this Mr. Big investigation are completely "over the top", such that the average well-informed Canadian would be truly shocked at the lengths to which the police went to lure Mr. Balbar into their fictitious criminal organization and orchestrate his confession. This includes its high financial cost and the activities that the undercover officers engaged in with Mr. Balbar: visits to strip clubs; watching pornography; using racist and misogynistic language; making lewd and degrading sexual comments about women; telling Mr. Balbar if he got into trouble with the law to call them first as opposed to a "mouthpiece"; and conducting very violent staged incidents in Mr. Balbar's presence that included threats of harm to the purported victims' children, knowing that Mr. Balbar had a son, and by implication threatening his son. Given the nature of this Mr. Big operation, the defence submits that it constitutes an abuse of process such that the evidence so obtained ought to be excluded.

[22] Further, the defence points to aspects of what Mr. Balbar said to the undercover officers and to Dr. Nicholaichuk, one of the psychologists called by the defence, to the effect that he acted in self-defence and in defence of his son when he struck Ms. Hamill. Therefore, the defence submits that the Mr. Big evidence ought not to be regarded as probative of Mr. Balbar's guilt in relation to second degree murder of Ms. Hamill as compared to its prejudicial effect.

IV. Legal authorities provided

[23] Counsel provided a joint book of authorities containing the following cases:

· R. v. Hart, 2014 SCC 52 [Hart];

· R. v. Mack, 2014 SCC 58 [Mack 2014];

· R. v. Babos, 2014 SCC 16 [Babos];

· R. v. McDonald, 2013 BCSC 2344 [McDonald];

· R. v. Decoine-Zuniga, 2013 ABQB 563 [Decoine-Zuniga];

· R. v. Langlet, 2012 BCSC 1621 [Langlet];

· R. v. Earhart, 2011 BCCA 490 [Earhart];

· R. v. Bonisteel, 2008 BCCA 344 [Bonisteel];

· R. v. Osmar, 2007 ONCA 50 [Osmar]; leave to appeal refused [2007] S.C.C.A. No. 157;

· R. v. Terrico, 2005 BCCA 361 [Terrico]; leave to appeal refused [2005] S.C.C.A. No. 413;

· R. v. Roberts, [1997] B.C.J. No. 765 (C.A.) [Roberts];

· United States of America v. Burns, [1997] B.C.J. No. 1554 (C.A.) [Burns]; leave to appeal refused [1997] S.C.C.A. No. 515;

· R. v. McIntyre, [1994] 2 S.C.R. 480 [McIntyre];

· R. v. Mack, [1988] 2 S.C.R. 903 [Mack 1988];

· R. v. Collins, [1987] 1 S.C.R. 265 [Collins]; and

· Rothman v. The Queen, [1981] 1 S.C.R. 640 [Rothman].

[24] In addition, the defence provided the Court with R. v. Smith, 2014 ONSC 3939 [Smith].

V. OVERVIEW

[25] In these reasons I will proceed in the following manner:

1. I will set out the new legal framework that determines the admissibility of Mr. Big evidence and confessions that arises from the decision of the Supreme Court of Canada in Hart.

2. I will set out aspects of the evidence that do not involve the Mr. Big investigation but are nonetheless important in assessing the Mr. Big evidence.

3. I will summarize aspects of the evidence from the RCMP about Mr. Big operations in general, including evidence about their structure and planning, approval, management, cost and the police officers' views and experience in terms of their efficacy and how they endeavour to prevent false or otherwise inadmissible confessions from occurring. Some of this evidence includes how the Mr. Big investigation against Mr. Balbar came about and how it was conducted.

4. I will provide an overview of the Mr. Big investigation conducted by the undercover officers in Project Eventail in relation to Mr. Balbar and comment upon certain aspects of it, in particular several scenarios involving violence and threatened violence to undercover operators within the presence or the hearing of Mr. Balbar.

5. I will set out details of Mr. Balbar's inculpatory statements to C., the primary undercover operator, and his confession to H., the crime boss.

6. I will set out the details of the events following Mr. Balbar's confession, including the re-enactment and follow up police investigations.

7. I will set out the background of Mr. Balbar, including his alleged vulnerability as the target of a Mr. Big investigation arising from reduced intellectual functioning. In that regard I will consider evidence of how he functioned during the investigation and the evidence of the two psychologists called by the defence, Dr. Nicholaichuk and Dr. Hervé, regarding their testing of Mr. Balbar and other aspects of their opinions.

8. I will conclude by setting out my analysis and findings regarding the admissibility of the Mr. Big evidence based on the Hart test, dealing first with probative value and prejudicial effect and then with abuse of process. Although Mr. Justice Moldaver in Hart suggests that trial judges may wish to commence their analysis with the issue of abuse of process, I do not see any advantage to doing so in the present case.

VI. THE NEW LEGAL TEST FOR ADMISSIBILITY OF MR. BIG EVIDENCE

[26] The issue of admissibility of Mr. Big evidence was considered by the Supreme Court of Canada in 2013/2014 because of the risk of wrongful convictions founded on unreliable confessions obtained from an accused in a Mr. Big investigation and the other prejudicial effects of admitting the evidence from such operations at trial that were clearly highlighted in the decision of the Newfoundland and Labrador Court of Appeal in R. v. Hart, 2012 NLCA 61.

[27] In Hart, Mr. Justice Moldaver, writing for a majority in the Supreme Court of Canada, set out a new test to determine the admissibility of the evidence obtained through Mr. Big operations.

[28] After considering the danger of unreliable confessions, the prejudicial effect of Mr. Big confessions and the risk of police misconduct, Moldaver J. summarized the risks and benefits of Mr. Big operations as follows:

[83] In searching for a response to the concerns these operations raise, we must proceed cautiously. To be sure, Mr. Big operations can become abusive, and they can produce confessions that are unreliable and prejudicial. We must seek a legal framework that protects accused persons, and the justice system as a whole, against these dangers. On the other hand, Mr. Big operations are not necessarily abusive, and are capable of producing valuable evidence, the admission of which furthers the interests of justice. We ought not forget that the Mr. Big technique is almost always used in cold cases involving the most serious crimes. Put simply, in responding to the dangers posed by Mr. Big confessions, we should be wary about allowing serious crimes to go unpunished.

[29] Mr. Justice Moldaver set out the new two-pronged approach:

[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.

[Emphasis added.]

[30] The learned justice reminds trial judges of their discretion to exclude evidence where its admission would compromise trial fairness, as articulated in R. v. Harrer, [1995] 3 S.C.R. 562, stating that in exceptional circumstances trial fairness may require the exclusion of a Mr. Big confession even when it would be admitted based on the new rules: Hart, at para. 88.

The first prong: the new common law rule of evidence

[31] In assessing evidence obtained in a Mr. Big operation on a voir dire, the trial judge is to weigh its probative value as against its prejudicial effect to determine threshold admissibility only, and not its ultimate weight: Hart, at paras. 97-98.

[32] The reliability of a confession to Mr. Big is the key consideration in determining its probative value, as stated by Moldaver J. in Hart:

[99] Returning to Mr. Big confessions, their probative value derives from their reliability. A confession provides powerful evidence of guilt, but only if it is true. A confession of questionable reliability carries less probative force, and in deciding whether the probative value of a Mr. Big confession outweighs the prejudicial effect of the character evidence that accompanies it, trial judges must examine its reliability.

[Emphasis added.]

[33] Similar to assessing the trustworthiness of a hearsay statement, the court is to determine the reliability of the confession by considering the circumstances under which the confession to Mr. Big was made, and whether there is any confirmatory evidence arising from the confession itself: Hart, at para. 101.

[34] In that regard, the first step in assessing the reliability of a Mr. Big confession is to examine the circumstances and assess "the extent to which they call into question the reliability of the confession". These circumstances include, but are not 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 age, level of sophistication and mental health: Hart, at para. 102.

[35] The trial judge is to take special note of the mental health and age of the accused, as a confession to Mr. Big made by a young person or a person suffering from a mental illness or disability "will raise greater reliability concerns": Hart, at para. 103.

[36] However, trial judges are not to approach this task in a mechanical, check-box manner. They are to examine "all the circumstances leading to and surrounding the making of the confession" in order to assess their impact on the reliability of the confession: Hart, at para. 104.

[37] After considering the circumstances in which the confession was made, Moldaver J. directs that trial judges are to look for "markers of reliability" in the confession itself:

[105] 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.

[Emphasis added.]

[38] After the probative value of the confession is determined, trial judges must weigh the probative value against its prejudicial effect by considering the moral and reasoning prejudice that accompanies the admission of a Mr. Big confession: Hart, at para. 106.

[39] In terms of moral prejudice, the trier of fact learns that the accused wanted to join a criminal organization and was willing to commit the crimes in simulated scenarios that he or she believed to be real. This tarnishes the accused's character and "shrouds the accused in an aura of distrust before he or she steps into the witness box": Hart, at para 75.

[40] In terms of reasoning prejudice, the risk is that the attention of the trier of fact will be distracted away from the charges before the court and drawn into the intricacies of the evidence regarding the Mr. Big operation, particularly if the latter gives rise to a dispute as to the facts. However, the risk of prejudice may be mitigated by excluding particularly prejudicial evidence that is unessential to the narrative: Hart, at para. 107.

[41] Ultimately, the task for trial judges is to weigh the probative value and the prejudicial effect of the confession and decide whether the Crown has met its burden. Moldaver J. comments that the potential for prejudice will be a fairly constant variable as Mr. Big operations "are cut from the same cloth" and therefore trial judges will "expend much of their analytical energy assessing the reliability of the confessions these operations generate": Hart, at para. 108.

[42] Mr. Justice Moldaver acknowledges that the determination as to when the probative value of a Mr. Big confession exceeds its potential for prejudice "will never be an exact science" as probative value and prejudicial effect operate on different planes - the former being concerned with proof of an issue, and the latter being concerned with trial fairness. As to whether the value of a confession exceeds its cost, Moldaver J. recognizes that while there will be "easy cases at the margins more common will be the difficult cases that fall in between": Hart, at para. 109.

The second prong: the doctrine of abuse of process

[43] With regards to police misconduct, it is not to be forgiven simply because a demonstrably reliable confession is obtained. This would be contrary to well-established legal authority on the inherent limits on the power of the state to "'manipulate people and events for the purpose of obtaining convictions' (R. v. Mack, [1988] 2 S.C.R. 903, at p. 941)": Hart, at para. 112.

[44] A "reinvigorated" doctrine of abuse of process is to guard against conduct that society finds unacceptable, and permits trial judges a wide discretion to fashion remedies where required that preserve the integrity of the justice system or trial fairness. In such instances the onus is upon the accused to establish such an abuse of process: Hart, at paras. 113-114.

[45] The determination of whether the operation undermines the integrity of the justice system and offends societal notions of fair play and decency will depend on whether a "reasonable well-informed member of the community" would be shocked by police misconduct: Roberts, at para. 15; McDonald, at para. 243.

[46] In Hart, Mr. Justice Moldaver makes specific reference to the recent decision of the Supreme Court of Canada in Babos (where the learned justice wrote the decision for the Court) to anchor the abuse of process doctrine in the context of Mr. Big operations: Hart, at para. 113.

[47] Moldaver J. in Babos explains the distinction between the two categories of abuse of process cases at para. 31: the "main" category, where state misconduct compromises the fairness of the accused's trial, and the "residual" category, where state conduct creates no threat to trial fairness, but risks undermining the integrity of the judicial process.

[48] The abuse of process doctrine in the context of a Mr. Big operation is situated within the residual category, as the purpose of the doctrine is to guard against state conduct that society finds unacceptable, rather than focusing on ongoing trial fairness concerns: Hart, at para. 113.

[49] Although the general framework is the same for both categories, the test will play out differently depending on whether the main or residual category is invoked: Babos, at para. 31. Moldaver J. sets out the test for abuse of process as follows:

[32] The test used to determine whether a stay of proceedings is warranted is the same for both categories and consists of three requirements:

(1) There must be prejudice to the accused's right to a fair trial or the integrity of the justice system that "will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome" (Regan, at para. 54);

(2) There must be no alternative remedy capable of redressing the prejudice; and

(3) Where there is still uncertainty over whether a stay is warranted after steps (1) and (2), the court is required to balance the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against "the interest that society has in having a final decision on the merits" (ibid., at para. 57).

[50] Moldaver J. goes on to explain how the test for abuse of process applies to the residual category as follows:

[38] in a residual category case, regardless of the type of conduct complained of, the question to be answered at the first stage of the test is the same: whether proceeding in light of the impugned conduct would do further harm to the integrity of the justice system. While I do not question the distinction between ongoing and past misconduct, it does not completely resolve the question of whether carrying on with a trial occasions further harm to the justice system. The court must still consider whether proceeding would lend judicial condonation to the impugned conduct.

[39] At the second stage of the test, the question is whether any other remedy short of a stay is capable of redressing the prejudice. [ ] Where the residual category is invoked, however, and the prejudice complained of is prejudice to the integrity of the justice system, remedies must be directed towards that harm. It must be remembered that for those cases which fall solely within the residual category, the goal is not to provide redress to an accused for a wrong that has been done to him or her in the past. Instead, the focus is on whether an alternate remedy short of a stay of proceedings will adequately dissociate the justice system from the impugned state conduct going forward.

[Emphasis added in the original.]

[51] However, in Babos (at para. 41) Moldaver J. stresses the importance of the balancing stage when the residual category of abuse of process is engaged. The court is obliged to consider which option provides greater protection to the integrity of the system: staying the proceedings, or having a trial despite the impugned conduct. The court must consider the nature and seriousness of the conduct, whether it is isolated or systemic and ongoing, the circumstances of the accused and the charges being tried and the interest of having the charges disposed of on their merits. It becomes less likely that society's interest in having a trial on the merits will prevail in this balancing the more egregious the state conduct, or when it shocks the community's conscience or offends its sense of fair play.

[52] Therefore, while the doctrine of abuse of process is to be reinvigorated to address the concerns that may arise in a Mr. Big operation, there is no suggestion that a less rigorous test is to apply. While Mr. Big operations are designed to induce confessions, they may not cross the line by coercing confessions. Where the will of the accused is overcome by the police conduct, inducement and threats will "almost certainly" amount to an abuse of process: Hart, at para. 115.

[53] Reiterating the established law that a confession derived from physical violence or threats of violence against an accused will not be admissible, regardless of its reliability, because such conduct is intolerable to the community (Hart, at para. 116), Moldaver J. offers the following guidance as to what other kinds of coercion amounting to an abuse of process may arise in a Mr. Big operation:

[117] Violence and threats of violence are two forms of unacceptable coercion. But Mr. Big operations can become coercive in other ways as well. Operations that prey on an accused's vulnerabilities -- like mental health problems, substance addictions, or youthfulness -- are

> also highly problematic (see Mack, at p. 963). Taking advantage of these vulnerabilities threatens trial fairness and the integrity of the justice system. As this Court has said on many occasions, misconduct that offends the community's sense of fair play and decency will amount to an abuse of process and warrant the exclusion of the statement.

[Emphasis added.]

[54] Trial judges are reminded that while coercion is an important factor to consider, Mr. Big operations may become abusive in other ways that trial judges, based on their experience, are well placed to recognize: Hart, at para. 118.

The operation of the two-pronged approach

[55] Mr. Justice Moldaver concludes the analytical framework part of his reasons in Hart with some comments as to why the two-pronged approach he posits addresses the three interrelated concerns that arise with Mr. Big confessions - reliability, prejudice and police misconduct - while recognizing their overlap:

> [120] The reason for this lies in the analytically distinct problems that the three concerns raise. Reliability and prejudice are fundamentally evidentiary issues. They are concerned with the quality of the evidence these operations produce. Indeed, they do not emerge as problems at all until a Mr. Big confession is admitted at trial. The concern that the police may engage in misconduct, by contrast, is focused on the behaviour of the state in eliciting the evidence. To be sure, there is significant overlap between the concerns. Police misconduct is more likely to produce an unreliable confession. But the overlap is not perfect. For example, a confession elicited during a Mr. Big operation where there has been no misconduct may still turn out to be unreliable and prejudicial. Similarly, a confession that is the product of misconduct may turn out to be reliable. Thus, in order to take complete account of both issues, two legal tools are required -- one that looks directly at the evidence, and one that serves as a check on the conduct of the police.

[Emphasis added in the original.]

[56] In the subsequent decision of Mack 2014, Moldaver J., writing for the Supreme Court of Canada, commented on the Mr. Big investigation in that case using the test developed in Hart to weigh probative value against prejudicial effect (although the appeal was framed under s. 24(2) of the Charter):

> [33] To begin with, the probative value of the appellant's confessions is high. The inducements provided by the undercover officers were modest -- the appellant was paid approximately $5,000 over a four-month period, at a time when well-paying, legitimate work was readily available to him. He was not threatened by the officers. And he was told, in his first meeting with Liam, that he could decline to say anything and remain on the organization's "third line" -- an option he initially accepted.

[34] Moreover, there was an abundance of evidence that was potentially confirmatory. First, the appellant's purported confessions to Mr. Argueta and Mr. Love described the same motive for killing Mr. Levoir as his confessions to the undercover officers. They also made reference to burning Mr. Levoir's body. Second, immediately after confessing to Ben, the appellant led him to the firepit in which Mr. Levoir's remains lay undiscovered. And third, shell casings fired from a gun found in the appellant's apartment were found in the same firepit. All of this made for a confession that was highly probative.

[35] On the other hand, while the confessions were accompanied by bad character evidence, the prejudice was limited. The appellant was not involved in any scenarios that involved violence, nor did the operation reveal prejudicial facts about the appellant's past history. The appellant's involvement with the organization was primarily limited to assisting with repossessing vehicles and delivering packages. In my view, any prejudicial effect arising from the Mr. Big confessions is easily outweighed by their probative value.

[57] In terms of assessing the undercover officers' conduct regarding an application for abuse of process, Moldaver J. noted that the appellant had not been presented with overwhelming inducements, had prospects for legitimate work that would have paid more than the undercover officers were offering and had not been threatened with violence if he did not confess. At most, Moldaver J. concluded that the officers created "an air of intimidation" by referring to violent acts committed by members of the organization. However, the appellant had not been coerced into confessing, as evidenced by his initial refusal to talk to the undercover officers about the killing (at para. 36).

[58] It is against this legal framework that the Court is to assess the admissibility of the Mr. Big evidence in this case.

VII. EVIDENCE OTHER THAN FROM THE MR. BIG INVESTIGATION

[59] I will set out in a cursory way evidence heard on this voir dire that is unrelated to the Mr. Big investigation. This evidence is significant as it bears on the reliability of what Mr. Balbar said to the primary undercover operator, C., and to H. as Mr. Big. Some weighing of the evidence is required at this stage in order to assess the probative value of the accused's confession to Mr. Big to determine threshold admissibility: Hart, at para. 98. Unless otherwise stated, I accept the testimony of the witnesses called as being credible and reliable for the purposes of this voir dire.

Corrine Ironside - the deceased's best friend

[60] Ms. Ironside and Ms. Hamill had been best friends since they were 15 years old. In the summer of 2003, she recalled that Ms. Hamill was living with Mr. Balbar in his apartment at #15, 215 Oak Road, also known as the Oak Apartments. Ms. Ironside recalled that Ms. Hamill was working on the streets as a prostitute and Mr. Balbar was dealing drugs. She said Ms. Hamill was using a lot of drugs in the summer of 2003, including marihuana, crystal meth,

crack cocaine and alcohol. Ms. Ironside recalled that she and Ms. Hamill would visit often and at times Ms. Hamill's daughter, Mary, would visit. Mr. Balbar, who she knew by his nickname "Smilie", had a son named Jessie and he would come and stay with Mr. Balbar and Ms. Hamill at the Oak Apartments. Ms. Ironside knew Ms. Hamill and Mr. Balbar to be in a common law relationship. She recalled that their apartment was very messy and cluttered with junk piled everywhere, including clothes, bike parts and tools.

[61] The last time Ms. Ironside recalled seeing Ms. Hamill was the night of another friend's birthday, which she believed occurred on July 19, 2003. She expected to see Ms. Hamill at the annual Kamloops Pow Wow held on the first weekend of August, but Ms. Hamill did not appear. When she heard something about a missing woman being found in the river, Ms. Ironside went over to the Oak Apartments and called up as she usually did to get Ms. Hamill's attention. A man named Mark came out. After Ms. Ironside spoke to him, she went to the police station because she had recognized some of the jewellery shown in the news to be associated with the female body found in the river to be Ms. Hamill's.

[62] On cross-examination, Ms. Ironside confirmed Ms. Hamill's substance abuse problems. She agreed that Ms. Hamill's personality changed the most drastically when she consumed alcohol, and she became mouthier and more aggressive. In addition to getting money from working as a prostitute, Ms. Ironside agreed that Ms. Hamill was using someone else's credit card and said that her reputation in the community as someone who would steal and was not trustworthy was growing.

John Matthew - the deceased's former spouse

[63] Mr. Matthew met and lived with Ms. Hamill between 1988 and 1990. They have one daughter together who he raised, Mary Matthew, born in 1990. In 2003, Ms. Hamill and Mary were having more visits than in prior years. Mary would keep in touch with her mother and Mr. Matthew would drive Mary into Kamloops from Enderby when they would arrange to meet. He would drop her off and they would visit. Sometimes Mary would stay overnight with her mother. He knew that Ms. Hamill was living with Mr. Balbar in 2003. The last time he saw her was about the end of June 2003 when Mary had a visit.

[64] He recalled that Mary was staying with his grandmother in Barriere in the summer of 2003. He recalled dates based on when they called him about the birth of a colt born on July 26, 2003, which then died on July 28, 2003.

Mary Matthew - the deceased's daughter

[65] Ms. Matthew is presently 24 years old. She said she saw her mother on and off as she was growing up, but more in her teens. When she visited she would stay over at her mother's apartment where she lived with her boyfriend, Robert Balbar, who they called "Smilie."

[66] In the summer of 2003, when Ms. Matthew was 13 years old, she recalled that Mr. Balbar's son was about nine or 10 years old. She recalled her mother's cell phone number (which corresponded to the number associated with the telephone records in Exhibit 63). She remembered calling her mother on her cell from her great grandmother's telephone to tell her the colt had died, which happened on July 28, 2003. She said talked to her mother and told her that the colt had died. Her mother was walking and they did not finish their conversation. She did not talk to her mother after that, although she tried her number a few times that day and then throughout the following week. Ms. Matthews expected to see her mother at the Pow Wow in August 2003, but she was not there.

[67] On cross-examination, Ms. Matthews indicated that when she was asked by police during her statement whether she saw any violence at her mother's, she told them that her mother and Mr. Balbar would sometimes argue. In terms of the last telephone call she had with her mother on July 28, she said there was a lot of background noise and then the line went silent. When she called back, a recorded message indicated that it was out of service. She tried at least a few dozen times over the next week.

Carmen Stedel - an acquaintance of Mr. Balbar and Ms. Hamill in 2003

[68] Ms. Stedel met Mr. Balbar and Ms. Hamill in 2003. She met Mr. Balbar first because her son took her over to Mr. Balbar's apartment to buy some marihuana. She then met Ms. Hamill through Mr. Balbar and said they seemed to be partners. Ms. Stedel took Mr. Balbar and Ms. Hamill with her four or five times to help her with her night janitorial job at a branch of the Scotia Bank. When she got paid she would pay them for their work. She went to their apartment to buy drugs and bought crystal meth and speed. She said that both Ms. Hamill and Mr. Balbar used crystal meth and that Mr. Balbar would get upset when Ms. Hamill went out to work on the streets and came back, having consumed crack cocaine.

[69] She recalled that the last time she saw Ms. Hamill was when she dropped them off after janitorial work. She had overheard a reference to Ms. Hamill going to work at the Pow Wow. When Ms. Stedel next saw Mr. Balbar, possibly a day and not as much as two days later, Mr. Balbar said he had not seen Ms. Hamill for a couple of days and he was worried about her. She recalled that Mr. Balbar had his son with him, as that same day Mr. Balbar came over to her house and their sons played together. They stayed overnight and the visit ended when Mr. Balbar called his home and left. She thought that the police picked him up at this time. Mr. Balbar's mother came by and picked up Mr. Balbar's son from her place.

[70] Ms. Stedel described Mr. Balbar's apartment as always having stuff everywhere - tools, laundry and nick knacks. She said he always had cleaning products there, such as bleach, soap and cleaners. She also recalled that Mr. Balbar's friend, nicknamed "Lips", stayed there.

[71] Ms. Stedel recalled that after the time Mr. Balbar stayed at her place she found a tiny pill box on the bank of the river at the totem pole area on Schubert Drive, which runs parallel to the North Thompson River. She also found a plastic bag with some different identification

documents in it and some marihuana. She was with a female friend and they had just finished work about 4 a.m. and were collecting rocks for her garden. Ms. Stedel said she associated the pill box with Ms. Hamill, as they both collected little boxes and Ms. Hamill had shown it to her one day. Ms. Stedel had asked her to trade it and Ms. Hamill had declined and taken it back to the bedroom. Ms. Stedel said that at the time she found the little box on the river bank she knew that Ms. Hamill was not coming back, but she could not recall whether she was still missing or had been found.

[72] On cross-examination Ms. Stedel said that Ms. Hamill had shown her the little box, which she had bought at the Salvation Army. She showed it to Ms. Stedel not more than a month before she went missing. Ms. Stedel said that she had told the police about the box and they had asked her to find it. She could not find it then but located it at a later time. She said that she still has the little box in her possession but it was not produced in court.

[73] In terms of the identification, Ms. Stedel testified that she found driver's licences, credit cards and BC Identification for about four people. She said she put them in a mail box.

Corlee and Allan Madge - neighbours of Mr. Balbar's in the Oak Apartments

[74] In the summer of 2003, Ms. Madge and her husband lived on the third floor of the Oak Apartments just down the hall from Mr. Balbar's apartment. She met Mr. Balbar through her husband and brother-in-law, who used to go to Mr. Balbar's apartment to buy crystal meth from him. She used to buy marihuana from Mr. Balbar, and if she did not have the money to pay for it she would leave a piece of her identification as security and then return later to pay. She went to Mr. Balbar's apartment almost every day during that time. Often Ms. Hamill would yell for her to come in and she would deal with Mr. Balbar to buy the drugs. She said that a fellow named Mark Nelson was always there, as he and Mr. Balbar were "joined at the hip".

[75] Ms. Madge recalled that early one morning she went to Mr. Balbar's apartment, knocked and when he came to the door he opened it just enough to poke his face out. She asked if he had anything and he said "No" and slammed the door shut. She saw blood at the bottom of the door. She looked to her right and saw a trail of drops of blood going from his door to the top of the stairs, down the stairwell to the main floor, and along a stretch of hall to the back door of the apartment building.

[76] Ms. Madge said she went back upstairs and told her husband what she had seen. A short while later when the two of them went out they made a point of going past Mr. Balbar's door, down the stairs and in the hallway. She testified that all she could smell was a very strong odour of bleach and the floor in front of Mr. Balbar's apartment was freshly mopped. She said that she never talked to Mr. Balbar about this, and when she went back to his apartment the next day or the day after there was no one there. She could not say when she saw the blood droplets, but said they preceded Ms. Hamill's funeral.

[77] On cross-examination, Ms. Madge said that she would give Mr. Balbar her "I.D." as security when she purchased drugs and she would come back with money and get her I.D. back. She said that he always had "stuff" and he would always do the deal.

[78] She also described the drops of blood she saw on the stairs as being "pear shaped drops" the size of loonies, drawing a diagram (Exhibit 8). She said bleach was unusual in that apartment building, as the landlord did not clean and did not use bleach. She was unable to say when she saw the blood drops except that she heard of Ms. Hamill's death a couple of weeks later when she met people on the bus on their way to her funeral. She did not report seeing the blood stains to the police at the time because the apartment building was not in good shape and people were getting beaten up all the time. She said she did not think anything of it at the time, as she was used to seeing alcohol and blood on the floor.

[79] Mr. Madge confirmed that Mr. Balbar, who he also referred to as "Smilie", was his drug dealer and that he and his wife lived in an apartment down the hall from Mr. Balbar's during the summer of 2003. Mr. Madge said that he would occasionally go to Mr. Balbar's apartment to purchase drugs from him, and he would sometimes stay and do the drugs in the apartment. He recalled that there were people in and out of the apartment and that Ms. Hamill was there most of the time. He said they told him they were a couple and they would argue like a couple.

[80] Mr. Madge recalled that one day his wife told him what she had seen in terms of the drops of blood. He stated that "we saw blood drops" from the door down three flights of stairs and all the way to the back door, stopping in the dirt. Mr. Madge said they knocked at Mr. Balbar's door. He answered, and when they said they saw the blood he said "Ok" and shut the door. Mr. Madge said he went back to his apartment. Later when he went to take out the garbage the whole building was full of the smell of bleach and the blood was all gone, with the floor still glistening.

[81] In cross-examination, Mr. Madge agreed that Mr. Balbar used bleach and had bleach and cleaning supplies in his apartment. He said the blood drops were irregularly spaced out, maybe seven or eight inches apart, similar to if someone had a nose bleed while walking. He said at the time he did not call the police and thought that maybe someone was beaten up at Mr. Balbar's place or he got robbed and hit in the face. He agreed that the apartment building was pretty bad and there was a lot of drug use going on there.

[82] Mr. Madge's prior statement to police was put to him and he agreed that he did not say anything in it about smelling bleach. However, Mr. Madge maintained that he smelled bleach coming from Mr. Balbar's place before the blood was cleaned up and then a stronger stench after the blood had been cleaned up. He said the woman who cleaned the apartment building used bleach on the floors and he thought she might have cleaned the blood up. He did not mean that Mr. Balbar went and cleaned the building because he did not see that. He further agreed that he did not tell the police that he had gone back to Mr. Balbar's apartment after seeing the drops of blood, but said it did happen.

[83] The apparent conflict in the evidence as between Mrs. Madge and Mr. Madge as to whether they both went back to Mr. Balbar's apartment after they both saw the trail of blood drops, or whether perhaps Mr. Madge is confusing what Ms. Madge told him she did initially in terms of knocking on Mr. Balbar's door, is not significant in terms of this voir dire, nor is any inconsistency about the smell of bleach. The key aspect of the Madges' testimony is that clearly at least one of them, most likely Ms. Madge, encountered Mr. Balbar at his door at the time she saw a trail of blood leading from it. They both testified that they saw a trail of blood drops leading from the door of Mr. Balbar's apartment down the flights of stairs and out the back door of the apartment building at a time generally consistent with Ms. Hamill's death and a short time later they observed it to be cleaned up.

Connie Buckle - Former RCMP officer who attended at Mr. Balbar's apartment in the early morning hours of July 30, 2003

[84] Former RCMP officer Connie Buckle was a member of the RCMP posted to Kamloops in the early morning hours of July 30, 2003, when she was dispatched to investigate a bear spray complaint in relation to Mr. Balbar's apartment. She recalled that Mr. Balbar looked uncomfortable when he answered the door and let the police into the apartment. He told them to get what they needed and get out. When she and her partner, Cst. Gable, entered the apartment, Cst. Gable dealt primarily with Mr. Balbar. They spent most of their time in the bathroom. Cst. Buckle went into the kitchen where there were two other men sleeping or pretending to be asleep.

[85] Cst. Buckle testified that the living room area and the kitchen area did not match in terms of the clutter and disarray, as the kitchen was fairly pristine in comparison. She said that there were garbage bags full of stuff in the kitchen area and lots of different things strewn about in a disorganized way. She described the state of the living room area as quite "disastrous" looking with boxes, bags and tools everywhere in complete disarray. She said that, in contrast, the kitchen counter area was clean of everything. Next to the table was a large white cooler, one of the large family size Igloo coolers that she had seen many times at Costco, and it was made out of thick plastic, the normal cooler material.

[86] Soon after, Cst. Buckle testified that she heard Mr. Balbar and Cst. Gable have an argument. Cst. Gable took Mr. Balbar downstairs and EHS and the fire department attended. When she left, Cst. Gable and Mr. Balbar were outside with other first responders.

[87] Cst. Buckle checked Mr. Balbar while doing street checks following this incident. Typically he would be riding a bike around residential areas on the north shore of Kamloops.

[88] In cross-examination, Cst. Buckle agreed that these events occurred 11 years ago. She recalled that when she left the scene it was very close to the end of her shift, which she placed at either 5 a.m. or 6 a.m., estimating that she left about 3:30 a.m. to 4 a.m. as the sky was starting to brighten. From the report regarding the incident, Cst. Gable likely would have filled in that Mark Nelson was the name of the man asleep in the chair and that Mr. Balbar produced a can of bear spray.

[89] Cst. Buckle became less sure of her observations about the clean kitchen counter when she was referred to her statement made in 2008. She said that she did not go into the bedroom in the apartment, nor did she see Cst. Gable do so. Cst. Buckle agreed that she made no mention of the cooler in the "624" report or her notes, and the significance of her attendance at the apartment only became known later.

[90] As opposed to re-calling Cst. Buckle for more questions, counsel agreed that it was admitted from her prior trial evidence that the cooler she saw in Mr. Balbar's kitchen was white.

Telephone records

[91] Exhibit 63 is comprised of telephone records from Ms. Hamill's cell phone, which was on a pay-as-you-go plan. The records include the date and time of all calls to and from her number between July 5, 2003 and August 21, 2003. The times recorded were Eastern Standard Time, three hours ahead of the time in Kamloops. The records indicate the numbers called from the phone, but not the source of incoming calls; just their time and duration.

[92] The record shows that Ms. Hamill's number received a call on July 28, 2003 that lasted 42 seconds at 7 p.m. Kamloops time.

[93] On July 29, 2003, there were only two calls recorded. The first is a call to a phone number associated with Mark Nelson, Mr. Balbar's friend, at 2:30 a.m. Kamloops time that lasted 16 seconds. The second was an incoming call at 3:37 a.m. Kamloops time that lasted 27 seconds. On July 30, 2003, four incoming calls to Ms. Hamill's number are recorded between midnight and 3:15 a.m. adjusted to the actual time in Kamloops. Two outgoing calls are then made from her phone to the number for Yellow Cabs in Kamloops at 5:15 and 5:16 a.m. Kamloops time. As noted above, Ms. Buckle departed the Oak Apartments at approximately 3:30 to 4 a.m.

[94] Thereafter, on July 30, 2003, there are five calls from Ms. Hamill's number to the number associated with Mark Nelson, all between 6:06 and 6:29 a.m. Kamloops time.

[95] The telephone records show no additional phone activity from Ms. Hamill's cell phone after July 30, 2003.

Mark Nelson - Mr. Balbar's roommate at the Oak Apartments

[96] Mr. Nelson is referred to by others by his nickname, "Lips". Mr. Nelson said he lived with Mr. Balbar in the Oak Apartments in the summer of 2003. They were both supporting themselves by selling meth and stealing. He knew Ms. Hamill and thought she was Mr. Balbar's girlfriend. She was often around for three days and then gone a few days and back again. Mr. Nelson said that he did not see the two of them interacting. He said the last time he saw her was around his birthday, July 24, 2003. He said that he did not know that she worked as an escort until after that date. He was also pretty certain she was using meth because if a person was at the apartment they were usually doing it. He recalled that when Ms. Hamill's absence was noticed, Mr. Balbar said that she had gone to Kelowna or Peachland to pick peaches. He recalled telling Ms. Hamill's sister (likely Ms. Ironside) when she came by that Ms. Hamill had gone picking peaches.

[97] Mr. Nelson described the apartment as "trashed" and messy with stuff everywhere, including things people had stolen. He said the cooler was blue, if it was the same one he remembered, and it was only two to three feet long. He said that it was in the hall closet for the longest time.

[98] Mr. Nelson recalled that he helped Mr. Balbar carry the cooler out of the building. He said he was under the impression it had guns and Tasers in it, because they had those kinds of items around the apartment. He said he just assumed this and did not ask Mr. Balbar directly.

[99] Mr. Nelson gave contradictory evidence about when he helped Mr. Balbar move the cooler. He first said it occurred after Ms. Hamill's body had been found because they were trying to remove all of the incriminating items from the apartment. He then said that they moved the cooler before her body was found.

[100] Mr. Nelson said that he remembered calling Nathan Bosa about getting a ride, and that Moris Rugolo appeared an hour or two later with a truck. Mr. Nelson said he could not remember where he was when he helped Mr. Balbar put the cooler in that truck and that was it, in terms of his involvement. He said he did not see the cooler after that and he never discussed what was in the cooler with Mr. Balbar.

[101] Mr. Nelson recalled an RCMP officer named Kate Dickman came to talk to him after Ms. Hamill's body had been found. He called Mr. Balbar at his parents' place and told him what was going on and the police made arrangements to talk to Mr. Balbar. Mr. Nelson said at that point he stopped going over to Mr. Balbar's apartment.

[102] Mr. Nelson was asked about the cooler on cross-examination. He agreed that it was hard to remember back 11 years. He said he seemed to remember it was a Pepsi blue colour and he imagined it had a white lid. When asked if it was secured with bungee cords he said he thought he remembered taping it. He said it was two to three feet long, one-and-a-half to two feet wide and about two to two-and-a-half feet tall.

[103] Mr. Nelson said he helped Mr. Balbar carry the cooler out of the building. He also said that Mr. Balbar carried it. Mr. Nelson did not recall it being heavy. He said that he did not notice it was leaking blood or any blood spots on the floor and had he noticed, he said he would have told someone right away.

[104] Mr. Nelson recalled that he had a call from Mr. Balbar in 2007 saying that Mr. Balbar needed to find the cooler. Then Mr. Balbar arrived with two men and Mr. Nelson became scared and tried to get back into his apartment building. He said the two men were obviously cops pretending to be gangsters.

[105] Mr. Nelson was not a particularly reliable or cooperative witness. However, I accept Mr. Nelson's evidence about calling Mr. Bosa to arrange for a truck that then arrived, driven by Moris Rugolo. Other evidence from more reliable witnesses, in particular Mr. Moris Rugolo, makes clear what Mr. Nelson's role was in assisting Mr. Balbar to meet up with Mr. Rugolo and move the cooler into the back of the truck, and that these events preceded the finding of Ms. Hamill's body in the river on August 1, 2003.

Moris Rugolo - drove Mr. Balbar and a cooler to the Indian reserve in July 2003

[106] At the outset I note that Mr. Rugolo gave very detailed and cogent evidence and impressed the Court as an extremely reliable and credible witness. I will only review the main points of his testimony.

[107] Mr. Rugolo has lived all of his life in Kamloops. He is presently 40 years old. In the summer of 2003, he was living with his long-time friend, Nathan Bosa. Based on his living arrangements he placed the following events after July 14, 2003. Mr. Rugolo recalled being awakened by Nathan Bosa, who asked him if he wanted to make $50 by giving a guy a ride to the reserve. Mr. Rugolo agreed, as it seemed like a pretty easy way to make $50. Mr. Bosa loaned Mr. Rugolo his pickup truck. Mr. Rugolo understood he was to pick up "Lips" (Mark Nelson), who he had known for about five years, at the Hasty Market on the North Shore and Mark would take him to meet Smilie. That is what Mr. Rugolo did.

[108] At the Hasty Market, Mr. Nelson put his bike in the back of the truck, got in and told Mr. Rugolo where to drive. He was told to go to the alley behind Sydney Courts that runs between the apartment buildings on Sydney Avenue and Fortune Drive. Mr. Rugolo said he drove down 8th Street to Richmond to where the 7-11 is, and turned left on Richmond. He then turned right onto Schubert, and continued south past Sydney Avenue to the next street that he believes to be Nelson. He drove up Nelson to Fortune, where he turned right. He then took the next immediate right in the alley that runs between the apartment building on Sydney and the one on Fortune Drive.

[109] Mr. Rugolo said he drove to the end of the alley where Mr. Nelson pointed out Smilie to him, who was standing off to the left-hand side near the end of the alley way. He turned the truck around and pulled in next to Smilie. Prior to that day, Mr. Rugolo had heard Smilie's name but had not met him. Mr. Nelson got out of the truck, took his bike from the back and

helped Mr. Balbar with a large cooler that they lifted into the back of the pickup. Mr. Rugolo said that he did not look at it "overly well", but he recalled that it was very long, roughly a metre or a metre and a half in length, and a white or a lighter shade in colour. He was less sure about its width and height, guessing it to be two feet wide and two feet high. He recalled that it was a lot longer than a normal cooler. Mr. Rugolo identified Photos 61, 62, 63 and 64 in Exhibit 5 as the location where he picked up Mr. Balbar and the cooler.

[110] After Mr. Nelson and Mr. Balbar put the cooler in the back of the truck, Mr. Balbar got into the passenger seat and he and Mr. Rugolo had a short conversation. Mr. Balbar told him to drive to the Indian reserve. Mr. Rugolo said that he drove back down the alleyway towards Fortune Drive, turned right onto Fortune and then drove on it to 8th Street and turned right. While driving along 8th Street, Mr. Rugolo recalled that Mr. Balbar mentioned he wanted to go to the 7-11 for a drink, a "Big Gulp". Mr. Rugolo agreed and drove to the 7-11 at Richmond and turned in and parked. Mr. Balbar went in, bought two drinks and came back out while Mr. Rugolo stayed in the driver's seat of the truck.

[111] Upon leaving the 7-11, Mr. Rugolo turned right onto 8th Street, and went north toward the Indian reserve. Mr. Rugolo said he drove down 8th Street, took the turn off at the corner of York and 8th onto Halston Road and over the Halston Bridge. Then Mr. Rugolo said he made a right turn on an exit just before the overpass on Halston that accessed the middle of the reserve via Kootenay Way. He said the route he took that day in 2003 to exit off the Halston Bridge Road onto a dirt road is closed off now (and was also closed off in 2008 when he did a re-enactment with the police).

[112] Mr. Rugolo said that he and Mr. Balbar drove down a dirt road about half a kilometre. Mr. Balbar then asked Mr. Rugolo if he would get out and let Mr. Balbar take the truck to his friend's house, as his friend would not know Mr. Rugolo and would probably have a negative reaction to his presence.

[113] Mr. Rugolo did not see this as a problem and agreed. Mr. Rugolo got out of the truck and Mr. Balbar got into the driver's seat, reversed his direction and drove north back towards the Halston Bridge. Mr. Rugolo lost sight of the truck, due to trees, but he said he could track it by the dust cloud it kicked up. Mr. Rugolo said that after Mr. Balbar went in a northern direction towards the Halston Bridge he took a left turn towards the river. He saw Mr. Balbar driving the truck until he was 50 to 100 metres from the river. Mr. Rugolo said that when he lost sight of the dust cloud, Mr. Balbar was heading towards the North Thompson River.

[114] Mr. Rugolo said that he sat on the side of the road drinking his drink, waiting for Mr. Balbar to return, which he did roughly 20 minutes later. Mr. Rugolo resumed driving. Whereas Mr. Balbar seemed quiet to Mr. Rugolo on the way to the reserve, when he came back to the truck he was less anxious and more talkative. While the cooler was in the back of the truck earlier when Mr. Balbar drove away, it was not there when he returned.

[115] Mr. Rugolo drove Mr. Balbar back to the north shore via the Red Bridge and the south shore. Once they got close to Sydney Avenue, Mr. Balbar asked Mr. Rugolo to take him to the Oak Apartments. Once they arrived Mr. Balbar gave Mr. Rugolo $17, said he would pay him the rest later and got out of the truck. Mr. Rugolo said he did not see or have any knowledge about what was in the cooler - Mr. Balbar never mentioned it and he never asked.

[116] Mr. Rugolo's evidence was not shaken to any significant degree on cross-examination except in relation to the distance he said he drove down the road after taking the exit after crossing the Halston Bridge. In prior testimony he said a kilometre or a kilometre and a half, whereas in direct he said about a half kilometre. His other estimates as to distance from the Halston Bridge to the Overlander Bridge and to Indian Point also appear to be underestimates.

[117] It was also put to Mr. Rugolo that he said the cooler was blue in the video re-enactment he did with the police in 2008. Mr. Rugolo indicated that he thinks of all Coleman coolers as that colour, but the lighter colour came to his mind in court. He stated that it could have been light blue, or somewhere between white and light blue.

[118] These minor discrepancies do not influence my finding that Mr. Rugolo was a reliable and credible witness.

James Wood - an acquaintance of Mr. Balbar's in September 2003

[119] Mr. Wood came to Kamloops in September 2003 with a number of others from Lillooet to try to score some drugs, in particular cocaine. His brother knew Mr. Balbar and the group of them went to Mr. Balbar's apartment, where Mr. Balbar was smoking meth and shared it with them. They stayed in the apartment for four or five days. He recalled that the apartment was pretty dirty and cluttered with garbage, clothes, lots of tools, cleaning supplies, a steam cleaner, and a vacuum. He believed there was carpet on the floor that was covered by various items. He also recalled Mr. Balbar smoking crystal meth and playing with the torch he would use for pipe smoking. He did not recall Mr. Balbar cleaning anything or doing anything else in particular while he was there.

Jack Roberge - a jogger who found Ms. Hamill's body floating on a snag in the North Thompson River on August 1, 2003

[120] Mr. Roberge was an avid jogger in 2003 who took the same route every day. He said he rarely saw other people in the park. On August 1, 2003, his route took him through Indian Point Park and he stopped to catch his breath at a specific spot by the river where an old beaver trail went down the bank. That year there was an old snag sticking up out of the river at that spot. On that particular day he saw something caught in the snag out in the river, which he determined to be a body. He said the body was bloated and gave off quite an odour. He could see pretty well the whole top of the body lying flat on the water, but he could not tell if there were any injuries. He said that he had jogged the previous day and he did not see the body that day.

[121] Mr. Roberge then described the steps he took to contact the authorities and how he returned to the site with two firemen about half an hour later. When they returned to the park, where the body was still caught on the snag, they met a conservation officer at the entrance to the park. Mr. Roberge gave a statement to the firemen and was about to leave when a boat pulled up with two people in uniforms in it. As he was leaving some other vehicles had started to arrive at the entrance to the park.

[122] Mr. Roberge was cross-examined in some detail about the scene, who attended and when, and was asked various questions about the river. He said he thought the distance from Indian Point to the Halston Bridge was closer to three miles but he was not sure. He said that there was not a back eddy in the portion of the North Thompson River where he found the body.

Walter Kelly - retired RCMP officer who responded to the call regarding Ms. Hamill's body being found

[123] Retired RCMP officer Walter Kelly testified that on August 1, 2003, he responded to a call regarding a body being found off Indian Point. He attended shortly after 11 a.m. and was met at the park by a conservation officer. He saw the body hung up on a log in the river and contacted the coroner and other police officers from major crime and the "Ident" section to attend. Sgt. Gehl arrived from Ident. He also asked that someone from the dive team attend to retrieve the body. The dive team member attended and a rescue boat arrived with two firefighters in it. The body was picked up and packaged by the dive team member, taken into the boat, and taken to shore. He said it was then taken by van to the hospital morgue. Later, he said that the body was brought to shore in the bag and lifted into the boat.

[124] Cst. Kelly said the body was quite bloated and partially clothed. He thought he recalled seeing black shorts and some jewellery on the body. Later, at the hospital morgue, Cst. Kelly saw the body transferred into a locked cooler and noted that there was a hole in the back of the skull, which he pointed out to Sgt. Morris when he gave him the key to the locked cooler later that day.

[125] In cross-examination, Cst. Kelly said that he did not sign a holdback sheet regarding information in this case and was not aware if there was a holdback sheet. He indicated that the conservation officer named Lockwood was there when he arrived on the scene and that there may have been others, including firemen and a fire truck. He noted that the jogger (Mr. Roberge) was there and at some point, Dr. Smilie, the coroner, and Sgt. Gehl arrived. Yellow police tape was put up and Cst. Muir, the dive team member, arrived at 12:45 p.m.

[126] Cst. Kelly's recollection of events was not particularly clear, no doubt due to the amount of time that has passed since August 1, 2003. In particular, he was confused as to how the body was transported from the scene to the morgue, but nothing important turns on this detail.

Steven Gehl - retired RCMP Sgt. who worked in "Ident" and took the photographs in Ex. 5

[127] The Admissions marked as Exhibit 59 relate to photographs taken by now-retired Sgt. Steven Gehl, a former Ident officer. Sgt. Gehl also testified.

[128] Sgt. Gehl indicated that he first attended the scene where the body was located about 11:49 a.m. on August 1, 2003. He observed that the body was 15 feet from the shore. He went out in the fire department's boat and indicated that he could not see much of the head because of how the body was lying. Most of the head was underwater, and all that was visible was the upper chin to the nose. The right side of the head was mostly obscured by the tree it was up against and the left arm was raised beside the head, obscuring its left side. Sgt. Gehl saw Cst. Muir remove the body, put it into a body bag and bring it to shore. He recalled that the body was transported to the hospital morgue in the custody of then Cst. Dave Kelly, who left the scene with the body. Later the same afternoon Sgt. Gehl was with Cst. Kelly, who opened the cooler in the morgue. Sgt. Gehl made further observations of the body and noted injuries to the head.

[129] In cross-examination, Sgt. Gehl was asked questions about the photographs he had taken. He said that the body went with Cst. Kelly downstream in the boat in a southern direction with two firefighters, whose names he provided. Sgt. Gehl indicated that Cst. Kelly returned to the scene at 3:20 p.m. At 4:16 p.m., Sgt. Gehl arrived at the hospital morgue. He said he was alone with Cst. Kelly when he opened the cooler. Cst. Kelly took the body partly out and Sgt. Gehl took fingerprints of the deceased. Sgt. Gehl said he made some more observations of the body, noticing the injury on the left side of the head and some jewellery on her neck and fingers. Then the bags were reclosed and the body was put back into the same cooler.

[130] Sgt. Gehl said that he re-attended for the autopsy on August 5, 2003. Also present were Cst. Mark Davidson, Mr. Paul Broadberry (the morgue attendant) and Dr. Stephen. Sgt. Gehl said that there was no holdback form and confirmed that he did not prepare or sign one.

Cpl. Shawn Muir - RCMP dive team member who retrieved Ms. Hamill's body

[131] Cpl. Muir recalled that he attended at Indian Point to retrieve a body from the North Thompson River, arriving at about 12:45 p.m. on August 1, 2003. He said Sgt. Gehl and another retired member of the Ident team, Ron Salmons, were present. He located the body hooked up in some log debris and walked into the river to retrieve it, sliding the body left arm and leg first into a body bag. He said the body was fairly decayed and bloated such that facial recognition was not possible. Once he got closer he could see breasts and believed the body to be female. As he recovered the body he remembered the fire boat came up. He believed that the body went on the boat, but he was not 100 percent sure. He remembers Cst. Kelly and one Ident officer at the scene besides himself, and he did not recall speaking with Sgt. Gehl. He left the scene at 2:20 p.m. On cross-examination, Cpl. Muir said that he was not aware of holdback information and was never asked to sign a holdback sheet.

Dr. James Stephen - the pathologist who conducted the autopsy on Ms. Hamill's body

[132] On August 5, 2005, Dr. Stephen conducted an autopsy on the body of an unidentified female who later was determined to be Heather Hamill. He described the body as markedly decomposed and to be about 5'2" in length (158 cm) and about 89 lbs in weight (40.7 kg). He said this was not a good indication of her weight when alive, as she had lost weight post-mortem. He found the cause of death to be multiple blunt force injuries to the head. In brief, he identified seven areas of injury on Ms. Hamill's head and labelled them "A" through "G". Underlying the areas of injury on her head were multiple skull fractures.

[133] Dr. Stephen described "A" as the uppermost injury on the right side of her head. It was a crescent-shaped laceration about 4 cm long with rough edges caused by a crushing injury of the skin, where the contour of the weapon causing the injury was curved and the underlying skull was fractured, consistent with a hammer or the end of a pipe. He believed this blow to have come from above. He described "B" as a group of at least four injuries to the skull in the area behind the right ear that were substantially similar to "A" and consistent with the same type of instrument. Dr. Stephen said it was more likely that "A" preceded the injuries grouped in "B". The injury marked "C" is another curved injury just to the left of those in "B" and consistent with the other injuries he found on the right side of the scalp.

[134] Moving to the left side of the head, Dr. Stephen described the injury marked "D" as a large deep wound on the temporal area that went into the skull. Generally round in shape, he noted its dimensions as 5.3 cm by 3 cm and said that its edges were degraded but consistent with lacerations to the skull. He labelled another similar gaping round hole on the left side of the skull as "E". It was located a little lower on the skull and a little more towards the front. Finally, Dr. Stephen identified two smaller wounds in the area between the left ear and the left eye, which he labelled "F" and "G", which he attributed to the two underlying fractures of the left zygoma bone. He indicated these fractures and the associated wounds could have been caused by one blow. Dr. Stephen testified that Ms. Hamill's brain was largely absent, as it had decomposed and exited through the hole in her skull.

[135] He described the wounds to the right side of the head as moderate or severe, lacerating the skin and fracturing the skull. The wounds to the left side of the head were very forceful as they lacerated the skin, fractured the underlying bone and penetrated into the brain.

[136] Dr. Stephen indicated that he could not tell the sequence of the blows from the injuries except that it is possible the blows to the right side of the skull rendered Ms. Hamill unconscious, allowing for a more steady and forceful delivery of the heavier blows to the left side of her head. Each of the blows to her head had resulted in damage to the underlying brain and was potentially fatal. The injuries on the left side were more penetrating of the brain and such injuries resulted in the loss of consciousness, bleeding and swelling. This affects a person's center for respiration and the person will stop breathing. The blow resulting in injury "A" could quite possibly have been fatal, causing Ms.

Hamill to become unconscious. The severity of the injuries found at "A", "B" and "C" would be cumulative, almost guaranteeing unconsciousness and would be fatal if untreated. If treated, they were "potentially survivable". The configuration of the injuries associated with "B" suggest that they were administered when she was not moving, given they appear to have all been directed at the same place. The large injuries on the left side of her head, "D" and "E", were very likely to have caused her death. The shape of "D" did not provide much information regarding the nature of the object used.

[137] Dr. Stephen provided detailed testimony about the length of time a person might remain unconscious and then in a coma before death, depending on the sequence and timing of the injuries. He indicated that in a shallow coma, a person may respond to painful stimuli, but in a deeper coma the person has no reflexes or central nervous system activity. He indicated that if a person sustained injury "A" and did not receive treatment and had no intake of water, becoming dehydrated, with a gradual degradation of cardiac and respiratory function, they would start to retain fluids in their lungs. A previously healthy person could survive a day or more. The person would survive a shorter time if the injuries associated with "B" and "C" were received. Then, if the injuries associated with "D" and "E" were added, the interval to death would be "short indeed". He also described a phenomenon known as a "foam cap", which is when a person in a coma is observed to be blowing bubbles. This is caused by increased secretions in the airways or fluids leaking into them. Head injuries may cause leakage of fluid into the lungs. Bubbles may be seen at the person's mouth closer to death.

[138] In total, the autopsy evidence of Dr. Stephen shows evidence of at least nine blows being delivered to Ms. Hamill's head. Ms. Hamill sustained a minimum of six blows to the right side of her head on her scalp and skull in the area above and behind her right ear associated with a distinctly curved instrument. She also sustained three blows to the left side of her head in the area of her scalp above her left ear and in the general area of her left temple. There were three areas of skull fracture on the right side of her head and two large defects in her skull on the left side joined together by bone fragments. All the blows were potentially fatal, but the blows causing two large injuries to the left side of her head ("D" and "E") were lethal. The other two injuries on the left side of the head, "F" and "G", were associated with the fractured left zygoma and reflect at least one blow.

[139] Dr. Stephen's findings were not seriously challenged on cross-examination. Of note is that Dr. Stephen did agree that it was possible that Ms. Hamill, having received injuries "A" or "B" or one of them, could have been rendered unconscious, regained consciousness, and sustained further blows. By the time she had received six blows she was likely unconscious and very likely dead. He also agreed that the injuries to the right side of her head alone could have been lethal.

[140] Dr. Stephen also revised his evidence that he thought it was likely that the injury represented by "A" had likely preceded those at "B". Upon looking at Photo 121 and the transverse fracture line connecting the two, he stated that he was not sure which injury had preceded the other.

VIII. Evidence from the RCMP regarding Mr. Big operations generally and Project Eventail in terms of its planning and oversight

[141] Given that evidence obtained as a result of Mr. Big investigations is now presumptively inadmissible, the Crown called a large body of evidence about the use of the technique generally and pertaining to aspects of this case.

[142] Staff Sgt. Mann, H. and Sgt. G. all gave testimony about the procedure the RCMP follows regarding Mr. Big undercover operations. Sgt. G. was also the main cover person in the present case. In addition, Staff Sgt. Roenspies, an investigating officer in Kamloops, testified about how after a review of outstanding homicide files in the Kamloops area in 2006, he selected the unsolved death of Heather Hamill from 2003 to be the focus of a Mr. Big investigation involving Mr. Balbar. He sought and obtained the assistance of the RCMP undercover unit to mount a Mr. Big investigation in relation to Mr. Balbar. He followed and had input into this Mr. Big investigation once the operational plan he prepared was approved and implemented. I have considered all their testimony and will simply refer to the highlights. The question of holdback evidence in this case was also addressed by Staff Sgt. Roenspies and now-retired Cpl. Mathieu.

Staff Sgt. Mann

[143] Staff Sgt. Mann of the RCMP is presently in charge of undercover operations in E Division, which is the RCMP division for BC. He reports to an inspector in the force. Staff Sgt. Mann testified in detail about the structure of his unit, which receives 15 to 20 requests a year for Mr. Big investigations from police investigators working on particular files. The investigating officers of the RCMP are required to prepare a detailed operational plan for the Mr. Big investigation that they seek to have the undercover unit carry out, which includes information about the target and the basis upon which they reasonably suspect the target to have committed the offence being investigated. The cost of the proposed investigation is estimated. These plans go up the chain of command for approval. As of two years ago, Mr. Big operations also require approval from RCMP headquarters in Ottawa, as well as approval within the division.

[144] Staff Sgt. Mann advised that BC is the largest province in Canada in terms of RCMP members and also in terms of using the Mr. Big technique. In 2007, when the Mr. Big operation targeting Mr. Balbar was approved, the operational plan did not require the degree of approval required presently. This was because the Mr. Big technique was considered a minor undercover homicide technique. However, the plan targeting Mr. Balbar did go through the usual steps in terms of the submission of an operational plan that

required pre-approval. It was approved. The information about the proposed target was more limited then and included the person's age and background. Mr. Balbar's drug use, although potentially presenting some issues, was not considered to be unusual.

[145] Staff Sgt. Mann advised that issues in relation to officer safety could prevent the use of the Mr. Big technique and so could the fact that the crime to be investigated was too recent or had not been fully investigated by other means. Young persons, age 17 and under, are not targets. Mental illness in a prospective target is a factor, with increased attention now being paid to that issue. He advised that this issue was managed by the undercover operator, who would consider whether the target is "of operating mind" in terms of engaging with people.

[146] Staff Sgt. Mann confirmed that the Mr. Big technique is primarily used for unsolved homicides. In his experience operational plans have been declined or sent back to investigators for further consideration 15 or 20 times.

[147] Staff Sgt. Mann described the oversight a Mr. Big operation receives as it proceeds. Having worked in the undercover area for 15 years, he considers the oversight of Mr. Big operations to be extensive. It is a higher risk area of police enforcement and proper use of the technique is very important. In relation to the integrity of the technique, Staff Sgt. Mann said that the RCMP are very concerned about it being used properly in order to ensure that it continues to be available in the long term. Correct management and proper supervision is important to make sure the police "are heading down the right road." He recognized that with multiple missteps they "could be out of business" and that they also need the support of the public. He said that the Mr. Big technique has evolved over the years and that the courts guide the actions of the police through case law. If the police are found to be "off side and not doing things appropriately", Staff Sgt. Mann said that they want to correct things. Therefore, they want to make sure they are responsive to court decisions and "where defences come from."

[148] Staff Sgt. Mann explained that weekly and monthly reporting is required in ongoing Mr. Big operations and the reports go up the chain of command. The cover person engages in detailed planning of the operation and directs the primary operator and any secondary operators who may become involved. It is the cover person who provides information back up the chain of command in the undercover unit about the investigation as it proceeds. Regular briefing sessions precede each scenario and debriefing sessions follow each scenario. Usually present are the cover person, undercover operators and the "rider", who is a member of the investigative team investigating the alleged offence.

[149] Staff Sgt. Mann described how they structure the scenarios in a Mr. Big investigation to the individual case and target. He said, "There is no standard play book where we say employ Scenarios One to Six." The members of the undercover team come to understand what the target brings with him and as the scenarios progress they "get a read on the personality of the target." They monitor what is being done and change it as necessary. He indicated that sometimes a target will provided details of the offence under investigation to the primary

undercover operator and there is no need for a crime boss interview.

[150] According to Staff Sgt. Mann, a successful Mr. Big operation includes one where the target is cleared of suspected involvement in the crime being investigated, which does occasionally happen. He said the success rate of Mr. Big investigations in BC has varied between 70 and 85 percent over the last 17 years. For example, in 2007, the year of Project Eventail, the RCMP in BC recorded 19 Mr. Big operations. Of these, 14 were considered successful and in five the file remained unsolved. In the five cases considered unsuccessful, either the target was not interested in engaging with the undercover operator or disengaged part way through. Two of the 14 successful operations involved clearing targets of involvement in the crimes being investigated. He provided additional details as to how the police conduct such operations, how they have dealt with situations in the past where the confession by a target is false insofar as it does not match with the facts of the crime and how they end involvement with the target.

[151] He indicated that over the years he has been engaged in this type of police work, the length and cost of Mr. Big investigations has increased incrementally over time. He attributes this to the effect of the decision of the Supreme Court of Canada in R. v. Mentuck, 2001 SCC 76, which permitted the media access to the scenarios used in Mr. Big investigations. Once the police were no longer able to supress the nature of the technique and associated scenarios, and details were reported resulting in more exposure as to how the police use this technique, the cost, length and the resources required to run viable Mr. Big investigations have increased. He described how a one-party consent authorization to record communications between the primary undercover operator and the target is important to such investigations, and if more than one target is involved a full Part VI authorization will be sought.

[152] A case with holdback evidence (information that, other than police investigators, only an accused or a suspect would know about the particular crime), is the best case scenario for a proposed Mr. Big investigation. However, if no holdback evidence exists, then other corroborative evidence is important. Staff Sgt. Mann also indicated that certain scenarios, including those that use large amounts of cash, weapons, expensive commodities, and high risk scenarios, including any with purported threats of violence or simulated actual violence, all come to him for review, and now go up the chain of command to the inspector above him for approval. Since the Hart decision there is a heightened review of operational plans for proposed Mr. Big investigations and more emphasis is put on the profile of the target.

[153] Staff Sgt. Mann described Project Eventail, targeting Mr. Balbar, as an average operation in 2007, and "three months of fairly smooth sailing." The cover person in this investigation, Sgt. G., would have reported to another sergeant who would have been closer to the day-to-day, but Staff Sgt. Mann indicated that he was in charge of the individuals who reviewed the operational plans and monitored the day-to-day operations.

[154] In cross-examination, Staff Sgt. Mann provided details of the weekly and monthly reporting, including the scenario sheets for each scenario. He agreed that having the evidence gathered in Mr. Big investigations become presumptively inadmissible represented a big change, resulting in more focus on compliance with the guidelines set out in Hart. He agreed with suggestions by defence counsel that it would be preferable that undercover officers involved in these types of operations not engage in explicitly racist, misogynistic and pornographic comments as they did in this operation. He also said that he was aware that undercover officers take targets to strip clubs or "peeler" bars, although he was not aware that it had happened in this case. In terms of the undercover officers sitting down with Mr. Balbar to watch porno films, Staff Sgt. Mann agreed that bonding between the primary undercover officer and the target can occur in different ways and this must have been considered appropriate by the cover person, although again he was not specifically aware of it.

[155] In terms of the scenarios that involve the threat of violence, Staff Sgt. Mann agreed that this has been "dialed down" in Mr. Big operations. He said depending on the target, the investigation may have to go down that road, but now these operations are definitely run to avoid "gratuitous violence." He was not aware of the specific scenarios in this investigation that involved feigned violence or threats of violence to undercover officers in the presence of Mr. Balbar.

[156] In terms of vulnerabilities presented by Mr. Balbar as a target in 2007, Staff Sgt. Mann agreed that only his drug problem was evident and it was not a major factor in terms of their decision to proceed. He agreed that he was not aware that Mr. Balbar did not have steady employment, was in receipt of welfare and had apparently sustained a brain injury. Neither was he aware of the extent of Mr. Balbar's social network, nor whether his intellectual functioning was impaired. Although there was no mention of Mr. Balbar having a possible brain injury in the various preliminary documents prepared, Staff Sgt. Mann said he was aware of discussions about Mr. Balbar having a possible brain injury during the investigation, although those discussions did not take place with him. He indicated that it was up to the cover person to make those kinds of assessments.

[157] Regarding possible Mr. Big targets and their mental health issues, Staff Sgt. Mann indicated that the "goal posts are different now". Whereas undercover operators and investigators were permitted to make those kinds of assessments in 2007, in the last two years a much more detailed profile of a prospective target must be prepared that contains 45 to 50 questions to be answered. The investigators are required to delve deeper into the questions of mental health and other aspects of a suspect's background.

[158] In re-examination, regarding the use of simulated violence in the scenarios, Staff Sgt. Mann indicated that "limitations talk" is used throughout the operation by the operators to ensure that the target is agreeable with what is proposed. If they are not, the cover person and the operators take a different tact.

[159] Regarding objectionable language, he indicated that type of language is not common around the office or with co-workers but it is used in undercover scenarios. It would be for the operator to decide how to play the role. He also indicated that on three occasions in his 15 years of experience targets have left the operation at the crime boss interview stage, as opposed to discussing matters with the crime boss.

H.

[160] H. has had extensive experience with the Mr. Big technique and played the role of the crime boss in Project Eventail. He described the goal of a Mr. Big investigation as being to seek the truth. He said this type of investigation is not conducted the same way every time, each one being case specific, depending on the target, the area and the homicide being investigated.

[161] H. described his role in two scenarios in the present case, playing the crime boss for a "cameo" appearance at the Vancouver Airport Fairmont on December 6, 2007, when C., the primary operator, brought Mr. Balbar to the lounge to meet H., who was having a drink with two other undercover officers playing roles in the organization. He also played the role of the crime boss in the video-recorded interview with Mr. Balbar in a suite at the Grand Hotel in Kelowna on December 16, 2007 (Scenario 36). Prior to this interview, H. was briefed on the undercover operation to date and information regarding the investigation of Ms. Hamill's death.

[162] H. indicated that prior to the crime boss interviews being video-recorded the crime boss was not provided with any information in order not to be subject to claims later that he had suggested certain information to the target during the interview when the target confessed. Now that video is employed, it is useful for the undercover operator playing the role of the crime boss to be armed with details of the homicide to know whether the target is responding truthfully, for example if the homicide being investigated was a shooting and the target confesses to a stabbing, or if what the target is saying contradicts what he previously told the undercover operator. In such circumstances, H. said the crime boss may decide to confront the target.

Staff Sgt. Roenspies

[163] Staff Sgt. Roenspies was assigned to Kamloops in 2006 and asked to review the outstanding homicide files. In the course of doing so he decided to pursue the death of Heather Hamill and turned the case into a project file. The investigation was at a stalemate and had been dormant for almost three years. Staff Sgt. Roenspies was suspicious of Mr. Balbar and sought to prove or disprove his suspicions. He had information that Ms. Hamill was Mr. Balbar's common law spouse, that there had been violence in the past between the two of them and Mark Nelson had been living with Mr. Balbar at the time Ms. Hamill disappeared, such that he considered whether Mark Nelson was an accessory after the fact, if Ms. Hamill had been killed in their apartment.

[164] Staff Sgt. Roenspies drafted an operational plan for a Mr. Big undercover operation and it was approved. At the time he knew that Mr. Balbar was on welfare, "squatted" at various places and lived with his mother, had a substance abuse problem with methamphetamines and cocaine and was not on court-imposed conditions at the time. He understood that a Mr. Big investigation could be very challenging without holdback evidence, but in the present case there were specific injuries to the head of Ms. Hamill that could be considered as holdback.

[165] In terms of his knowledge of Mr. Balbar having a brain injury, Staff Sgt. Roenspies understood from Cpl. McWilliam that Mr. Balbar had a moderate head injury from a motor vehicle accident that may impact his decision making. He had other information from Cst. Chris Gable about Mr. Balbar's level of functioning in the community. Staff Sgt. Roenspies formed the opinion that he was not concerned about this issue, but he made others alive to it so they could continually assess it. He recalled discussing the issue of Mr. Balbar's head injury a number of times with the cover person for Project Eventail, Sgt. G., in the context of designing scenarios that required Mr. Balbar to follow detailed instructions in order to test his abilities. These included "clean-the-bag" scenarios, where Mr. Balbar was required to transport an item for the organization in a manner that required a number of steps, involving a number of locations and modes of travel. He recalled that Mr. Balbar was able to transport a package containing fake diamonds from Vancouver to Montreal by Greyhound bus over a number of days, arriving on schedule and with the package, albeit without his personal suitcase. Staff Sgt. Roenspies said that "not once" did he have concerns that Mr. Balbar was mentally disabled.

[166] Staff Sgt. Roenspies provided a number of examples relating to the conduct of Mr. Balbar during Project Eventail that he regarded as significant in terms of Mr. Balbar's ability to function mentally. He recalled that in a scenario involving what was said to be the explosive "C4", Mr. Balbar knew more about it than the undercover officer who had researched it. He also became aware of Mr. Balbar telling C., the primary undercover operator, about his heavy beard to disguise himself from the police and visual recognition.

[167] At another point during the operation, Staff Sgt. Roenspies understood that Mr. Balbar had armed himself with a replica hand gun and some bear spray, which seemed like a calculated move on his part to prepare for the upcoming scenario. He also recalled being advised that Mr. Balbar had asked about what countries did not permit extradition to Canada, which was significant to him as it was a more complex concept.

[168] When Mr. Balbar was arrested for a robbery committed by someone else in the midst of a scenario, Staff Sgt. Roenspies thought Mr. Balbar dealt with the situation in an appropriate manner, given that Mr. Balbar thought he was in the midst of a task for the fictitious criminal organization. In another scenario Mr. Balbar had been quite well versed in the concepts of longitude and latitude.

[169] Staff Sgt. Roenspies also regarded details that Mr. Balbar provided in his confession to H., and as followed up the next day in the re-enactment that Mr. Balbar participated in with C. and J., showed Mr. Balbar's ability to recall details and "trouble shoot."

[170] Staff Sgt. Roenspies said that after the crime boss interview, Cpl. Goodall had drafted materials to seek production of medical records in relation to Mr. Balbar to provide information about any brain injury he may have sustained and what had been concluded about his functionality. This application was denied and there was nothing further the police could do in that regard. In cross-examination on this topic, Staff Sgt. Roenspies agreed that he would have been aware of the information contained in the unsuccessful application for medical records about Mr. Balbar having sustained three head injuries and having a disorganized thought process, although he had not before read the part of the Information to Obtain in evidence (Exhibit 17). He described how the Part VI authorization was obtained to facilitate the crime boss interview and indicated that application contained information about Mr. Balbar's head injury.

[171] With regards to Mr. Balbar's drug use, Staff Sgt. Roenspies indicated the issue did come up frequently during the Mr. Big operation and did cause some problems. He described a period in early November 2007 when the police lost contact with Mr. Balbar briefly and were concerned he was binging on crystal meth (methamphetamines). C. made contact with Mr. Balbar in Kamloops. It appeared that phone contact had been lost because Mr. Balbar was surfing the internet and had forgotten to turn off his pay-as-you-go cell phone.

[172] Staff Sgt. Roenspies said that he never considered ending the operation because of Mr. Balbar's drug use, but in consultation with Sgt. G. they decided to keep Mr. Balbar out of Kamloops by arranging scenarios elsewhere. He said that as the bond got stronger between Mr. Balbar and C., they conducted more elaborate scenarios, including the debt collection scenario with feigned violence towards a female undercover operator to test Mr. Balbar's views regarding hurting women.

[173] Staff Sgt. Roenspies was cross-examined in some detail about the various scenarios that took place in Project Eventail. He was generally aware of what went on except regarding the threats made in several scenarios: the threats made to the purported borrower in the loan scenario in Nanaimo that if the loan was not repaid C. would kill the borrower's wife and children; the threat to the female undercover officer in the robbery scenario that she and her son would be harmed or killed if she failed to facilitate payment of the money owed; and the specific comments about the organization not liking "rats" that implied harm would come to anyone suspected of being a rat.

[174] Staff Sgt. Roenspies was also cross-examined about budgeting, funding and the general costs associated with Mr. Big operations and this one in particular. The cost of Project Eventail (excluding salaries but including overtime) was $156,344.

[175] Staff Sgt. Roenspies set out in some detail why he felt the original investigation into Ms. Hamill's death had been botched, which included the failure to seek a search warrant for Mr. Balbar's apartment. In particular, he felt that the holdback evidence had been dealt with in a lax way, adding that present practices are much stricter and include a holdback sheet that everyone with access to the information is required to sign. He recalled that photographs, the pathologist's report and some lab reports to do with the mechanism of injuries were kept in a safe, but said it was "loosely guarded." He adopted his evidence from the previous trial where he said it was not really holdback because a lot of people knew of the information. He confirmed his prior evidence that the most important pieces of information were the injuries to Ms. Hamill's head, and while he did not find any indication that information had been disclosed to the media, the circumstances surrounding the discovery of her body by passersby, firefighters, ambulance and search and rescue personnel meant that control over holdback information had been lost.

[176] In re-examination, Staff Sgt. Roenspies admitted that he had no firsthand knowledge regarding holdback information, as he obtained his information from his review of the file. He also indicated that he did not know what those who attended saw or did when Ms. Hamill's body was found, nor did he know how the information was packaged in the "GIS safe" or who had access to it. He agreed that this aspect of the case preceded his involvement by a few years.

Retired Cpl. Andre Mathieu

[177] Cpl. Mathieu became involved in the investigation regarding the death of Ms. Hamill in 2006 as the file coordinator. He was also involved in the traffic stop scenario with Mr. Balbar and C. on December 11, 2007, where he played the role of a plainclothes officer still pursuing Mr. Balbar for his role in Ms. Hamill's death. He also helped Sgt. Fesenko search the river bed for hammers in April 2008.

[178] As the file coordinator he reviewed the RCMP press releases to media and placed on the web regarding Ms. Hamill's death (Exhibit 54). It contained no information about the nature of her injuries. It did contain details regarding the jewellery she was wearing to help with identification of the body.

[179] With regards to the holdback evidence in this case, Cpl. Mathieu said that it was in the form of paper documents kept in the GIS safe in an envelope. Sgt. Kerr opened the safe and provided it to him. Cpl. Mathieu said he would have reviewed it and kept it in his own locked file cabinet to which no one else had access. He said that he believed he contributed documents to the holdback envelope when he obtained a copy of the pathologist's report after August 2006, which he would have shared with Staff Sgt. Roenspies. The report would have come into the office addressed to whoever had requested it. Once the undercover operation was complete, the material was released to the database analyst to be scanned and disclosed.

[180] Cpl. Mathieu said that the holdback information in this case was kept as confidential as it could be and at no time did any information come to light that the holdback had been compromised. He said this would have been a major issue to address prior to an undercover operation.

Sgt. G.

[181] Sgt. G. has an extensive background in undercover work. He has played different roles in over 200 Mr. Big operations. He indicated that he recalled targets being cleared roughly half a dozen times, including one where the suspect took and passed a polygraph. He is presently in charge of the field office of the undercover unit.

[182] Sgt. G. described the role of the cover person as the person who is responsible for the safety of the operators, liaises between the undercover operator and the investigator, in this case Staff Sgt. Roenspies, and designs and implements the scenarios. He likened the role of a cover person to a director of a movie.

[183] Sgt. G. was the cover person in Project Eventail investigating Mr. Balbar. At the beginning, the information he had about Mr. Balbar was that he was hanging out in the community with drug users, had a substance abuse problem, went all over town on his bike and did not have a job. He was not sure if he was told where Mr. Balbar lived, or if he had a place to live. Sgt. G. said that he understood from Staff Sgt. Roenspies that when Mr. Balbar dealt with the police he told them he had a head injury and was doing drugs. Sgt. G. said that Staff Sgt. Roenspies reminded him throughout the operation that the head injury issue would be brought up, so he designed some scenarios to see if Mr. Balbar was "a functional individual."

[184] Sgt. G. reviewed the scenarios that occurred in Project Eventail, using the Scenario Sheets collected in Exhibit 60 as a guide. Given that the Court must focus on the nature of the Mr. Big operation as it occurred in the context of the individual target, here Mr. Balbar, it is not useful to review his evidence as to why and how he designed the scenarios. However, a few of Sgt. G.'s more general statements are of note:

· the undercover operators in general and in particular the primary undercover operator (C.) in this case are provided with very little information about the target or the offence being investigated in order to ensure that they cannot prompt the target to say things and that any details that are divulged come from the target;

· scenarios are devised to facilitate bonding between the target and the primary and other undercover operators;

· the personality of the target determines how the police will proceed: if the target is known to hang out in the drug and criminal world, then the undercover operators act accordingly; or if the target is unlikely to be part of the criminal world, the police devise other scenarios;

· depending on how a target responds to crime, the scenarios turn slowly to criminality, and from less to more serious crimes;

· if the target responds negatively to a particular scenario or does not wish to engage, the investigation takes a different direction;

· given that the offence in Project Eventail involved a violent crime against a woman scenarios were devised to test the target's response to such crimes and to let him know that the criminal organization was engaged in violence against women when required for the overall goals of the organization, such that it would be acceptable for Mr. Balbar to speak of such things within the organization;

· the "bag movement" scenarios involving Mr. Balbar served a number of purposes, including opportunities for bonding between him and the undercover operator, to introduce him to the business of the criminal organization and give him detailed instructions to follow to address the brain injury issue;

· the trip to Montreal, where Mr. Balbar delivered a package by taking the bus from Vancouver and returning the same way, served many of the same purposes but also showed that the criminal organization was a large one, and was seen as a good test of his abilities to deal with more complex tasks;

· Mr. Balbar performed the tasks in the scenarios "in the middle of the pack", if not a little above the middle of the pack, when compared to other Mr. Big targets, including some with addictions and some with more normal lives that included regular jobs and family.

[185] Regarding the profanity, graphic racist and misogynistic language, some of it particularly vile, spoken mainly by the undercover operators in scenarios in Project Eventail, Sgt. G. explained that the police did not invent this manner of speaking. He stated, "We do hang out with real criminals and we know how they operate, we take what those people do and we put that in our scenario." He reiterated that the undercover officers have to act like gangsters who speak in that fashion. As to whether he specifically told C. to include the racist elements in the conversations with Mr. Balbar, Sgt. G. said that he did not remember if he told C. to do that or if he did it on his own.

[186] Sgt. G. had a very practical approach to Mr. Big investigations. Paraphrasing, he said the operations have common elements - the police have to "bump" (make the initial contact) and gain credibility, develop a bond, show the target they are a successful criminal organization and demonstrate how they deal with issues, making sure that the target understands the importance of honesty and loyalty. The police do not want the target to lie to the crime boss and they do not want to put the wrong person in jail, because if the operation does not work the real killer is still out there. Succinctly put, he said, "It doesn't make sense to get a confession from anybody."

Findings regarding the RCMP and the Mr. Big technique

[187] First and foremost, it must be kept in mind that each Mr. Big operation resulting in evidence that the Crown seeks to use at trial starts out as presumptively inadmissible and has to satisfy the test set out in Hart in terms of its probative value outweighing its prejudicial effect. A coerced confession is an inadmissible one and police methods must not constitute an abuse of process.

[188] While this investigative technique has exonerated the occasional target in the past, clearly its primary purpose is to gain evidence to mount a prosecution in homicide cases that have gone cold. Because of the dishonesty inherent in presenting an imaginary world to a suspect designed to entice a confession, it is easy to see how scenarios may act upon a target such that a confession is coerced or may exceed what the community will tolerate in terms of the "community shock test".

[189] In the event that the vulnerabilities of an accused are preyed upon, the level of feigned violence or threatened violence towards the accused or others in his presence, or scenarios with objectionable content go beyond what community standards while tolerate, the evidence will remain inadmissible based on an abuse of process. While one appreciates that culpable homicides occur in violent and unpleasant circumstances, the sky is not the limit for this type of investigation.

[190] These witnesses did their best to portray the present use, and to a lesser extent, the past use of the Mr. Big technique as a well-planned, well-managed and adjustable investigative technique that is an important tool in assisting police to solve unsolved homicides. Although there were some initiatives underway prior to the Hart decision to increase the exercise of caution and good judgment in the selection of targets, and to more closely manage the directions that these types of investigations may take, the Court has the clear sense that the definition of a successful case had only recently acquired the nuance that the technique exonerated the innocent. The vast majority of past successes were defined as gathering sufficient evidence to send a case to trial. The spectre of a false confession that could lead to a wrongful conviction remains alive and to be guarded against on a case by case basis. The fact that this evidence is presumptively inadmissible will provide a greater and continuing incentive to the police to be particularly alert to the nature of the target, in particular to vulnerabilities that target may present, and to the staging of scenarios that are excessively violent.

[191] The evidence in this voir dire shows that the police are giving more consideration these days to the nature of the target and the activities in scenarios including those using feigned violence, presumably to fend off a finding of abuse of process. However, in my view the focus for this type of voir dire in the future must be the substance of the actual Mr. Big operation, as opposed to police procedures and what they aim to achieve. The best imaginable police practices will not serve to render admissible a confession or other evidence obtained in a Mr. Big operation that runs afoul of the test in Hart. While Hart

renders Mr. Big evidence presumptively inadmissible, it sets out a clear pathway to admissibility and provides guidelines as to when such an investigation may become abusive.

[192] With that being said, I make the following findings on this evidence with regards to Project Eventail and Mr. Balbar:

· the procedures that existed in 2006/2007 were followed when Project Eventail was considered, approved and implemented;

· there was nothing inappropriate in selecting Mr. Balbar as a target for a Mr. Big operation in relation to the death of Ms. Hamill;

· the nature of the operation carried out was not unusual in the context of other similar investigations;

· consideration was given to Mr. Balbar's claim of a brain injury;

· the police made efforts to obtain Mr. Balbar's records with regards to the extent of his brain injury that were unsuccessful and designed scenarios that tested his ability to function in terms of the instructions he was given;

· no particular consideration was given to his apparent lack of employment, the fact he was on social or disability financial assistance, where he resided or what his social network was;

· the police were aware of Mr. Balbar's substance abuse problem, which was not seen as a bar to making him a target;

· there was viable holdback evidence in relation to the head injuries that Ms. Hamill received based on the evidence of Cpl. Mathieu and other evidence on this voir dire to the effect that most of her head, including where the injuries were, was submerged in the river and her body, as it had floated up against the snag in the river, could not have been visible to anyone other than Cpl. Muir (who testified that he did not see the injuries when he recovered her body and placed it in a body bag while still in the river). Later, her injuries were seen only by Cst. Kelly and Sgt. Gehl when they attended at the morgue, and then by those present at the autopsy;

· between August 1, 2003 and 2006/2007 when the Mr. Big operation was planned and carried out, while there was a less rigorous protocol to ensure the security of holdback evidence, it would be pure speculation for the Court to find that the integrity of the holdback regarding Ms. Hamill's head injuries was compromised prior to the undercover operation; and

· in 2007 when Project Eventail was approved, the cover person had considerable latitude in deciding which direction to take the investigation and which scenarios to run. The undercover operators also had considerable latitude in terms of how to play their roles and the level of intensity to bring to situations of threatened and actual violence (feigned) and reporting and oversight of their superiors was mainly after-the-fact.

IX. AN OVERVIEW OF Project Eventail

[193] This Mr. Big operation began on September 26, 2007 and ended with the accused's arrest on December 19, 2007 - a period of just over 13 weeks. It was comprised of 37 staged scenarios that took place at different locations in BC and also in Quebec. As part of this Mr. Big operation, Mr. Balbar took a package that he believed contained diamonds from Vancouver to Montreal by bus and then returned to Vancouver by bus after a number of staged scenarios.

[194] After the initial "bump" or meeting between C., the primary undercover officer, and Mr. Balbar in Kamloops on September 26, 2007, the two spent a considerable amount of time together pursuing the business of the fictitious criminal organization.

[195] A secondary undercover operator, J., was involved in BC. P. was a secondary operator in Quebec. Other police undercover operators made "cameo" appearances, fulfilling one role or another, with what was a fairly elaborate Mr. Big operation. The stated purposes of Project Eventail were to conduct activities to facilitate bonding between Mr. Balbar and C.; set tasks for Mr. Balbar to perform that gradually drew him into employment with the organization, providing him with modest sums of money and promises of increased remuneration in the future; provide opportunities for conversations between the undercover operators and Mr. Balbar that stressed honesty and loyalty as the core values of the organization where the boss takes care of his people; and gradually escalating scenarios in terms of their degree of feigned criminality and level of violence, including threats of violence towards women and other vulnerable groups, such as children.

[196] With the offer of participating in a big upcoming job for the organization in the offing, a staged traffic stop of Mr. Balbar together with C. just outside of Kamloops occurred during which an officer approached and accused Mr. Balbar of killing Ms. Hamill. This was interpreted as "heat" from the police directed at Mr. Balbar and a situation that the boss needed to be advised of and likely would be able to assist with. The stage was then set for the Mr. Big crime boss interview, which occurred with H. on December 17, 2007 in Kelowna at the Grand Hotel.

[197] I have reviewed all of the evidence related to scenarios conducted by Project Eventail. The Court heard a very large amount of detailed evidence about what occurred from C., the primary operator, but also from J. and P., the two secondary operators, and the undercover operator who made a cameo appearance in the C4 scenario. As the main cover person, Sgt. G. testified about why he devised the scenarios as he did. The undercover officers who testified have exceptionally good memories and took very detailed notes. Some of the scenarios in the latter part of the operation were also audio-recorded. Each scenario was described in a "Scenario Sheet" that briefly stated which undercover operators were to be involved, the objectives, the operational plan and the result. Sheets for the 37 scenarios are found in Exhibit 60.There is no dispute on the evidence as to the facts with regards to what occurred in this Mr. Big operation and I accept the evidence presented by the Crown on this

voir dire.

[198] I note that the undercover officers were thoroughly cross-examined by counsel for Mr. Balbar, bringing out details of the vulgarity, racism and misogyny in their conversations with Mr. Balbar, the circumstances of Mr. Balbar's life in terms of his very limited means and meth addiction, actions of Mr. Balbar consistent with a lower level of intellectual functioning (like losing his personal belongings or failing to meet up as planned), the elements of threatened or actual (simulated) violence to others in his presence, the lure of available sexual partners, having friends, making money and having an apartment to live in.

[199] It is useful to provide the following brief description of the numbered scenarios in Project Eventail to show the chronology of what occurred leading up to Mr. Balbar making reference to his involvement in Ms. Hamill's death to C. and then to H. in the crime boss interview.

[200] I will provide fewer details about the bag movement scenarios because they were all quite similar. These scenarios involved Mr. Balbar being directed by C., or occasionally others, to move various bags containing a commodity belonging to the organization from one location to another (Scenarios 7, 8, 9, 10, 11, 15, 16, 18, 24, 26 and 32). These scenarios usually required Mr. Balbar to follow a series of steps and in some cases quite detailed, prolonged and elaborate steps were required to fulfil the assigned task (for example, finding a locker key in a public bathroom, finding a particular locker in a different location, using the key to pick up or drop off the bag, remembering a locker number and combination, and taking a variety of modes of transport to get to and from his destination). The commodities Mr. Balbar transported included electronic devices, fake diamonds, credit cards and fake C4 explosives. The evidence of C. and P. was that Mr. Balbar did what they asked him to do in every scenario. J. said that Mr. Balbar "followed instructions almost always exactly as I asked."

[201] The majority of the evidence regarding the scenarios in Project Eventail was given by C., the primary operator, accompanied by some evidence from other undercover operators. The Mr. Big operation unfolded as follows:

o Scenario 1 on September 26, 2007, took place in Kamloops and involved C. meeting Mr. Balbar by pulling up beside him in a truck and asking him for directions and assistance in locating a vehicle that C. needed to repossess. C. offered to pay Mr. Balbar for his help and they drove about Kamloops looking for this vehicle. They had lunch and C. dropped Mr. Balbar off and picked him up later, and they went to different pubs looking for the vehicle. They ended up at a strip club. C. learned Mr. Balbar's nickname was Smilie. As he often did during the operation, C. gave Mr. Balbar half of a ripped $50 bill, promising him the other half when they met again.

o Scenario 2 on September 27, 2007, also took place in Kamloops. C. picked Mr. Balbar up from the residence where he was staying on Sydney Street and they went to various pubs, continuing to look for the vehicle to repossess, and C. took Mr. Balbar to a pub where C. asked him to watch a

person C. had to meet who was another undercover operator. Once that person left, C. and Mr. Balbar socialized. C. indicated that he had to go to Vancouver but would be back at 4 p.m. the next day. In the course of a discussion about girls, Mr. Balbar told C. about a girl who was his friend who worked in downtown Kamloops as a prostitute and had been killed three or four years before, that it was a "Pickton" thing, and the police had been "all over him and his friends", wanting to tap his phone. When C. dropped Mr. Balbar off, he gave C. a small Halloween decoration. The next day, C. stopped by three times to pick up Mr. Balbar but he was not there, although Mr. Balbar did call him and they arranged to meet the following day.

o Scenario 3 on September 29, 2007, involved C. and Mr. Balbar meeting in Kamloops, a drive to Salmon Arm to continue the search for the vehicle to be repossessed. They stopped and had lunch. During the drive Mr. Balbar talked about his past, including how he stole copper wire to make money and had an upcoming court date for theft. C. talked about working for the boss, who was tough but fair, looked after those who work for him as long as they did not lie, and for whom the most important things were honesty and loyalty. C. received a staged call from the boss and was directed to go a pub in Vernon and meet the same man he had met previously. Mr. Balbar was to sit elsewhere and watch their meeting and then later give the man an envelope, which Mr. Balbar did. Mr. Balbar made comments to C. indicating that he was available to help him anytime and will give C. his cell number once it is hooked up. Mr. Balbar talked about his son and how he would like to shave but has grown a beard so that the cops will not be able to find him by identifying his face. Mr. Balbar talked about having problems with a female a few years previously and that he thought she was in a car accident. C. dropped Mr. Balbar off. They were to meet again on October 2, 2007, but C. was unable to contact Mr. Balbar at the number at the residence on Sydney Avenue where Mr. Balbar said he lived in the basement. The woman who answered the phone said Mr. Balbar did not live there.

o Scenario 4 on October 3, 2007, involved the repossession of the vehicle that C. and Mr. Balbar had searched for previously. C. picked up Mr. Balbar at the residence in Kamloops and noted that he looked to be in rough shape. Mr. Balbar said that he smoked methamphetamines and had been out partying, but had slept the last 18 hours. They drove to Salmon Arm to look for the vehicle to be repossessed. After dinner they carried on to Sun Peaks. Mr. Balbar talked about how he had a few ex-girlfriends and did not trust women. At Sun Peaks, C. sent Mr. Balbar into a pub to look for a particular male, who turned out to be there. C. confronted the male in the parking lot and told Mr. Balbar to stand beside him as C. threatened the male in the course of repossessing the male's vehicle. He told the male, another undercover officer, that the vehicle was no longer his and if he went near it, C. would come back with a baseball bat and use it on his head. Afterwards, when C. asked if Mr. Balbar had any problems with how the boss handled his business, Mr. Balbar said that he was fine with it and he had C.'s back. C. asked Mr. Balbar if things went bad, would he be okay with it, and Mr. Balbar responded that he would be fine with it. When asked if he wanted more work, Mr. Balbar said he did. Mr. Balbar was paid $250 and given half of a ripped $50 bill. They arranged to meet the next day at noon for work. This was the first scenario that involved threatened violence in Mr. Balbar's presence.

o Scenario 5 on October 4, 2007, was the first of several scenarios that involved C. engaging Mr. Balbar to help him find a female wanted by the organization and culminated in Scenario 14, the collection scenario. Scenario 5 started in Kamloops. Mr. Balbar was not at the residence where he had been picked up before but made contact with C. from a pub, where C. picked him up. They purchased a cell phone for Mr. Balbar and then drove to Vernon where C. had Mr. Balbar go into a number of restaurants looking for the female ("A.") whose picture C. had shown to Mr. Balbar. They did not find the woman and engaged in conversation about various topics as they drove. C. dropped Mr. Balbar off at the Kamloops residence and paid him $50. On October 5, Mr. Balbar called C. asking if there was any work C. needed done. C. said he would be in touch. At one point Mr. Balbar told C. that he was going to Valleyview (on his own) to look for A., the female.

o Scenario 6 on October 9, 2007, involved C. and Mr. Balbar continuing to look for the female, A. C. picked Mr. Balbar up in Kamloops, and after getting something to eat, they drove to Vernon to look for A. They talked about various things along the way, including how Mr. Balbar planned to look for a place of his own for under $400 a month and to get his son back to live with him in the spring. Mr. Balbar talked about prior sexual relationships and his relationship with his son's mother. In Vernon, they went to restaurants looking for A. without success. C. asked Mr. Balbar if he would help him the next day with work in Vancouver and Mr. Balbar agreed. On the way back to Kamloops, Mr. Balbar talked about various things, including about wanting to make a perpetual motion machine, electricity in the clouds and how blood makes the human brain work. C. dropped him off at the residence in Kamloops and made a plan to meet up the next day, which occurred.

o Scenario 7 on October 10 and 11, 2007, involved Mr. Balbar and C. driving from Kamloops to Coquitlam. En route, they talk about many things. Asked by C. if he wanted more work, Mr. Balbar indicated that he did, so he could get a place of his own. C. talked a lot about the organization he worked for, saying he was just like the boss as he needed the guys working for him to be honest, loyal and dependable, and to tell the truth. C. talked about staying away from the drug trade, which was full of rats or informants. Mr. Balbar talked about aspects of his life, including that since his "ex" died he had just been partying. C. showed Mr. Balbar around a warehouse belonging to the organization and then bought him a bus ticket to Kelowna. Mr. Balbar then followed an elaborate set of instructions to retrieve a bag from a locker at Ikea and took the bus to Kelowna. C. met him in Kelowna at a hotel room where they left the bag and went out to a strip club and socialized. Mr. Balbar told C. that he had a pellet gun and some mace in his bag at the hotel, which C. took from him later, saying that it might draw heat. The next day, C. picked Mr. Balbar up from the hotel and Mr. Balbar had to leave the bag at a locker at the airport, following a set of instructions. They then drove to Kamloops where C. dropped Mr. Balbar off at the usual residence and they planned to meet for more work in a few days. C. paid him $300 and a ripped half of $50 bill.

o Scenario 8 on October 14 and 15, 2007, involved Mr. Balbar moving a bag containing credit cards from Kelowna to Castlegar by bus. It started with C. picking up Mr. Balbar in Kamloops and driving with him to Kelowna after having some difficulty finding him. During the trip Mr. Balbar

told C. that he was willing to take "a pinch" for C. and would keep his mouth shut if they were pulled over with a bag of contraband, as he had been through interrogations before, that jail was not so bad and he might go to jail the following month for theft of copper. Mr. Balbar followed detailed instructions, collected the bag, and there were no difficulties apart from forgetting his phone and C. having to follow him and give it to him. C. and Mr. Balbar met in Castlegar at a hotel after Mr. Balbar got off the bus. They went out for dinner and Mr. Balbar went to the bathroom for 15 minutes and said he had smoked a bowl of methamphetamines, two or three "hoots", to keep him motivated. They discussed his addiction to meth and Mr. Balbar said he had been using for ten years but he took a day off each week, and with "a point" a day he could function. He said he was planning to quit in the spring when he got his son back. C. encouraged him to stay clean when working for him. The next day another undercover officer came to pick up the bag and C. and Mr. Balbar left and drove back to Kamloops. They engaged in a lot of conversation which included C. telling Mr. Balbar to stop stealing copper wire as it drew too much heat and he would not need to do that if he kept working for C. C. told Mr. Balbar that J. would pick him up for work if he wanted more work, which Mr. Balbar said he did. C. dropped him off in Kamloops and paid him $100 and another $50 so he did not have to steal wire. He told Mr. Balbar to get some identification because he was going to need it for work in the future.

o Scenario 9 on October 17 and 18, 2007, involved J. picking Mr. Balbar up in Kamloops after some difficulty in reaching him. They drove to Coquitlam where J. and Mr. Balbar met C. at a restaurant. C. gave Mr. Balbar a bus ticket for Kelowna and detailed instructions about picking up a bag to take with him, which Mr. Balbar did. He met J. in a hotel room in Kelowna and the next day an undercover officer came to collect the bag.

o Scenario 10 on October 23, 24 and 25, 2007, involved Mr. Balbar transporting a bag said to contain the explosive, C4, from Vancouver to Nanaimo. C. picked him up in Kamloops and they drove to Abbotsford after making several stops in Kamloops to try to get identification documents for Mr. Balbar. En route they talked about many things. Mr. Balbar talked about being out partying all weekend, how he quit stealing copper wire, how he likes to go away from Kamloops to work, how people used to steal his stuff and a book made out of human flesh belonging to a friend of his. C. discouraged talk about females. Mr. Balbar said he had to watch out in terms of who was around but said he had no problem working for C.; he had friends in the past he could not trust. C. told him anytime he did not feel comfortable he could leave, and Mr. Balbar said that working for C. was good. C. dropped Mr. Balbar off at a hotel in Abbotsford, gave him $40 and told him he would be in touch the next day. Mr. Balbar called back to see if he left his sunglass case with his meth in C.'s vehicle and C. told him he did not see it. The next day, C. picked Mr. Balbar up and they went to the Vancouver bus station where C. gave him a bus ticket, some money and instructions to pick up a bag from a locker and transport it to Nanaimo, which Mr. Balbar did. C. found Mr. Balbar's sunglass case containing meth under the seat in his vehicle and got rid of it, telling him that C. did not want him holding any drugs when he was working. Once in Nanaimo at a motel, another undercover officer came and had some conversation with Mr. Balbar about C4, during which Mr. Balbar appeared to know a fair bit about C4 and said that he used to make it at home. Later that day, C. and Mr. Balbar went out for dinner and C. told him

that he liked Mr. Balbar's honesty about the meth. C. talked about his boss and how honesty and loyalty were so important to the boss, who was like the head of the family, and how he will help those working for him fix their problems as long as they are honest. C. also talked about how the boss needed to know the truth, as he liked to fix things once so as not to waste time and resources. C. told Mr. Balbar that if he ever got into trouble to call C. first. Mr. Balbar said that he would be available to work for C. anytime except Halloween and Christmas when he needed to visit his kid. The next day, Mr. Balbar and C. took the ferry back to Horseshoe Bay and then went and purchased a phone charger and a phone card for Mr. Balbar. C. then purchased a bus ticket for Mr. Balbar to return to Kamloops, which he did. Mr. Balbar indicated that he would take the bus from Kamloops to the Lower Mainland for work in the future.

o Scenario 11 on October 29, 2007, involved Mr. Balbar taking the bus from Kamloops to Coquitlam. C. picked him up and they went to a covert warehouse where C. introduced him to two undercover officers said to be associates in the organization. Then C. took Mr. Balbar to the Ikea in Coquitlam and gave him detailed written instructions about picking up a bag and "cleaning" it by moving it about. Mr. Balbar picked up the bag but then in the course of following the instructions, which took him to the Metrotown Mall, he was mistakenly arrested as a suspect in a robbery. The undercover team arranged for Mr. Balbar to be released and then C. picked him up. Mr. Balbar told C. that he was willing to go to jail for five years for C. C. praised him for how he handled the situation. Mr. Balbar said that he had been through worse and had beaten "a 25 to life" and that the police did not even interrogate him. He was keen to have more work as he had cleaned his calendar for C. C. raised the topic of Mr. Balbar staying for free in an apartment C. might get as long as he would leave for short periods if C. needed it. Mr. Balbar said that he would be interested as he currently did not really have anywhere to stay. C. dropped him off at his hotel after paying him $250 and $120 for his bus ticket back to Kamloops. The next day Mr. Balbar missed his bus but then caught one, leaving C. a message that the "snarks are fishing", referring to the police. C. had some trouble connecting with Mr. Balbar prior to the next scenario.

o Scenario 12 on November 1, 2007, involved C. picking up Mr. Balbar and driving him to Abbotsford. During their conversation when Mr. Balbar was asked if he liked the work and if he wanted more, to which Mr. Balbar replied that he would work 24/7 if he could. He also indicated that he was willing to leave Kamloops and that he had no fear and was willing to do anything. He and C. discussed their lengthy criminal records. C. indicated that his criminal record was by far the worst and that Mr. Balbar could leave anytime if the work is too tough or messy as C. knows that he will keep his mouth shut. When he dropped Mr. Balbar off at a hotel in Abbotsford he gave him $20 and told him he would pick him up the next morning.

o Scenario 13 on November 2, 2007, involved C. taking Mr. Balbar to a high-stakes poker game run by the fictitious criminal organization where Mr. Balbar helped C. provide security. C. told him it was an event where the organization made a lot of money. C. took care of the money while Mr. Balbar had to search each of the players when they entered. C. was required to roughly eject one of the players who was a sore loser and appeared like a tough enforcer while Mr. Balbar watched. Earlier in the day C. had given Mr. Balbar some money for clothes and told him to clean

up, which Mr. Balbar did. Before he dropped Mr. Balbar off at his hotel, C. told him he had done a good job. C. asked him if anything had bothered him, to which Mr. Balbar replied that it was an easier way to make money than he was used to and he was willing to work for C. 24/7. C. told Mr. Balbar that he would not need him for a few days and that he would put him on a bus back to Kamloops, to which Mr. Balbar replied that he would rather stay down in the Lower Mainland. Mr. Balbar left his backpack in C.'s vehicle when he left and C. took it to him. The next day, Mr. Balbar called C. to inquire whether C. needed him.

o Scenario 14 on November 4 and 5, 2007, involved C. and Mr. Balbar driving to Prince George and staking out a motel where A., the female who was in debt to the organization, was apparently staying. While driving up to Prince George they engaged in conversation that included C. talking about going to Mexico if he had to "lay low" and Mr. Balbar asking if there were still countries with no extradition. An audio recording of their conversation as they staked out the motel (Exhibits 37and 37A) indicated that Mr. Balbar was very engaged in this enterprise. He had a number of suggestions about how to best observe the unit that A. was supposed to be in without attracting attention, such as moving to park at a better location, giving C. a warning of the odds, given that there were five cop cars circling around in the vicinity and going to check the restaurant and the unit A. was supposed to be in. Various comments by Mr. Balbar indicated that he was comfortable with the notion of doing physical harm to someone else. The actual encounter between C. and Mr. Balbar and A. was audio-taped (Exhibits 39 and 39A). A. had a number of gold coins she had taken from the organization and was several short. After C. verbally threatened A. with grave physical harm and indicated that he would prefer to kill her, Mr. Balbar was sent outside of the room to guard the door while in the room the undercover officers staged a scenario that contained a high level of feigned violence. Then Mr. Balbar was brought back into the room to see the distraught and beaten A., who had fake blood coming out of her mouth. Mr. Balbar's comments to C. immediately afterwards indicated that he thought that if A. had not had the coins on her C. would have "trunk[ed] the bitch." When C. said that perhaps he ought not to have brought Mr. Balbar along, Mr. Balbar responded that he would rather know that C. was safe with him "keeping six" and "It's not like I haven't trunked people before." He also said "I got no emotion for fuckin' broads. It's fuckin' doesn't make a difference to me I could run'em through a chipper an' fuckin' I don't know 'em, they're just a fuckin' piece of fuckin' material" (Exhibit 39A, pp. 27-29). Mr. Balbar said that he had "crossed the bridge a few times" in relation to killing someone, and a bit later that " if it's a guy or a fuckin' girl or whatever somebody fucks up, fuckin' problem needs to be resolved " (Exhibit 39A, pp. 30-31). C. drove Mr. Balbar back to Abbotsford and left him in a hotel. C. paid him $300 and the next day set up work for Mr. Balbar with J.

o Scenario 15 on November 8 and 9, 2007, involved a bag movement scenario that required Mr. Balbar to pick up a bag from a locker in the Lower Mainland and take it to Whistler by bus. J. was the undercover operator. They stayed overnight in Whistler and socialized. Mr. Balbar had a problem with the hotel where he had been staying in Abbotsford, as he had damaged the room, some metal items were missing and he had burned the comforter using a blow torch to heat his meth. C. indicated that further problems like this could cost him his job with the organization

and Mr. Balbar apologized. Another hotel was found for Mr. Balbar.

o Scenario 16 on November 12 and 13, 2007, involved Mr. Balbar meeting C. who gave him a bag to keep overnight. The next day, a female undercover officer came to pick up the bag and C. took Mr. Balbar out to buy some new clothes, as he was going to meet some important people. Then C., J. and Mr. Balbar spent an evening at an apartment said to be C.'s, where they "socialize" by watching a porno movie, another movie and eat barbequed steaks. The conversation included how well connected the boss was, how the boss took care of C. and how C., in turn, looks after his people, including Mr. Balbar. C. reiterated that if Mr. Balbar did not like working for him he could leave at any time. Mr. Balbar made other comments that indicated he was very willing to work for the organization as nothing bothers him. In the course of this scenario, C. made very lewd comments to Mr. Balbar about the fact that he should have engaged in sex with the woman who came to pick up the bag as the boss sent her to him, essentially for his sexual pleasure.

o Scenario 17 on November 14, 2007, was another scenario that involved a high degree of simulated violence. Briefly, in Mr. Balbar's presence, C. met a woman (a female undercover officer) who owed the organization money and had not paid it. He threatened to kill her and her son in front of her, having gone through her purse and taken a photo of her young son. She offered to set up the man she was seeing to be robbed by C. to pay down her debt, as she expected to meet the man that night for sex and it was likely he would be in possession of a large amount of money. Reluctantly C. agreed. Later, C. and Mr. Balbar went to a dark parking lot and C. engaged in a staged robbery of the woman and the man (another undercover officer) where he pulled the man from their vehicle, putting him to the ground and sticking a 9mm pistol in his mouth and threatening to shoot the man if he did not turn over the money, which the man did. Mr. Balbar was present on the other side of the vehicle, making sure that the female did not get out. C. had shown Mr. Balbar the gun earlier and Mr. Balbar would have been under the impression that it was loaded, which it was not. In the lead-up to the robbery, Mr. Balbar suggested that he and C. might need "a piece", referring to a gun, as the man may be armed. C. assured Mr. Balbar that he knew his business, as this was what he did for a living, and if Mr. Balbar needed a piece, C. would give it to him to make sure it was clean. C. and Mr. Balbar talked about whether Mr. Balbar trusted C. and he said he did, "100 percent." C. talked about trust and loyalty and how C. could take $5000 from the $30,000 he had just collected and Mr. Balbar said that he would never do that. C. indicated that someday Mr. Balbar might be collecting a bag for C. Mr. Balbar was dropped off at the hotel and C. gave him $50.

o Scenario 18 on November 16, 2007, involved C. picking up Mr. Balbar and taking him to the Vancouver bus station with a bag to transport to Montreal. Mr. Balbar indicated that he could handle a three day bus ride and C. gave him instructions about how to avoid "heat" on the trip and told him to stay in touch on the way. At the bus station Mr. Balbar gave C. several last names C. could use to buy the ticket. C. and Mr. Balbar discussed why he would not provide his real last name, as to do otherwise would draw heat on himself. Mr. Balbar indicated that he did not have warrants for his arrest outstanding but the police were investigating him four or five years previously. Mr. Balbar stayed in touch with C. by phone as he travelled across the country,

arriving in Montreal on November 19, 2007. C. flew to Montreal and met up with Mr. Balbar there for a number of scenarios while Mr. Balbar was in the company of other undercover officers playing roles associated with the Quebec part of the criminal organization.

o Scenario 19 on November 19, 2007, involved Mr. Balbar meeting P. in Montreal and watching a transaction between P. and an undercover officer posing as a biker who was buying the fake diamonds that Mr. Balbar had successfully transported across the country in the bag, although he lost his suitcase. After the transaction, Mr. Balbar, in the company of C. and P., met other individuals involved in the Quebec organization. They socialized and C. told Mr. Balbar that he was to help P. over the next few days.

o Scenario 20 on November 20 and 21, 2007, involved Mr. Balbar travelling by car with P. to a town outside of Montreal, St. Georges, and then going to a very isolated border crossing where Mr. Balbar was directed to go into the customs' office and retrieve a bag from a corrupt customs officer (another undercover officer) and give the officer an envelope of cash. Mr. Balbar was to deliver a threat to him that if the customs officer talked, he and his family would be killed, along with their dog. Mr. Balbar picked up the bag and delivered the envelope and he and P. departed, with P. screaming threats at the officer out of the window of the vehicle. While P. did not accompany Mr. Balbar into the customs' office, he reported that Mr. Balbar did not seem to be disturbed. Once back in Montreal, Mr. Balbar was directed to deliver the bag to a man in a subway station, which he did. The purpose of the customs officer scenario, according to Sgt. G., was to test the extent of Mr. Balbar's criminality, as to whether it extended to dealings with law enforcement officers.

o Scenario 21 on November 21, 2007, involved an elaborate social scenario in a private pool hall in Montreal, where Mr. Balbar met various members of the Quebec organization. One of the "members" was kicked out of the organization in front of Mr. Balbar for being dishonest to the boss regarding the circumstances of an incident with a vehicle.

o Scenario 22 on November 22, 2007, involved P. and Mr. Balbar breaking into a car compound where the vehicle referred to the night before was located. After locating the vehicle, P., assisted by Mr. Balbar, broke into the vehicle and retrieved the package that the kicked-out member of the organization had left there. Prior to breaking into the car compound P. indicated that they were going to "whack" (meaning kill) the member who had been kicked out and Mr. Balbar indicated that this was not a problem for him. Later, in the presence of C. and P., the undercover operator posing as the boss in Quebec praised Mr. Balbar's work.

o Scenario 23 on November 23, 2007, involved Mr. Balbar and P. having dinner and P. letting him know about work the next day.

o Scenario 24 on November 24, 2007, involved Mr. Balbar being given a package to transport back to Vancouver on the bus. He stayed in touch with C. by calling from different locations as he travelled across the country.

o Scenario 25 on November 27, 2007, involved C. picking Mr. Balbar up at the bus station in Coquitlam, retrieving the package and taking him to a hotel.

o Scenario 26 on November 28, 2007, involved Mr. Balbar transporting a bag to Victoria via the bus and the ferry, which he did, making numerous phone calls to C. along the way. C. met him at a hotel room. Mr. Balbar showed C. some pornography that he had recorded on his phone or a camera. Another undercover operator came to retrieve the bag. C. and Mr. Balbar then went out for dinner at the Keg, where C. spoke about a big upcoming job and said that one guy had backed out, leaving a spot for Mr. Balbar. C. said he would vouch for Mr. Balbar with the boss so he could take the spot. Mr. Balbar repeated that he liked the work but that there was "not much adrenalin," and C. indicated that might change. Mr. Balbar asked whether the boss could fix things if he had serious charges in the past, as he had done for C., to which C. replied that he did not know what serious was, and that they take care of each other within the organization. The ensuing conversation included C. bringing up that the boss had helped him out or he would have been looking through bars or "six feet under". C. told Mr. Balbar that the boss did not care about stolen copper wire or meth charges. Mr. Balbar said that he had been looking at "25 to life" and it was just like flipping a coin, but the cops had nothing on him. He asked C. if the boss could help him if he needed it. They discussed whether Mr. Balbar still had heat on him and Mr. Balbar indicated that he had tidied up most of the loose ends but wanted to know if the boss would help him if he needed it. Mr. Balbar indicated that it was regarding some charges.

o Scenario 27 on November 29, 2007, involved Mr. Balbar and C. travelling to Nanaimo to meet with a man who wanted to borrow $200,000 from the organization for a massage parlour. In the course of their conversation en route to Nanaimo from Victoria, Mr. Balbar told C. that his son had seen him do some illegal stuff and now they did not get along. He also spoke of being off meth for a few weeks and confirmed that he trusted C. when asked. There was talk of Mr. Balbar joining C. and J. in Whistler for a good time over New Years that involved girls. In speaking about Christmas presents, Mr. Balbar said he had no one to buy presents for as he had stopped hanging out with people in Kamloops years before. Upon their arrival, C. explained the terms of the loan to the man borrowing the funds, which involved providing the names and personal information of his wife and children as security. The man reluctantly agreed. Mr. Balbar was to go to Nanaimo once a month to collect the $10,000 interest and get a copy of the books to give to C. Mr. Balbar was also to get free sex with his choice of the women working in the massage parlour. This, combined with a monthly run to Montreal to deliver diamonds, was to provide Mr. Balbar with regular work for the organization. Once off the ferry, C. received calls that sent him to New Westminster to meet "Mo" who needed an alibi in relation to a murder and an alibi was constructed that involved Mr. Balbar and Mo going into the casino and the casino's head of security changing the dates on the surveillance video to create the alibi. C. talked to Mr. Balbar about keeping his mouth shut and contacting him right away if anyone comes asking questions, stressing that people in the organization are like family and they do not rat each other out.

o Scenario 28 on November 30, 2007, involved C. picking up Mr. Balbar from his hotel and taking him to the bus station to catch a bus to Kamloops. C. reminded Mr. Balbar not to go out on a binge and to come back the following Tuesday, which was December 4th, which was then changed to December 5th.

o Scenario 29 on December 5, 2007, involved Mr. Balbar taking the bus from Kamloops to Coquitlam to meet C, which he did. Mr. Balbar indicated that he had been partying all weekend. Prior to leaving Kamloops, Mr. Balbar missed the first bus and forgot his backpack with his cellphone in it. Upon arriving C. took him to buy a new cell phone and some minutes for it and told Mr. Balbar that he had missed his opportunity to work that day because he was late but that he could work the next day.

o Scenario 30 on December 6, 2007, involved Mr. Balbar transporting a suitcase containing handguns from Vancouver to Chilliwack by bus, which he did. C. met him there and then another undercover officer came to purchase the guns. Mr. Balbar was instructed to search the prospective purchaser and to make sure that the door to the hotel room locked. After the deal was done, C. and Mr. Balbar drove to Surrey. On the way they discussed a number of topics, including how the boss's family sticks together unlike East Indians and bikers, who turn on each other. Mr. Balbar asked C. if C. could get him a piece, referring to a gun, to which C. responded that if he needed one then C. would get it for him. At a bank in Surrey, C. showed Mr. Balbar $20,000 in cash that would be his payment for participation in the upcoming big job and placed it in a safety deposit box. C. told him that he was putting Mr. Balbar's name forward but that the boss had the final say. When C. asked Mr. Balbar if he was happy about the money, Mr. Balbar said that it was not that much money, as he had done million dollar grow-ops in the past. C. said that Mr. Balbar was free to leave if he wished, to which Mr. Balbar responded that he was happy and would do it for free. Later when the topic of the money comes up, Mr. Balbar said that he would be excited about $200,000 as opposed to $20,000. While shopping at a mall, C. paid for some clothes that Mr. Balbar needed and C. gave him $200 towards an iPod as a Christmas gift. Some portions of audio were played (Exhibits 41, 41A, 42 and 42A) in which Mr. Balbar talked about how he broke into a storage locker in Kamloops, making bombs with ammonia nitrate and diesel to blow up ant hills, picking locks and how he has a complete set of lock picks. These conversations occurred while C. and Mr. Balbar were on their way to meet H., the crime boss, at the Vancouver Airport Fairmont Hotel lounge. C. told Mr. Balbar that this was the big boss in charge of everything and he was to be treated with respect, called "sir", as the boss is God. When they met the boss, H., he was with an undercover operator playing the role of his body guard and P. from Quebec. They socialized for a few minutes and then the bodyguard was told by H. to take Mr. Balbar to the bar while H. continued to talk to P. and C. Then C. and Mr. Balbar left, and on the drive C. pretended that the boss was angry at him for bringing Mr. Balbar along to the meeting and they discussed rats, with Mr. Balbar assuring C. that he was not a rat. C. told Mr. Balbar that the boss would check him out and had people who could do that. After C. assured Mr. Balbar that the boss was not worried about petty things like meth and weed charges, Mr. Balbar indicated that he had a lot of heat in Kamloops because of "maybe four guys, one girl", and then he said that the girlfriend was the only thing that had resulted in heat. Mr. Balbar then told C. that he had whacked her "upside the

head with a hammer" because she had gone nutty and grabbed a machete that she was "flailing" around his son (Exhibits 42, 42B, p. 29). A little later, Mr. Balbar told C. that it was four or five years ago, that they were living in the Oak Street apartments, her name was Heather and they found her in the river. He also said that he had never told anyone before but that he thought his son might have seen something when it happened (Exhibit 42B, pp. 31-35). They went to a pub on the way back to the hotel where C. dropped Mr. Balbar off and paid him $200.

o Scenario 31 on December 7, 2007, involved Mr. Balbar being picked up by C. and taken to Burnaby to look at an apartment for Mr. Balbar to live in where he would just have to pay $300 or $400 per month in rent. They discussed music, girls and how C. would be moving up in the organization after the upcoming big job. They met P. for lunch and then C. dropped Mr. Balbar off at his hotel, giving him $50 and telling him to stay out of trouble until he had work for him, which was Sunday, December 9th. Work for Mr. Balbar was then delayed to December 10th.

o Scenario 32 on December 10 and 11, 2007, involved Mr. Balbar transporting a bag on the bus from Coquitlam to Kelowna and then meeting C. in a hotel room in Kelowna. As in other bag movement scenarios, Mr. Balbar had to follow a fairly detailed set of instructions to retrieve the bag to be transported. Once he was in Kelowna, Mr. Balbar was in touch with C. and required to take a taxi to his location. They left the bag in the hotel room and went out for dinner and then to a strip club, where C. met a female undercover officer portraying someone who knew C. from Vancouver who was flirting with C. Later, C. made it clear that he was going to go and have sex with the female and the message was that similar experiences would be available to Mr. Balbar once he was established in the organization. During this evening, C. told Mr. Balbar that he had signed the lease on the apartment they had looked at and Mr. Balbar would be moving in on January 2nd. The next morning C. talked about having had sex with the female, a male undercover officer came to pick up the bag from the hotel room and then Mr. Balbar and C. travelled to Kamloops, where C. was pretending to be looking for a warehouse for the organization to rent. C. and Mr. Balbar started to leave Kamloops when the next scenario occurred.

o Scenario 33 on December 11, 2007, involved the traffic stop of C. and Mr. Balbar by uniformed RCMP officers. Mr. Balbar was recognized by Cpl. Mathieu and accused of killing Ms. Hamill. Cpl. Mathieu made it very clear that he was going to continue to investigate Mr. Balbar in relation to Ms. Hamill's murder. Cpl. Mathieu wanted Mr. Balbar to go with him to be questioned but C. intervened, saying that if he was not arresting him then Mr. Balbar was not required to go. C. and Mr. Balbar went on their way after C. was given a ticket for tinted windows on his truck. This was interpreted as Mr. Balbar drawing a lot of heat by C., such that they were going to have to take the matter to the boss to have it cleaned up once and for all. Mr. Balbar mentioned the cooler and Mark Nelson borrowing a truck. C. dropped Mr. Balbar off at a hotel in Coquitlam and told him to dress nicely and he would pick him up later. Later that night, C. and Mr. Balbar went to socialize with other members of the organization at a strip club in Surrey. There was talk of the big job coming up in January and a toast to the member, Mo, who had needed the alibi, which had apparently worked in removing suspicion from him. Later that night, C. dropped Mr. Balbar back

at his hotel and paid him $200, telling him that J. would pick him up the next day.

o Scenario 34 on December 12 and 13, 2007, involved an overnight trip to the Sunshine Coast for Mr. Balbar with J. to look for a suitable offload site to unload a boat in the upcoming big job. Mr. Balbar became very involved in this search, remembering distances and discussing longitude and latitude with J.

o Scenario 35 on December 16, 2007, involved Mr. Balbar transporting a sealed bag from the Lower Mainland to Kelowna by bus. C. met Mr. Balbar in Kelowna in a hotel room where they left the bag and went to the casino. Another male undercover joined them, playing the role of someone Mr. Balbar would be with on the big job. Later in the evening, C. took Mr. Balbar back to his room and reminded him to continue to mind the bag until the next morning, when C. would contact him.

o Scenario 36 on December 17, 2007, involved C. taking Mr. Balbar to meet the boss at the Grand Hotel in Kelowna, where the crime boss interview took place (the details of which are set out below).

o Scenario 37 on December 18, 2007, involved C. taking Mr. Balbar to Kamloops and meeting with J. and Mr. Balbar showing them the various places he referred to in his interview with the crime boss so that the boss can take care of the loose ends and help Mr. Balbar (also referred to below).

Findings with regards to Project Eventail

[202] Having considered all the evidence regarding this Mr. Big investigation targeting Mr. Balbar, I make the following findings:

· Mr. Balbar was very motivated to work for this fictitious criminal organization;

· Whenever he was presented with a choice, either to take on more work or leave the organization, he was keen to continue to be involved with C. in the organization;

· Mr. Balbar obviously had little money and liked the money he made by working for C. In total, he received approximately $4,130. On the other hand, he made various comments that indicated he had made more in the past and was not that impressed with the $20,000 he was to receive as his payment for working on the big job. Money did not seem to be his main motivation;

· He was very willing to move to the Lower Mainland to work for the organization and very interested in the apartment that he would be able to live in, but not to the extent that he would not have jeopardized his continuing involvement with the organization by possibly backing out of helping with the big job right at the end of the investigation;

· Although Mr. Balbar spoke of his son, friends and partying in Kamloops, he clearly welcomed the social contact with C. and the other undercover operators. He also seemed somewhat ambivalent, remaining until the end willing to separate himself from C. and the upcoming big job when he got nervous about having spoken about Ms. Hamill's death, and having gone to the place by the Halston Bridge with C. and J. where he said he had dumped her body in the river;

· Mr. Balbar did not appear to be bothered by the escalating violence or criminality as the scenarios progressed; to the contrary, he was very motivated and engaged in these scenarios, and at times either had or sought to possess weapons; and

· What Mr. Balbar told C. and H. about Ms. Hamill's death and how he disposed of her body was not coerced. Rather, it was something he chose to talk about in the hopes that he could continue to work for the organization and the boss could help him resolve the loose ends.

[203] In short, Mr. Balbar bought into the lifestyle and social and monetary benefits that the organization appeared to offer and was willing to talk about his involvement in Ms. Hamill's death to gain the boss's approval and assistance.

X. MR. BALBAR'S CONFESSION TO MR. BIG AND ITS AFTERMATH

The crime boss interview

[204] On December 17, 2007 (Scenario 36) Mr. Balbar met with the fictitious crime boss, H., to be interviewed about his past problem with police and who, according to C., needed to approve his participation in the upcoming big job. Their meeting was video-recorded (Exhibit 21) and transcribed (Exhibit 21A). During this meeting Mr. Balbar confessed to killing Heather Hamill and disposing of her body in the river.

[205] The tone of the interview was relaxed and congenial. At no time did H. raise his voice or do or say anything that could be interpreted as threatening in relation to Mr. Balbar. Throughout, Mr. Balbar sat on a couch in the living room of the hotel suite and H. sat in a chair to his right. He appeared relaxed. At times Mr. Balbar gestured with his hands to emphasize a point. He drew two diagrams on hotel note paper: a rough sketch of the area where he said he dumped Ms. Hamill's body and the cooler (Exhibit 23); and a rough sketch of his apartment (Exhibit 24) where the blood was after he struck Ms. Hamill. When their conversation was concluded, Mr. Balbar got up to get a glass of water and then searched for a wine glass and poured himself some wine.

[206] It is necessary to review this confession in some detail for the purpose of assessing the manner in which it was obtained, including whether it came about as a result of threats or intimidation or was otherwise coerced, and so as to later compare aspects of it with other evidence to assess its reliability. However, it is lengthy and I do not propose to include it all, only certain key portions. H. refers to the undercover officer playing the role of the crime boss and B. refers to the accused, Mr. Balbar.

[207] The interview started with H. inquiring how Mr. Balbar was, with him responding, "Excellent, yeah" (Ex. 21A, p. 6, l. 144), followed shortly thereafter by H. inquiring about how Mr. Balbar was being treated by others in the organization, including C., the primary operator, to which Mr. Balbar responded "Fuckin, utmost, fuckin' best that I've probably ever been." When asked if he was happy with everything Mr. Balbar said, "Yeah, yeah. Better than, better than anything else I've ever been in" (p. 8, ll. 186 and 188).

[208] At the outset, H. set the stage, stressing honesty and the importance of not lying:

H: Uh, but if you do things behind my back, either fuckin' trying to maybe take a little bit of the action here, a little bit of the action here, or tryin' to take a piece of a little bit of cash, here, I'll find out, it's my job to find out.

B: I'm not greedy, man.

H: 'Cause if I don't find out, I'm not doing my job, and then other people can get hurt. Like W. [first name edited out] or someone else or you know, people can get hurt. And that's not the way to do business. So the biggest thing is, I guess don't ever get greedy.

B: No.

H: Don't ever fucking lie. That's another important thing, 'cause if you're fuckin' gettin' greedy or lying, you're trying to fuck me in some way. And my job is, before I go to bed at night, be sure everybody I've fuckin' dealt [with] that day, was straight up front with me. That they're not trying to fuckin', do me damage. 'Cause there's too much to lose.

B: Definitely, you can't trust someone who's lying. Makes sense.

H: What's that?

B: It makes sense, yeah. Can't trust anybody who lies to you.

[Ex. 21A, pp. 10-11, ll. 238-254]

[209] Then H. opens the door for a discussion of Mr. Balbar's situation in Kamloops where he is experiencing considerable "heat" from the police (Scenario 33, the "Traffic Stop"):

H: It's important. You got another situation that, we gotta deal with. I think you know what I'm talking about.

B: Yeah.

H: Yeah, what?

B: The Kamloops situation.

H: Yeah. And like I said, and I wanna be very fucking clear on you, right now. What you and me talk about right now, is gonna stay between you and I right now, okay? When we get all the facts in and we figure it out, then we'll decide how we're gonna deal with it. It's gotta be dealt with. Do you understand that?

B: Yes.

H: 'Cause, 'cause if it's not dealt with, you're gonna get fucked in the end. If you get fucked, like I just told you, the domino effect? Everything can fuckin' slide down, and I can't have that.

B: Mm, makes sense (Clears throat).

H: So, gimme that fucking story from A to Z, and I'll tell you how I think if I fuckin' check things out, and how we're gonna deal with it. But I'm gonna need you to fuckin', help me deal with it. So you don't get fucked, I don't get fucked.

B: Eh. Startin' at 'A', oh, all's they got, what they got, or-?

H: Don't give me what they got, I don't give a fuck what they got. I will find out what they got, just by paying someone some cash. I gotta be sure everything that's been done, has been done so that nothing bites us in the fucking ass. An' if we have to go fuckin' deal with an issue, we will.

[Ex. 21A, pp. 12-13, ll. 272-296]

[210] Then Mr. Balbar started to talk about what had happened in the past, in terms of police surveillance and the witnesses the police may have spoken to in relation to the killing of Ms. Hamill, after which the following conversation ensued:

H: 'Kay. Gimme the situation, what happened between you and your old lady. And tell me the fuckin', how it ended.

B: (Sigh) She fuckin' snapped and fuckin' grabbed a machete or whatnot and fuckin', was flailing around where, where my son was sleeping and shit. And I fuckin' clunked her up the side of the head with a hammer.

H: 'Kay, that's so far, I don't see the fuckin' harm in there. But let's just carry on here for one second, okay? So we don't get too fuckin' far ahead of ourselves, why did your old lady like I don't know nothin' about her.

B: I don't know. Drunk and mixing drugs or somethin'.

H: Well, you would know, you were there.

B: Yeah, I think she was fuckin', did a bunch of that, some kind of fuckin' uh, that juice people drink when they're coming off heroin or somethin', or somethin' that made her go nutty, yeah. The bad part was, somewhere in there, my boy woke up. She woke him up in there, and I guess he fuckin' mighta seen, seen some of the ending. Like fuckin', he was already, always taught to stay tight to family, fuckin', I couldn't see him sayin' anything but fuckin', he mentioned it to my mom. So between there, there's, this little bit of, my mom she's always been top notch over everything but, going senile and shit, I always worry about her a bit. But, other than that, I know his shit's pretty tight, I depend on it. Fuckin' I didn't do my job right. But other than that, there's, there's just people makin' up shit and people that fuckin', I didn't get along with and shit.

H: Well let's back up here now.

B: (Clears throat)

H: You said you di-, what'd you do, you, she took a machete after you?

B: Yeah, she just fuckin' snapped. She was goin' at it, after him, startin' to fuckin' flail around in the bedroom, and shit. Fuckin' wouldn't leave and shit and fuckin', somewhere in there, fuckin', yeah. I whacked her upside of the head with a hammer or somethin' a few times.

H: What's a few times?

B: Fifty, sixty times or somethin', I dunno.

H: Well no, seriously that's uh, no, no, no see, first of all, don't think that you can impress me-

B: No.

H: -by telling me you did something you didn't fuckin'-

B: Probably-

H: -do.

B: -for repeatedly for quite a while. And that didn't work, grabbed a mallet and that didn't work, so I grabbed a fuckin' sledgehammer. Somewhere in there, yeah, she fit in the cooler and fuckin'-

H: 'Kay, back up. Y-you just mentioned, a mallet, a sledgehammer, and how many hammers did you use?

B: Three (sigh).

H: What were you, this happened in the garage or-?

B: No, ki-kitchen.

[Emphasis added.]

[Ex. 21A, pp. 13-15, ll. 306-350]

[211] Then H. asked Mr. Balbar for more details and about his state of mind at the time:

H: Well, we'll talk about that in a minute, just, but I, so when you say, you-, describe hitting her. I wanna fuckin', I, I, I can't see anybody hitting a person that many times then going to get another hammer.

B: Well, I just fuckin' figured she was fuckin' taken care of and then fuckin' she'd be movin' about a bit, so fuckin', I wanted to be thorough.

H: Were you fuckin' drunk or on dru-dope or what?

B: No, not really. I do a little bit of meth on the side but I don't really drink much.

H: Well, the day this happened, were you fuckin' whacked out of your head or were you pretty fuckin' normal?

B: I was pretty normal. Yeah.

H: So, you always keep a fuckin', what'd you say, a-?

B: I had all my tools there, yeah.

[Ex. 21A, pp. 15-16, ll. 355-366]

[212] After Mr. Balbar described hitting her "upside in the head", how everything was contained in the cooler, how he used a hammer to keep the blood down and how the blood was not too bad, H. asked Mr. Balbar to describe "not too bad":

B: Uh, the whadda ya call it? Before she was bleeding and whatnot, like I, I did give her like, the option. Fuckin' I didn't just k-knock the shit [out] of her fifty times when she fuckin' had the machete and whatnot. I whacked her a couple of time and then she wanted to fuckin' go to the cops and whatnot. And I said, well fuckin' wait until fuckin' I take my son back, 'cause fuckin' I ain't fuckin' having the cops lookin', take him in, fuckin' me in and that, if you wanna rat me out or whatever. Fuckin' wait 'till tomorrow. And she didn't wanna go that route.

H: So?

B: So she fuckin', tried to fuckin' flail out the door or whatever to fuckin' call the cops. So I fuckin', I think that's probably where, where I fuckin' just whacked her a few times repeatedly thinkin' that it was dealt with. And she showed me that it wasn't. So, I fuckin' upped it to a mallet and she still wasn't, so I upped it to a sledgehammer (chuckles).

H: So, the first hammer was how big? I'm just tryin' to picture this now.

B: Just a standard hammer, yeah.

H: With the claw or the other end?

B: Just with the flat side, yeah.

H: And the mallet, how big's a mallet?

B: It's like a sledgehammer with a little handle.

H: And how big's a sledgehammer?

B: It's just a mallet with a long, long handle,

H: And you just had these laying around your apartment?

B: Yeah. Fuckin' had tools, lots of tools, and that.

H: So, when she was running, wasn't there blood all over the place?

B: No, before, before she was bleedin' and whatnot, I made sure she was fuckin' fitted, fitted into a cooler. But fuckin', she wasn't bleedin' and shit. Like, I was tryin' to make any blood anywheres. It's pretty much, just tryin' to fuckin' knock her out, and so she would drop the machete and

16:23:15 (Scraping noise)

B: -she didn't wanna go that route. So, then I fuckin' kept it as wrapped up as I could.

H: So, there was no blood to be cleaned up. No, no, no, no fuckin', anything left behind. Seriously.

B: Afterwards, her foot popped out or whatever and there was a little bit of blood what fuckin' came off her. But fuckin', it was totally cleaned up and the place burnt.

H: The place burnt?

B: Yeah. There was a small apartment fire there or somethin'

H: So, where was the blood, like when you say a little bit?

B: Uh, the blood, there was like, from, from a little bit of, I cleaned up from the fuckin' foot thing. Around where the edge of the apartment was and whatnot. But I pretty much disposed of everything there, fuckin', pretty, pretty well. Everything was gone. And after I left, the, the landlord there, he fuckin' stripped down the whole apartment and redid it.

H: What was this blood on? Was it on the floor? Was it on the couch?

B: Uh, it was on the base of the carpet going into the living room.

H: How big of an area?

B: Probably 'bout maybe, that big. Maybe a little bit , just from the extra cleaned up of the kitchen. But uh, I got rid of, got rid of all that. And then it was all torn right out, fuckin' ripped down to the fuckin' roots, and fuckin' new, new flooring, hardwood floors were put in.

H: And how'd you get rid of that other stuff then?

B: (Sigh) A lot of it went in the river.

H: Now, how'd you clean it up though, like clean up that where the rug was you said?

B: I [had] uh, oven cleaner. Lye. Fuckin', eats everything right down to, to nothing, yeah. Yeah, even eats the fingers off it you don't fuckin' wear gloves, yeah.

[Emphasis added.]

[Ex. 21A, pp. 16-19, ll. 37-437]

[213] Mr. Balbar explained to H. how it was that he had oven cleaner with lye in it in his apartment and how he cleaned up the apartment:

H: So, you just happened to have that in your house?

B: No, I had bought a fuckin', a bunch of Easy Off.

H: From like, you just and went and bought it after this happened?

B: Well, here and there and I mainly tried to get it fuckin' without fuckin' going into a store, so I just kinda scooted through places I knew would have some. And I fuckin' took the oven stuff out and just put water in and fuckin' stuck it in the pocket. That way, there's nobody watching you buy the stuff.

H: Describe that to me. That, that's, that's thinkin' smart and that's what I like to see, but describe that to me. You wanna make sure that I just understood what you said.

B: Uh, cruising through like, utility rooms, fuckin' that I took, like I had a buddy who's a locksmith so I could cruise through places pretty easy. So, I just cruised through most, any apartment would have, have oven cleaner and stuff for when the old tenants move out. And you, you can hit fifteen, twenty apartments, periodically snoopin' through everything in sight. So, there's nothing out of the ordinary about it. And then you, out of sight, just drop the oven cleaner in a fuckin' container. After cruising through an area, you, you'd hit, hit three or four places, you, you're well stocked up on it.

H: So, how long did it take you to clean this up?

B: I knew, I knew with after two years of being in the same place with her as common-in-law and they couldn't use anything in the apartment as evidence. So I got rid of everything that was lookin' real bad right away. That's, it, that was the only, the only part what caused a little of heat. When they phoned me up, I was at a place out on the Westside, fuckin' getting' rid of, getting' rid of the stuff. I had it box, it all boxed up. Fuckin' they phoned me up there, and fuckin', they said they needed to, fuck they asked these questions and whatnot. So I fuckin' took off to meet Mom, what came there to get me. Mom and Dad, or whatever. And fuckin', I think they were watchin' the place from there, just to see what my reaction was, fuckin' comin' out of there, maybe. And I fuckin' threw, threw the box in the river, or whatnot.

H: 'Kay, you still lost me here.

B: Rather than, than burnin' everything fuckin' out there, I just fuckin' jumped on a [pedal] bike and fuckin' threw everything in the river and met them down the road.

[Emphasis added.]

[Ex. 21A, pp. 19-20, ll. 438-471]

[214] Next, Mr. Balbar explained how he cleaned up using carpet cleaner. He explained how he cleaned the bedroom because after he gave her "the chance", she was spitting and causing her DNA to leak all over the apartment. He said he did a "pretty thorough job", "like every square brick and then Easy off for fuckin' thoroughness " and how he used Easy Off to clean the hammers and "fired" them into the river (Exhibit 21A, p. 21, ll. 483-502).

[215] Mr. Balbar described the cooler into which he said he put Ms. Hamill as follows:

H: Yeah, let's back up here now. You mention you stuck her in a cooler like, how big of, how, I don't know [how] big is your old lady, stick in the cooler? What the fuck?

B: You get those five foot, big camping coolers. They're like five, five and a half feet, them big white ones, or whatever. Fuckin', fair sized one, yeah.

H: And why'd you have that in your house?

B: Just in case of such a fuckin', thing an', I fuckin' had all kinds of shit, fuckin' for campin' and whatnot.

[Emphasis added.]

[Ex. 21A, p. 22, ll. 513-520]

[216] Then Mr. Balbar described how he taped up and transported the cooler:

H: Hm. You don't want that shit sittin' around there, unless you need it. So then once your old lady in this cooler, now what do you do?

B: I drag it, I duct taped it, sealed. I fuckin' wrap it an' fuckin' drop it outside, take a taxi down the street to [an] abandoned alley way where there's no windows and I fuckin', knew there's this table there was fuckin', out of sight, I stuck it under there. And-

H: Hey, hey now you-

B: And then I called the truck to, to fuckin'

H: 'Kay, you're talk, talk, you fuckin' duct taped this cooler up.

B: (Chuckles) Yeah.

H: And you dragged it?

B: Yeah. Well, I [couldn't] lift the thing without making any noise.

H: Well, where'd you drag it to?

B: I brought it down beneath the apartment. It was like a dark pitch, black little corner and I called a cab. And then I took it down to an alley way, a dead end alley way.

H: You put this cooler in a cab?

B: Yeah, I stuck it in the back truck (chuckles). Yeah, it was, it was all sealed and tight and fuckin', I didn't look like myself an' fuckin', the cab driver thought nothin' of it.

H: Who lifted the cooler in the fuckin' cab?

B: I did.

[Emphasis added.]

[Ex. 21A. p. 23, ll. 530-551]

[217] Then Mr. Balbar explained how he deposited the cooler under a table, paid the cab and sent it on its way, making arrangements for a truck to come:

B: I brought the cab down to this place down a few streets over, and I jumped out, dropped the thing out. I paid, I paid him, jumped out and dropped it, waved to him, he left. And after he left, I dropped it under this table and fuckin', hooked up this truck. An' the thing stayed air tight. So, borrowed this truck and got rid of the, everything.

H: [Whose] truck did you borrow?

B: I don't even know. And he didn't even know, so it worked good.

H: Why didn't he know?

B: Uh, it, it was through my roommate. An' fuckin' when he explained, he said he said he needed somebody trustworthy. And the person that come was straight, straight up. Went through questioning and didn't say a thing. And the truck went in and fuckin' went and through that with a fine tuned fuckin' microscope and it was clean.

H: Well, 'cause of the cooler. So who drove the truck? then?

B: No, I dropped him off on the side of the road.

H: Can you explain that to me? You, you're, you're jumpin'. You got this cooler. You take it somewhere in the back of a taxi, you say. An' then you fuckin' get hold of a truck?

B: Yeah. Buddy comes with the truck and I fuckin' told him I gotta go to a fuckin', do this gun thing and fuckin' I need the truck, kinda thing. And he didn't even care. He just fuckin', don't even wanna know, don't even know you, fuckin' just fuckin' fuckin' bring me the truck. An' fuckin' he was good with fuckin' givin' him fifty bucks, too. And fuckin' pickin' him later.

[Emphasis added.]

[Ex. 21A, pp. 24-25, ll. 555-577]

[218] Mr. Balbar explained that no one saw him clean up the blood in his apartment, and that there had subsequently been a fire in his apartment. Then he explained what happened with the cooler once it was in the truck, taking it to the other side of the river from where he lived:

H: When you took this uh, cooler, like where'd you , explain this to me in the truck.

B: Well I took it to the other side of the river and then fuckin' got rid of the fuckin', the body on the other side.

H: 'Kay, describe that to me now. Like the other side, what the fuck?

B: Uh, where the river goes, rather than bein', comin' from my side, came from the other side, yeah.

[...]

H: What way did you go?

B: Well, the one river comes down this way, and the other river comes down this way, and fuckin' come, [gesturing with his hands] they, they both go out that way. I went to this side of the river where fucking, the boat would float and fuckin' down and fuckin' -

H: The boat would float?

B: Well, the body would float and fuckin' scoot in, it's like a back eddy, fuckin' down at, in Viewpoint Park, on the other side of the river. So there was never a question that it came from My street ended up up on the end of the river. I coulda just went down a half a block, but I went to the other side of the river to fuckin' make sure it wasn't on my side of the river.

[Emphasis added.]

[Ex. 21A, pp. 27-28, ll. 644-668]

[219] Then Mr. Balbar explained to H. how in Kamloops there is one river like a "T" and drew a rough diagram of the two branches of the river (Exhibit 23). He marked the Kamloops Indian Band lands on the side of the river opposite to where he lived, and described a back eddy off Viewpoint Park where Ms. Hamill's body would be found, on the opposite side of the river to where his apartment was. Asked if anyone had seen where he parked the truck, Mr. Balbar said, "No", as he had parked in his "bro's fuckin' yard" next to an ancient burial ground (Ex. 21A, pp. 28-29, ll. 670-696).

[220] Mr. Balbar then described what he did with the cooler:

H: What did ya do with the cooler, wouldn't it float?

B: Uh, no. I fuckin', just made it disappear for-

H: Whadda ya mean made it disappear?

B: I just put it in a place where I knew it would get buried. Disposed of it in, in time. But I haven't checked on it, but I-

H: You haven't checked on it?

B: I haven't taken the chance to go fuckin', just in case, yeah.

H: Where'd, where'd, where would it be on this map?

B: (Clears throat)

H: 'Cause what if the fuckin' pigs have got that fuckin' thing now?

B: They wouldn't.

H: 'Kay where would that cooler be?

B: It woulda been buried up at the, up at the dump, by now.

H: Why?

B: 'Cause everything gets bulldozed in and whatnot. You got, Indian, you got fuckin' the mountain and whatnot, and you got like the little fuckin' -

H: So where'd you put the cooler after you

B: I put it in the area what was getting' put fuckin' buried with all the rest of the crap. (Clears throat) (Rustling noises) Pretty much. I can't really explain, explain that detail.

H: Did you just come [across] it, or did you know about it ahead of time?

B: Uh, I knew about it ahead of time.

H: Why?

B: Uh, just 'cause I grew up, that's where I grew up on the reserve. My buddies were-

[Emphasis added.]

[Ex. 21A, pp. 30-31, ll. 707-731]

[221] Then Mr. Balbar indicated that Ms. Hamill was wearing all her clothes at the river until he made it look "like a trick fuckin' dumped her off" by ripping off her shirt so she was just wearing her bra and "like fuckin' sweat pants or somethin'" and he put her shirt into the river so it floated down with her (Ex. 21A, pp. 31-32, ll. 732-745). He told H. that this happened "[a]t least five years ago, more than that" (Ex. 21A, p. 32, ll. 764-766).

[222] Then, in the course of describing his cleanup of the apartment, Mr. Balbar drew a diagram (Exhibit 24) showing most of the mess in the kitchen where the linoleum and the carpet from the living room met. When asked where it started, he added:

B: Uh, she'd be walkin' around the house trippin' fuckin' at first. And then she grabbed her machete and I's just kinda fuckin' followin' her, fuckin' keepin' an eye on her what not. And she started fuckin', she realized I had my son visitin', and she started trippin' on him, and fuckin' goin' in the bedroom and shit. And I think I fuckin' whacked her fuck a couple times just to knock her out, in the bedroom. And fuckin', she got up and fuckin' she was half-assed normal again fuckin' and then she fuckin' started trippin', wantin' to call the cops or whatever. And fuckin', then she fucking was flailin' out out the door and fuckin' probably fuckin' around in here.

H: So is that the, what room is that?

B: This would be the kitchen.

H: Oh yeah.

B: Between the kitchen (scratching noises), yeah, that area. And, but she was, walked around spittin' the shit all over the place. But this area was totally fuckin', the linoleum, had the square linoleum floor was removed and fuckin' carpet and insulation and everything was totally removed down to the cement and hardwood floors have been installed right through now.

H: So was there a rug in the living room?

B: There was rug in the living room.

H: That's where the blood was, where the blood there then?

B: Right in the entrance way goin' in-

H: Oh yeah.

B: -comin' off the linoleum, yeah.

[Ex. 21A, pp. 34-35, ll. 808-830]

[223] In terms of what Mr. Balbar did next:

B: He picked me up on the side of Oak Street Apartments, pretty much in the dark.

H:

B: Took me over to an alley way that was dark.

H: Okay, then the taxi driver took you someplace. Where'd he take you?

B: To, end of Sidney Street. It's like a dark back alley with, of a dead end alley.

H: And who lives there, or who lives near there?

B: Uh, nobody, never went to anybody's place. I just paid 'im and fuckin' made it look like I was fuckin' livin' there and he drove away.

H: So then, how did you, get a hold of someone to get this truck?

B: Uh, I went back to the apartment afterwards and I got the roommate, asked him if he knew, knew somebody with a truck 'cause I needed to get rid of a couple guns and shit that were layin' around. He, he borrowed a truck from somebody who was up there fuckin' probably like, one of the higher up fuckin' biker dudes or whatever fuckin' -

[Emphasis added.]

[Ex. 21A, pp. 37-38, ll. 889-903]

[224] Then Mr. Balbar described having the cooler in the apartment for a couple of days waiting for an opportunity to get rid of it when the cops came to his apartment:

B: -the mess was, that's when I, yeah, the mess was fuckin', already cleaned up. I had the cooler actually in the apartment for, for a couple days. Waitin' for the right opportunity to get rid of it. It was kinda touchy fuckin' story with that but..

H: Well tell me about that.

B: That was a trip and a half. Fuck I had the cops come in doin' a fuckin' flail. Well before that it was in the bedroom. And fuckin' I fuckin' barely made it through that one. Fuckin' but I did. They fuckin', I had the place cleaned up and it was lookin' normal. They kept fuckin', I had cops fuckin', they were fuckin' harrassin' me for fuckin', lookin' for drugs or whatever and fuckin'. They were searchin' the place. The place was a mess with fuckin' illegal shit. I don't know how I pulled it through that one. And the cop was sittin' on the cooler in the bedroom, fuckin' going through my dresser (chuckle) and fuckin' yet, that's a good thing.

H: Are you fuckin' bullshittin', I wanna know right now.

B: No. (Chuckle)

H: 'Cause I'm not gonna fuckin' fuck with fuckin' stories that this.

B: No, this, that's why I didn't bother with that part. (Chuckle) I, you just asked me the fine details of, I actually had it in my apartment for a couple of days.

H: While you cleaned up.

B: Yeah.

[Emphasis added.]

[Exhibit 21A, p. 39, ll. 913-933]

[225] Mr. Balbar then described how he had tools lying all around his apartment and how he used the hammers on Ms. Hamill:

H: So you'd fuckin', explain that. You told me you used one first and then what'd you do?

B: And then fuckin' like, five, ten hours later or somethin' fuckin' she would be still kickin' her about and then fuckin' switch to a bigger hammer.

H: And your boy was in the apartment all the time?

B: Uh, yeah, he was sleepin' I guess.

H: So when you went to the biggest hammer, shoe me how hard you'd have to hit her. She me this? Stand up and show me.

B: I don't know, like fuckin', that size hammer, you'd have to like stand up, be like fuckin' about that long [Mr. Balbar stood up and gestured].

H: Yeah.

B: So fuckin', I made sure fuck, everything was in the cooler at the time.

H: kept everything

B: In the fuckin' cooler, yeah.

H: You think your old lady was still alive then?

B: Well, she was still blowin' bubbles, so.

[Emphasis added.]

[Ex. 21A, p. 40, ll. 938-953]

[226] Then, after H. took a call (receiving instructions), Mr. Balbar volunteered:

B: -only the other thing-

H: (To phone: Right.) Sorry what was that?

B: Oh, other than uh, (clears throat) when, when it was all wrapped up and taped and sealed, unable to be opened without knowin'. And it never left my sight, fuckin' other than when it was stashed, and nobody seen me stash it. Nobody disturbed it

[Emphasis added.]

[Ex. 21A, p. 42, ll. 986-991]

[227] Then H. asked Mr. Balbar what he intended when he first hit Ms. Hamill:

H: When you hit her the first time, what was your intent? Like what, what are you thinkin', I'm gonna fuckin'

B: Uh, I was just gonna knock her upside the head and fuckin' take the machete away and fuckin', fuckin' hope that she would come to her senses.

H: And then what made you finish her off?

B: She wanted to go to the cops and fuckin' whatnot, and fuckin' the hospital and shit, and I fuckin' told her to tough it out, fuckin' in the morning I'd fuckin' take my son back to his, to my mom's and fuckin' she'd go to the hospital or rat me out or whatever she wanted. And fuckin', she didn't wanna do that. Or else she wanted to fuckin' take off and fuckin', I wasn't gonna have the fuckin' heat come down on me fuckin' while I had my son there.

H: So roughly how long did you have her before you realized okay she's not fuckin' blowin' bubbles?

B: Un, probably twenty-four hours at least. It was like the next day fuckin', or so fuckin', she still looked like she was twitchin' around.

H: What time of day did this start then?

B: Uh, it must have been at least a twenty-four hour thing.

[ ]

H: What time of the day did she first start comin' at you with the machete?

B: Oh that was night. And then fuckin' the next day I already, I took my boy back and whatnot, or mom come and picked him up, shipped him out the door. And fuckin', yeah, made sure, I'm pretty sure that by that time she was all wrapped up and the thing was sealed.

[Emphasis added.]

[Ex. 21A, pp. 42-44, ll. 1005-1028]

[228] H. followed up by asking about the size of Mr. Balbar's "old lady" and how it was she fit into the cooler, to which Mr. Balbar responded:

B: Yeah. Well she, she didn't fit in it that easy but fuckin', she fit in it. Hell I could fit in one. Fuck anybody could, in them big coolers, yeah.

H: Yeah?

B: They were built five and a half feet long and they were fuckin', probably the height About that .., about that long, probably a fuckin' almost the size of a fridge, about five feet high.

[Emphasis added.]

[Ex. 21A, p.44, ll. 1051-1056]

[229] Mr. Balbar described the cooler being made of plastic, with insulation and another layer of plastic on the inside, the kind one would take weekend camping and as having flip up handles and then gestured as to how he would hold it with "your arm width is pretty maxed out right here". He also described the cooler was moved "one stair at the time thing kinda thing to keep it quiet" and while one could not jog around with it, " it's possible fuckin' without makin' any noise" (Ex. 21A, p. 45, ll. 1060-1075).

[230] Then Mr. Balbar described what happened to the hammers:

H: Now, where'd you put the hammers? What happened to them?

B: (Clears throat) I, I know I fucking got rid of the one in the river.

H: Which one?

B: Uh, the mallet.

H: And why that one and not the other two?

B: I imagine if I can't exactly tell ya what I did with them because I knew I was fuckin' probably had a slight fuckin', cops followin' me so I got rid of 'em fuckin' casually, fuckin' in my day to day activities fuckin' without anybody

H: So you don't remember? or you do remember, tell me.

B: Everything got fuckin' pretty much bagged up and fuckin' I got rid of the whole apartment. fuckin', the, the hammers and any, everything what was right important, I made sure I got rid of them right away, before there was ever any heat. Fuckin', the, the one, I can't remember exactly where the other two hammers went.

[Emphasis added.]

[Ex. 41A, p. 47, ll. 1115-1128]

[231] After some conversation about the amount of blood in the cooler and where else in the apartment there was blood, Mr. Balbar brought up the detail about Ms. Hamill's foot again:

H: What about on the rug?

B: Other than when her foot came up there was none. That's the only mess, whatever made the mess. When her foot came out fuckin' for some reason fuckin' and there was like a pool of it. I shoulda contained it right to that pool but fuckin' I took the mop to it and I fuckin' end up having' to do the whole fuckin' floor. It took me fuckin' quite a, quite a, somewhat longer than just getting rid of that area.

H: Well, it looks like you're really thinking things through.

B: Yeah.

H: It's not a bad thing.

B: Yeah. I took my time about it, and I thought fuckin', how the average person would be getting' fuckin', getting' smacked up. The only, the only thing I fuckin' shoulda done is got the fuckin' blankets and shit into a burning barrel when I went to Westside, first thing. But I was waitin' for everybody to be sleeping and then fuckin' go out like I'm fuckin' roastin' some hot dogs, kinda thing. And then fuckin', be way better. Yeah, I got rushed a bit there.

H: How long after was that?

B: Uh, I probably, they found her the day after she was in the river. She'd already been dead for like a week or more.

H: Didn't she start to stink in your apartment? What time of year was his?

B: This was like, summertime, yeah. Yeah, that's why I fuckin' go to put a rush on, fuckin' just getting' it done right away. But fuckin', when the cop was sittin' there, I was surprised yeah. He probably just thought it was a fuckin' dirty drug house.

H: Fuck, you're lucky, man.

B: Yeah, yeah, this is fuckin' closest I've been to fuckin' cashed in a twenty-five year bit, yeah.

H: Well, we'll deal with it.

[Emphasis added.]

[Ex. 21A, pp. 49-50, ll. 1169-1196]

XI. THE FOLLOW UP TO MR. BALBAR'S CONFESSION

Re-enactment on December 18, 2007(Scenario 37) involving Mr. Balbar, C. and J. and C.'s same day video reviewing the places visited

[232] Later on December 17, 2007, after Mr. Balbar finished talking to the crime boss, C. drove with Mr. Balbar back to Kamloops and they met up with J. The purpose of this trip, not shared with Mr. Balbar, who believed he was still with members of the criminal organization, was for Mr. Balbar to provide more details regarding what he told the crime boss about Ms. Hamill's death and disposing of her body. Once in Kamloops, Mr. Balbar, J. and C. paid a visit to Mark Nelson, who was not cooperative and threatened to call the police after C. asked him a few questions about the cooler. Mr. Balbar was worried that the police would attend and they left. After dinner in Kamloops, C. and J. took Mr. Balbar to a motel in Chase where they left him overnight.

[233] On December 18, 2007, J. and C. picked Mr. Balbar up and he directed them to places in Kamloops associated with his confession to the crime boss. This was audio-recorded (Exhibits 46 and 46A). On this occasion Mr. Balbar provided additional detail about the circumstances surrounding Ms. Hamill's death.

[234] They started at the Oak Street Apartments at the corner of Oak and Fortune Drive, where Mr. Balbar pointed out the apartment where he killed Ms. Hamill. He provided details about how he got the cooler out of the apartment, and where he waited for the taxi cab he called to pick him up, telling the cab driver he was going fishing. He described how the cab took him to the place at the end of a lane near a house he knew to be empty and put the cooler under a table, with a pebble on top so he would know if it had been disturbed. Mr. Balbar then described how a guy came to the lane and how he took the cooler in the truck with the guy driving to the Indian reserve. Mr. Balbar volunteered to take C. and J. on the same route, which he did. At various times during this day Mr. Balbar said things that indicated he was very concerned about attracting the attention of the police.

[235] J. noted the route they took on a Blackberry-type device (Exhibit 56) as Mr. Balbar directed them. From the Oak Apartments at Oak and Fortune the cab went right on Fortune and then right down the alley between Nelson and Sydney Avenues. The cab stopped behind the last house on the left (5-670 Sydney Avenue) that had a table behind it where Mr. Balbar had left the cooler and then walked back to get the truck. Once he came back, and the cooler was in the truck, Mr. Balbar directed them on the route taken by the truck (with Mr. Rugolo driving). J. noted that the route led them back out onto Fortune Drive where they turned right, then right on 7th, left on Richmond, right on 8th, right at Liquidation World (following Highway 5 North signs), continuing on Halston Ave., right at the Esso onto Salish Road, right onto W. Shuswap Road, right at a stop sign (Kootenay Way), left to cross the tracks and then a quick right to parallel the tracks, and left at the Halston Bridge, where the road went under the bridge.

[236] Once Mr. Balbar, C. and J. were down on the east river bank of the North Thompson River, they got out of their vehicle and walked down on the river bank, looking for signs of the cooler that Mr. Balbar said he had thrown into some bushes nearby. Mr. Balbar explained that he had left Ms. Hamill in the cooler in the bush, after taking the cooler out of the truck, and then how he came back that night and got rid of her and cleaned the cooler. They then left this side of the river and went back to the west side of the North Thompson River, not far from Sydney Avenue and Oak Road, to a location at Schubert Drive (which runs along the west side of the riverbank) and Comox Ave, where Mr. Balbar told C. and J. was roughly the place where he tossed the sledgehammer that he had used on Ms. Hamill into the river. Mr. Balbar then took C. and J. to the location of the storage room where he said he had stashed two machetes. He described them as stuck under the bottom shelf of a shelving unit with "the shelf's holdin' them up. With just the weight " (Exhibits 46 and 46A, p. 118, ll. 2713-2714).

[237] As this re-enactment unfolded, Mr. Balbar talked to C. and J. about how he gave Ms. Hamill a chance, that she flailed into the room where his son was sleeping and he whacked her upside the head and told her to "dummy up." He then said she did not want to go that route and he was surprised at how much she could take before she died. He said he watched her blow bubbles for a while in the cooler, put his feet up and "smoked a bowl." He also described using progressively larger hammers to strike her and how it took her up to 24 hours to die (Exhibit 46A, pp. 111-115).

[238] After the re-enactment with Mr. Balbar was over, C. retraced their steps while being videotaped later the same day (Exhibit 45). That video shows the various locations pointed out by Mr. Balbar and accurately represents the various locations more than four years after Ms. Hamill's death. The only inaccuracy is that C. was incorrect regarding the address for the apartment building where Mr. Balbar said the machete was stored, it being 174 St. Paul and not 2nd and Sydney Avenue.

[239] Following these events, the undercover operators took Mr. Balbar back to a hotel in Merritt, where he was arrested the next day. That morning, the morning of December 19, 2007, Mr. Balbar left an urgent voice mail for C. to contact him, which C. did. Mr. Balbar was very concerned that the police knew they had been at the Halston Bridge the day before and wanted C. to go back there and check for tire tracks and photograph them before leaving Kamloops. C. agreed to do so. These calls were audio-recorded. Initially, when C. was reluctant to do so, Mr. Balbar said, "Yeah, I'll get back to ya, you you don't got a a replacements for me if I can't make it?" (Exhibits 47 and 47A, Tab 2, ll. 23-24).

Sgt. Fesenko

[240] Sgt. Fesenko became involved in the investigation of Ms. Hamill's death in 2007. He accompanied Cpl. Mathieu in the traffic stop scenario on December 11, 2007. He was also involved in searching for and locating items as a follow up to what Mr. Balbar told the crime boss, and then C. and J., on December 18, 2007 when they took Mr. Balbar around

Kamloops for a re-enactment. Mr. Balbar had referred to stashing two machetes at a particular location, one of them referenced as having been used by Ms. Hamill to threaten his son at the time he struck her with a hammer.

[241] Based on C.'s video made on December 18th that recorded the places that Mr. Balbar had directed him to earlier that day, Sgt. Fesenko described how he followed the detailed directions that Mr. Balbar had provided and located a machete. In particular, using the photos taken by Sgt. Gehl (Ex.5, Photos 30-52), Sgt. Fesenko described going into the underground parking area of the apartment complex at 174 St. Paul Street in downtown Kamloops to a breezeway that had a locked door to a boiler room. He obtained a key and entered the boiler room, went down into it and saw a white piece of plywood against the end wall. When that was moved there was a shelving unit behind it and he found a machete wedged horizontally in by its blade between a bracket supporting the bottom shelf and the shelf itself. He conducted a search of the boiler room and did not find a second machete.

[242] It was also Sgt. Fesenko's task to search the west bank of the North Thompson River along Schubert Drive in the area of Comox Avenue for one or two hammers and some table legs. One of the hammers was to be a sledge hammer. He organized and participated in two searches of that area on April 19 and April 26, 2008. Prior to the first search, Sgt. Fesenko conducted some experiments where he threw a hammer and a mallet from the bank in the same area to help determine the area to search. In the first search, a handle to a small finishing hammer was found. In the second search, a rusted hammer head was found. He also researched the water levels of the North Thompson River at various times and went back to the area on the east side of the North Thompson River just south of the Halston Bridge. On July 31, 2008, based on the water level he observed at the place where the hammer handle was found would have been 11 metres into the water and he was unable to say where the hammer head would have been in relation to the waterline at that time.

[243] Sgt. Fesenko's finding of the machete based on the detailed information Mr. Balbar provided to C. and J. during the re-enactment is a very significant piece of evidence in terms of being potentially confirmatory of this detail in Mr. Balbar's account, and also as a demonstration of Mr. Balbar's intelligence given his ability to engage in a fairly complicated series of actions and remember and recount them over four years later.

Mr. Balbar's Warned Police Interviews on December 19 and 20, 2007

[244] After Mr. Balbar was arrested and charged with Ms. Hamill's murder, he was interviewed by police on December 19 and 20, 2007 in the Kamloops RCMP Detachment. The interviews were audio and video taped on this voir dire (Exhibits 4 and 4A).

[245] The interview on December 19 was just over two and a half hours long. Mr. Balbar was questioned by Cst. Singer and Cst. Dadwal, using a variety of techniques. Mr. Balbar did not want to talk to the police and repeatedly asserted that he was tired, his eye hurt and he would rather just go to bed and rest. Even repeated references to Mr. Balbar's son had no appreciable effect.

[246] Mr. Balbar did engage in conversation about his life in Kamloops, and talked about his back pain from a motor bike accident and doing a bit of meth for his back pain. However, throughout this interview Mr. Balbar's recurrent theme is that he did not come there to listen to the police officer talk and makes many comments similar to "I'm not coming here to listen to you. I'm, I'm drifting off having trouble staying awake to entertain you" (Exhibit 4A, p. 51, ll. 1312-1313). He denied killing Ms. Hamill. Cst. Singer presented Mr. Balbar with evidence from various sources that the police had collected against him, all to no avail.

[247] Even when Cst. Singer played Mr. Balbar a portion of his confession to Mr. Big, Mr. Balbar said "Mmm I ain't gonna defend myself, I'm just here to listen" (Exhibit 4A, p. 81 l. 2090). When asked who H. was in the video Mr. Balbar said, "Ah it looks like buddy that was trying to, trying to ah offer me a bunch of stuff if I would like to try to fit in with something I don't know. Yeah. Ah some kinda thing like that I ain't gonna defend myself an " (Exhibit 4A, p. 80, ll. 2057-2062). Even when Cst. Singer played the portion of the confession where Mr. Balbar referred to his son seeing what happened to Ms. Hamill, Mr. Balbar repeated that he was just there to listen.

[248] When Cst. Dadwal was talking about the Mr. Big investigation that the police had conducted in relation to Mr. Balbar and referred to the fact that Mr. Balbar had phoned C. when he was arrested, Cst. Dadwal told Mr. Balbar that "these guys didn't ta mean it personally when they did this shit on ya I know it fucks with the mind and you're not the first guy I've spoken to after this. This happens all the time. It happened, it happens to like big gangster criminals." Mr. Balbar responded "Oh, yeah" and then a bit further on in their conversation Mr. Balbar said, "Who, who, who else is gonna tease you with money?" After Cst. Dadwal said "Huh?", Mr. Balbar said, "Fuck yeah, I, I don't care. I had fun" (Exhibit 4A, pp. 92-93, ll. 2396-2408). Mr. Balbar continued to indicate that he was there to listen and said that his lawyer would deal with it or make sense of it.

[249] The next day, December 20, 2007, the second police interview with Mr. Balbar lasted under an hour. Despite Cst. Dadwal's best efforts to engage Mr. Balbar in discussion about the offence, including showing him a picture of himself on the front page of the Kamloops newspaper in the context of just being charged with first degree murder, Mr. Balbar kept repeating how tired he was and asking to go back to his room. One such comment representative of many similar ones was, "Well I told you I I ain't talking, I just wanna go to my room. You don't got respect to just let me go back to sleep" (Exhibit 4A, Tab 2, p. 7, l. 136-137).

Mr. Balbar's statement to Dr. Nicholaichuk

[250] In this voir dire, Dr. Nicholaichuk disclosed notes of his interview with Mr. Balbar on September 27, 2009, made in preparation of his report. These had not been disclosed before. The majority of notes made on this date related to what Mr. Balbar told him about what happened when Mr. Balbar killed Ms. Hamill. In the notes Mr. Balbar referred to Ms. Hamill as "her" and to C. by his first name.

[251] According to the notes, Mr. Balbar wanted C. to think that he could watch his back and not that he had gotten beaten up by his girlfriend, Ms. Hamill. He made up a whole bunch of stuff to make it look like he was tough like C. Mr. Balbar said that she was drinking and throwing things, that she started hitting him and hit him with the machete. She got a knife and was chasing him. Mr. Balbar said that he made up the part about three different hammers. He said that Ms. Hamill put the machete at his son in the bedroom and pulled it up like she was going to hit his son. She was chopping at Mr. Balbar with the machete. He said he hit her in the head with a hammer and when he went to check she was dead, not breathing. Mr. Balbar said he made up the part about telling C. that he killed her later because he did not want C. to think that she was trying to kill him. Mr. Balbar said that he was sure she was dead the first time he hit her, and he was very scared after he thought she was dead. He said he tried to move her to the funeral place after the cops came. The hammer came from his tools. After his mother came to pick up his son, Mr. Balbar said that he put Ms. Hamill into the cooler and took her down the street in a taxi and then got a truck to take her to the burial place on the reserve. He left the cooler there. She was wearing stuff when he put her into the river. She was wearing a top under her shirt.

XII. ABOUT MR. BALBAR

[252] Evidence about an accused as a target of a Mr. Big investigation, is an important part of the Hart analysis, both in terms of assessing probative value and prejudicial effect, and in terms of an alleged abuse of process. Age, background, lifestyle and any particular vulnerability are relevant.

[253] In this case the information about Mr. Balbar comes from what the police knew about him prior to the Mr. Big investigation, his criminal record, what he told undercover officers and what they observed during the operation, limited information about his lifestyle from other witnesses who knew him in the community and the evidence of two psychologists, who were the only witnesses called on behalf of the defence. Mr. Balbar did not testify on this voir dire.

[254] The first psychologist, Dr. Nicholaichuk, interviewed and tested Mr. Balbar in Kamloops Regional Correctional Centre ("KRCC") on September 26 and 27, 2009. Almost five years later, on May 29, 2014, Dr. Hervé interviewed and tested him at Fraser Regional Correctional Centre ("FRCC"). Both psychologists wrote reports regarding their findings and opinions (Dr. Nicholaichuk's report is Exhibit 28 and Dr. Hervé's report is Exhibit 27),

and testified at length. Dr. Nicholaichuk had previously testified for the defence in the first trial. Briefly stated, both psychologists concluded that Mr. Balbar was of low intellectual functioning based on tests they administered and other limited information provided to them. Dr. Nicholaichuk indicated that the accused had an IQ of 44 and that overall his scores placed him in the Moderately Mentally Retarded range of intellectual functioning. Dr. Hervé considered Mr. Balbar to meet the criteria for Moderate Intellectual Disability contained in the "DSM V" (American Psychiatric Association: Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition. Arlington, VA: American Psychiatric Association, 2013). Before turning to that evidence it is useful to set out what became known during the voir dire about Mr. Balbar from other sources.

Background

[255] Mr. Balbar was 36 years old at the time the undercover operation commenced on September 28, 2007. He was arrested a few days after his 37th birthday, on December 19, 2007. He was 32 years old in the summer of 2003.

[256] Evidence from Corlee and Allan Madge, Corinne Ironside, Carmen Stedal, Mark Nelson and James Wood was that Mr. Balbar was selling marihuana and crystal methamphetamine during the summer of 2003. The same evidence suggests that he was doing a brisk trade in drugs from his apartment. He was astute enough to expect regular payment, but if a purchaser did not have the money he would accept identification as security and then return it upon the receipt of payment. Ms. Stedal testified that Mr. Balbar and Ms. Hamill would assist her at her cleaning job from time to time and she would pay them for their work. The evidence of Mark Nelson was that both he and Mr. Balbar were engaged in selling drugs and stealing in the summer of 2003.

[257] The same witnesses, except Mr. Wood, and the evidence of Mary Matthew and her father, John Matthew, indicated that Mr. Balbar and Ms. Hamill were in a common law relationship, and in 2003 Ms. Hamill was living with Mr. Balbar at his apartment in the Oak Apartments.

[258] From what Mr. Balbar told C. in the early stages of the undercover operation in September 2007 he was living with a friend named Mike in a basement suite in Kamloops, and supporting himself on approximately $1000 a month from disability payments and from what he made from the theft of copper wire. Mr. Balbar told C. about being involved in growing marihuana (Scenario 8, October 15, 2007). There is no question that Mr. Balbar was living on very little money and welcomed an opportunity to improve his finances.

[259] Mr. Balbar has a lengthy criminal record. All of the convictions are entered in Kamloops. His criminal record commences with a conviction as a youth in 1989 for Break and Enter where the disposition was probation for one year. The last entry is on March 15, 2007.

[260] As an adult, Mr. Balbar has been convicted of two break and enters, two thefts, two possession of stolen property offences, six offences related to possession and trafficking of drugs, four counts of obstruct, one count of mischief, one conviction for assault, one count each of dangerous driving, refusal to provide a breath sample and driving while disqualified, two offences related to possession of firearms or ammunition, one conviction for possession of break-in instruments, two failing to appear and four breach charges. The longest single custodial sentence imposed is equivalent to eight and a half months, including pre-trial credit.

[261] At one point in the undercover operation Mr. Balbar told P., "I have never done any straight work in my life ... it's all I know is crime" (Exhibit 19H, Transcript of conversation, November 11, 2007, p. 9, ll. 200-201). With this background, it is not difficult to see why Mr. Balbar was drawn to work in a criminal organization.

[262] Mr. Balbar grew up in the Kamloops area based on what he told H. during the crime boss interview and seemed very familiar with the area. It is not clear if he was estranged from his mother and his son in 2007. However, the evidence suggests that Mr. Balbar was not particularly socially isolated. He appeared to have friends and to have had a number of relationships with women.

[263] In particular, I note, drawing on the submissions of the Crown, that Mr. Balbar made various references to friends during the Mr. Big operation. He made reference in the first scenario to "friends" whom, he proposed, could work for C. On October 3, 2007 (Scenario 4), the accused referred again to his "friends" saying that he did not trust any of them; he repeated this statement several times during the undercover operation, including on October 10, 2007 (Scenario 7). He also referred to a friend named Hippy with whom he had grown marihuana on October 15, 2007 (Scenario 8); to a buddy he had swapped girlfriends with for a time on October 14, 2007 (Scenario 8); to a friend in Montreal and a friend named Juan who lived in the Lower Mainland (Exhibit 41A, Transcript of conversation, December 6, 2007, pp. 52-53, ll. 187-1207). In response to a question from C. while they were in Prince George on November 4 (Scenario 14), Mr. Balbar said he did not tell his friends about the work he was doing, saying "No. Well they were... buggin' me for a bit, but... nobody really cares. As far as they know, I work for... some warehouse..." and made reference to a friend named Buckles (Exhibit 40A, pp. 50-51). With J. on December 12, 2007, in Scenario 34 on the Sunshine Coast, Mr. Balbar made reference to a friend who was married and had a job but was restless. J. inferred that the accused was proposing the friend as a potential employee of the criminal organization. On December 13, 2007, Mr. Balbar mentioned he had a friend whom he has always trusted.

[264] On October 9, 2007 (Scenario 5), Mr. Balbar told C. the names of four women with whom he had relationships, one of whom was Rona, the mother of his son. He mentioned a fifth woman - though not her name - saying that she was really crazy and he had lived with her in a six bedroom house until his son moved in. On December 6, 2007, Mr. Balbar told C. about a woman with whom he had recently had sexual relations (Ex 42B, p. 40-43).

[265] Mr. Balbar mentioned his son, Jessie, on a number of occasions during the undercover operation. On September 29, 2007, Mr. Balbar said that his son was 10 years old and lived with the accused's parents. On October 9, 2007, Mr. Balbar said that he was anticipating getting his son back in the spring and that he would then get two cheques and be able to afford a place of his own. The next day he said that he would quit using drugs in the spring when he got his son back. On October 24, 2007 (Scenario 10), Mr. Balbar said that he could work for C. any day except for Halloween and Christmas Day as he needed to visit his son on those days. On November 1, 2007, Mr. Balbar referred to his son as 14 years old. During the re-enactment (December 18, 2007), Mr. Balbar and the undercover officers discussed Mr. Balbar buying his son a Christmas present. Mr. Balbar made reference to his son having seen him kill Ms. Hamill in comments to C. and H.

[266] Mr. Balbar's son used to visit him in 2003 based on his evidence and that of others, including Ms. Stadel and Mary Matthews.

[267] There is no direct evidence as to whether Mr. Balbar had continued to use methamphetamines and/or other drugs from the summer of 2003 to the fall of 2007 when the undercover operation commenced, nor is there direct evidence of the actual amounts or frequency of his use. However, during the Mr. Big operation it was clear from Mr. Balbar's discussions with C. and other evidence that he was using methamphetamines regularly.

[268] Specifically, on October 3, 2007 (Scenario 4) Mr. Balbar said he had been out partying, had been sleeping for the past 18 hours and that he smoked methamphetamines. C. testified that the accused looked dishevelled and "in rough shape". Again, on October 23, 2007 (a Tuesday), the accused reported that he had been partying all weekend. The next day he handed over a sunglass case containing methamphetamines to C. On November 9, 2007, Mr. Balbar was found to have damaged his hotel room, including burning objects with a blowtorch of a sort used to smoke drugs. On November 29, 2007, Mr. Balbar said that he had been off meth "for weeks", but acknowledged having done meth on the night of November 21. On December 5, 2007 (a Wednesday), Mr. Balbar missed his bus and reported that he had been partying "all weekend" and had spent $1500. He was still "hung-over" on December 6, 2007, although he said that he had not used meth in days. While he denied continuing meth use in December, he reported to J. on December 13, 2007 that he had been up all night and had hiked 20 km in the woods. When Mr. Balbar was arrested on December 19, 2007, he was in possession of two grams of methamphetamines.

Mr. Balbar's day-to-day level of functioning

[269] The most reliable evidence of Mr. Balbar's level of day-to-day functioning comes from the Mr. Big investigation.

[270] Within that investigation I find that the police did not prey on Mr. Balbar's apparent addiction to methamphetamines. To the contrary, C. discouraged it on a number of occasions by stressing the need to be clear-headed to do the work of the organization, and how having drugs or behaving in a manner suspicious to the police only brought unwanted "heat" to the organization. C. confiscated Mr. Balbar's sunglass case containing a supply of methamphetamines. Keeping Mr. Balbar away from what the police assumed were his drug-using friends and subculture in Kamloops served the purposes of the Mr. Big operation, but this caused no hardship for Mr. Balbar, who expressed on a number of occasions his willingness to move from Kamloops. The other side of the coin, as expressed by Sgt. G., was that while the police wanted to limit Mr. Balbar's drug use, they also covered his basic living expenses during scenarios and gave him some cash, some of which Mr. Balbar likely used to buy drugs, in order that Mr. Balbar would not feel compelled to commit an offence like a robbery while involved in the operation.

[271] In 2007 although Mr. Balbar regularly used methamphetamines and appeared to be addicted to them, he generally appeared to be able to function normally day-to-day and to maintain his supply. Despite his dependence on methamphetamines, and apart from the reference to his having sustained a brain injury or injuries, Mr. Balbar did not appear to have any physical problems or illnesses. He had a social network and was fit enough to get around Kamloops on his bike.

[272] However, there is no question that Mr. Balbar expressed a number of odd beliefs during the course of the undercover operation, including that his friend had a book made out of human skin; a fog machine would provide appropriate concealment for a vehicle in the upcoming big job; he was going to set up a lemonade stand to make money; and that he could build and make money from a perpetual motion machine. He also seemed to have limited knowledge about the world. When asked by C. if he had been to Montreal before, Mr. Balbar said, "That's almost like Quebec, yeah." (Scenario 18, November 16, 2007 p. 7, l. 149). In the same scenario, Mr. Balbar made some comments that seemed to indicate he thought "Filipino broads" were associated with Montreal, were probably French and came in by boat, being associated with an island like Hawaii "or some of them tropical s-islands " (Scenario 18, pp. 25-26, ll. 572-578).

[273] The accused also expressed a number of paranoid beliefs about police surveillance, some of which were inaccurate and others less so, including that the police had facial recognition software that could be thwarted by facial hair; he had been followed by police helicopters; bank machine cameras were available to the police to track people; he had to be careful about what he said on the phone; a cell phone that had been in police control could be used to link him to other people; the police confronted him during the traffic stop scenario to see how he would react; and the police might have followed them to the river after the re-enactment and asking C. to check for additional tire treads at the scene.

[274] The Crown made detailed submissions to the Court with regards to evidence drawn from the Mr. Big operation as to how Mr. Balbar actually functioned day-to-day. It was the Crown's position that in addition to weaknesses in their reports, Mr. Balbar's level of day-to-day functioning undercut the conclusions of the psychologists. The Crown put to both psychologists the following definition of intelligence, with which they agreed, "the global capacity of a person to act purposefully, to think rationally, and to deal effectively with his/her environment." The Crown then enumerated the ways in which Mr. Balbar appeared to function reasonably well and at a level that exceeded what one would reasonably expect based on the psychologists' reports.

[275] Drawing on that list and also other examples, I find that Mr. Balbar appeared to act purposefully, think rationally, and deal effectively with his environment in the following ways:

Throughout the 37 scenarios, Mr. Balbar engaged in hours of responsive conversation with undercover operators, in particular the primary operator, C. Although he made the occasional strange comment, would sleep for portions of driving trips and was sometimes quiet, the vast majority of these conversations, while laced with profanity and not generally about sophisticated topics, were normal interactive conversations in which Mr. Balbar definitely was an active participant. Although Mr. Balbar was not where he was supposed to be sometimes when C. was to pick him up, was late or on several occasions appeared to go on binges of partying that likely included his consumption of methamphetamines, overall he generally met up with C. and other undercover officers as planned. He did lose things during the operation (several cell phones and his suitcase), but remembered many others without apparent difficulty. While Mr. Balbar lost several cell phones that C. and other undercover operators used to keep in touch with him, there is evidence that he ran down the battery "surfing the net" and learned to text. He used his phone to call C. upon occasion. When it came to doing tasks for C. and the criminal organization, Mr. Balbar was generally diligent. He followed detailed instructions, some fairly intricate and by memory, that involved him moving about in cities with which he was likely unfamiliar, including Abbotsford, Coquitlam and Surrey, and taking a return cross-Canada bus trip from Vancouver to Montreal. These activities involved Mr. Balbar picking up and transporting various packages, taking taxis, public transit, buying bus tickets and changing buses. Although Mr. Balbar looked "rough" from time to time and likely needed a shower and a change of clothes, he was quite capable of cleaning himself up to look presentable. For example, on the day of the poker game (Scenario 13) C. gave Mr. Balbar $150 and told him to buy a nice shirt, pants and shoes for that night, and to shower, shave and get cleaned-up. When C. came back later that day, Mr. Balbar had done as requested. When he appeared in the crime boss video Mr. Balbar looked well groomed and well dressed. At different times Mr. Balbar was able to retain and recite impressive kinds of information. This included impressing the undercover operator in the C-4 scenario (Scenario 10) with his knowledge of C-4 explosives, such that the undercover operator became nervous, as it appeared that Mr. Balbar's knowledge of C-4 exceeded his own. Other examples are Mr. Balbar's memory of the mileage between locations from memory for J. (Scenario 34); his knowledge of longitude and latitude, his inquiry as to extradition to Canada and his appreciation of the nature

of pumpkin as an aphrodisiac. Mr. Balbar demonstrated notable street smarts. For example, when he thought he had lost his bus ticket to Kelowna (Scenario 9), he bought another one, rather than cause a scene trying to look for it. He appreciated that, as he was likely carrying illegal or illegally-obtained goods in the bag he was transporting for the organization, it was best not to draw attention to himself. Prior to the staged assault on a female in the collection scenario in Prince George (Scenario 14), and while Mr. Balbar and C. were conducting surveillance of the hotel from their vehicle, Mr. Balbar pointed out to C. that they were highly visible and suggested a better, less visible place to park, at which point C. recognized that Mr. Balbar was right and moved the vehicle. In another scenario, Mr. Balbar brought along his own pellet gun and some mace in order to be ready to assist C. in a bag movement scenario (Scenario 7, October 10, 2007). When Mr. Balbar was arrested in relation to Ms. Hamill's death on December 19, 2007, he was subjected to rigorous questioning by a number of police officers skilled in verbal interrogation who used a wide assortment of techniques to encourage Mr. Balbar to confess to his involvement in Ms. Hamill's death. He steadfastly declined to discuss that topic and showed considerable mental fortitude and a clear appreciation of the process and his legal rights in doing so.

[276] In addition, I find upon reviewing Mr. Balbar's demeanour and how he communicated with H. in the crime boss interview, that he was communicative and responsive. This is clear on the video. He communicated in a normal manner. His narrative of his actions with regards to killing Ms. Hamill and disposing of her body and other related items were also indicative of his ability to act purposefully, rationally and effectively, in circumstances that were stressful and presumably novel.

[277] Mr. Balbar's account, as told to H. and with some additional details provided to C. and J. the next day, is replete with planned problem-solving decisions with the requisite follow-through. His account suggests that Mr. Balbar made sure that Ms. Hamill was inside a cooler before he finished her off to contain the mess, taped the cooler shut to ensure it stayed closed, called a taxi with a cell phone previously used by her, put the cooler in the trunk of the taxi and had the driver take him a few blocks away from his place, using the ruse of going fishing to allay any suspicions. The place he chose to take the cooler, to the dead end alleyway behind a residence that he knew was unoccupied, is indicative of thought and planning, as is his leaving the cooler there under a table and placing a pebble on top of it so that he would know if anyone disturbed the cooler. Similarly, the arrangements he made through Mark Nelson for someone trustworthy, who he did not know, to come and pick him up in order that he could dispose of the cooler on the reserve show planning and street smarts. Mr. Balbar, knowing that he lived very close to the west bank of North Thompson River, decided it would be a better idea to dispose of Ms. Hamill's body in the river from its east bank on the reserve so as to distance himself from it if her body was found. Mr. Balbar also devised the pretext of a friend being upset at the prospect of meeting someone unknown in order to leave Mr. Rugolo at the side of the road while Mr. Balbar drove off and disposed of the cooler at a spot that only he would know. Upon his return to pick up Mr. Rugolo, Mr. Balbar told Mr. Rugolo that he wished he had more time to make a better deal, so that Mr. Rugolo would think he had met someone and sold him

whatever was in the cooler.

[278] Then, according to what Mr. Balbar further explained to C. and J. on December 18, 2007, he returned to the cooler that night alone on a bicycle and dumped Ms. Hamill's body into the river, washing out the cooler and then throwing it into the bushes.

[279] Mr. Balbar described the steps he took to get rid of items associated with him killing Ms. Hamill. He described cleaning the hammers and throwing one of them into the river and disposing of the others in the course of his daily activities. He said he hid two machetes in a locked room in the basement of an apartment building, and then gave the undercover officers very detailed instructions on their exact location almost four and a half years later, resulting in the police finding one machete stored exactly in the manner Mr. Balbar described at a location in downtown Kamloops.

[280] Finally, Mr. Balbar described to H. that the active ingredient in oven cleaner was lye and, knowing that lye would be good to use to get rid of blood, he used oven cleaner to clean up the apartment, including on the carpet and the hammers. Not wanting to arouse any suspicion by buying oven cleaner, Mr. Balbar described how he broke into empty apartments and stole small amounts of oven cleaner to increase his supply.

[281] For these reasons, I find that Mr. Balbar's day-to-day level of functioning shows an adequate level of intelligence to the extent that he generally acted rationally, purposefully and dealt reasonably effectively with his environment.

The psychologists' evidence

[282] The issue of the level of Mr. Balbar's intellectual functioning was a hard-fought issue in this voir dire. Together, the direct and cross-examination of both psychologists took five full days of court time. In assessing their evidence and deciding what weight to ascribe to it I have reviewed their testimony, their reports and the materials put to them that had a bearing on the underlying facts and their assumptions.

[283] I accept that Dr. Nicholaichuk and Dr. Hervé were proven to be properly qualified experts and that the opinions sought fell within their areas of expertise, which was in the area of clinical psychology with a forensic specialty. Specifically, both were qualified to give expert opinion evidence in the areas of testing, assessment and the interpretation of testing and neurocognitive functioning, functional capacity, memory and mental illness. In addition, Dr. Nicholaichuk's expertise included the areas of learning disability and intellectual disability.

Dr. Terry Nicholaichuk

[284] Dr. Nicholaichuk's report in relation to Mr. Balbar is dated October 1, 2009. Its stated goal was to test Mr. Balbar's "intellectual capacity" at the request of his counsel at the first trial. The sources of information that Dr. Nicholaichuk stated he relied upon consisted of five

hours of testing and interviewing Mr. Balbar on September 26 and 27, 2009, a telephone call with his mother, the administration of four tests and "transcripts of conversations between Mr. Balbar and members of the RCMP." The tests he administered to Mr. Balbar were the Wechsler Memory Scale III (Abbreviated), Wechsler Fundamentals, Academic Skills, Canadian Edition (a test of academic achievement), Wisconsin Card Sorting Test (WCST) and Wechsler Adult intelligence Scale IV (Canadian norms).

[285] In his report, Dr. Nicholaichuk related a social history, information about Mr. Balbar's education and employment, his associates and relationships, his criminal history/ institutional adjustment, mental health and substance abuse. He did not have any sources for this information other than Mr. Balbar and his mother at a time when Mr. Balbar was facing a first degree murder charge in relation to Ms. Hamill's death.

[286] In particular, Dr. Nicholaichuk stated that he did not have access to any records from KRCC where Mr. Balbar had been in custody for two years and where he interviewed him. He did not have Mr. Balbar's criminal record. He did not make inquiries as to the types of medication that Mr. Balbar was taking at the time of the interviews and testing, although he noted in his report that Mr. Balbar was taking medication for anxiety and to help him sleep (at p. 4). He did not have access to any information other than from Mr. Balbar's mother about Mr. Balbar suffering what he described in his report as "a serious brain injury to the frontal area of his brain." He reports that Mr. Balbar was placed on a permanent disability pension and provided assistance by the BC Brain Injury Association (at p. 3) without independent confirmation. He noted Mr. Balbar's mother reported that "she did not note a great change in her son's behaviour subsequent to his accident except that his memory was worse than before" (at p. 3). Dr. Nicholaichuk also stated that Mr. Balbar's mother reported that "she has not had significant contact with him since he left home at the age of 18 and was therefore unable to give a detailed account of how he lived or functioned" (at p. 2). Despite the precarious nature of this information, Dr. Nicholaichuk concluded that Mr. Balbar did indeed suffer from a serious brain injury.

[287] Dr. Nicholaichuk made other assumptions without a proper basis. For example, he assumed that because of Mr. Balbar's "inability to read, he has never been able to qualify for a driver's licence" (at p. 3). I note that he has convictions for dangerous driving, refusal to provide a breath sample in 1996 and a conviction for driving while disqualified contrary to s. 259(4) of the Criminal Code in 1998. In the undercover operation there is evidence of Mr. Balbar texting and referring to using the internet.

[288] Dr. Nicholaichuk accepted Mr. Balbar's mother's statement that Mr. Balbar was not considered to be sufficiently competent to provide care for his son and that his son was placed with her after Mr. Balbar was first arrested and incarcerated (at p. 2) without further inquiry. It is not clear the extent to which Mr. Balbar ever cared for his son or when he was "first arrested and incarcerated."

[289] Dr. Nicholaichuk accepted Mr. Balbar's mother's account of her son's learning problems in school, including the fact that he was diagnosed as ADHD and was on Ritalin for a time. However, two sentences later in his report, he wrote that Mr. Balbar's mother said "that throughout his school-age years, she was never fully appraised of the nature nor the extent of Mr. Balbar's problems in learning" and did not know if he had been assessed (at p. 3). He reported that the mother stated that her son "was a quiet child and was not, to her knowledge, never aggressive" (at p. 3). Probation records used to cross-examine Dr. Hervé cast considerable doubt on this statement.

[290] Dr. Nicholaichuk indicated that Mr. Balbar reported that he never really drank, but smoked pot and did cocaine once, and admitted to the occasional use of methamphetamines, the latter statement being categorically shown to be inaccurate by other evidence on this voir dire.

[291] Although his report refers to transcripts of conversations between Mr. Balbar and members of the RCMP, Dr. Nicholaichuk was unable to say what he reviewed in this regard and said that he did not regard the way someone spoke to be an accurate indicator of intellectual ability.

[292] In terms of the tests Dr. Nicholaichuk administered to Mr. Balbar to assess his intellectual capacity, Dr. Nicholaichuk considered that Mr. Balbar made a good effort and considered the test results to be "an acceptably valid assessment of his ability." He stated the following as his findings at pp. 5-6:

Because of concerns regarding Mr. Balbar's intellectual ability, I first administered the Weschler [sic] Adult Intelligence Scale - IV, WAIS-IV (Canadian Version), The WAIS-IV is a widely used, well normed measure of overall intellectual functioning and also provides information with regard to specific subdomains associated with intellectual ability, Overall, Mr. Balbar scored within the Moderately Mentally Retarded range of intellectual ability. This requires a full scale IQ between 35-40 to 50-55. Mr. Balbar's Full Scale IQ on this administration of the WAIS-IV was 44, This placed him below the first percentile (<l%) in terms of his intellectual functioning. This means that more than 99% of people tested would score higher than he did. Inter-test and intra-test scatter was minimal suggesting that this is a relatively valid assessment of Mr. Balbar's actual intellectual capacity. His non-verbal ability was at the third percentile [Perceptual Reasoning Index] and his Verbal Comprehension was at the first percentile. A more detailed description of Mr. Balbar's abilities in various areas tapped by the WAIS-IV follows.

[ ]

Mr. Balbar's working memory was also assessed by means of the WAIS-IV. This refers to his ability to memorize new information, hold it in short-term memory, concentrate, and manipulate that information to produce some result or reasoning processes. It is important in higher-older thinking, learning, and achievement. It is also important for cognitive flexibility and planning ability, as well as learning and ability to self-monitor. Mr. Balbar's score on this index placed him at the first percentile overall. This indicates significant impairment and is consistent with his

poor educational and vocational attainment. It is also consistent with his poor score on a test of his ability to perform numerical operations.

[Emphasis added.]

[293] Dr. Nicholaichuk then set out his findings in relation to the other tests. Mr. Balbar's executive functioning was assessed to some degree by the Wisconsin Card Sort Test. The result was that his performance placed him below the first percentile. This is indicative of moderate to severe impairment. Dr. Nicholaichuk opined that it is quite possible that his problems in this area and his low score on the WCST were due to his initial developmental delay, which was then exacerbated by the subsequent injury to his brain. He evaluated Mr. Balbar's memory by means of an administration of the Wechsler Memory Scale TTI (Abbreviated), designed to estimate auditory and visual memory. He noted that Mr. Balbar's responses were consistent with other testing conducted for the purposes of this evaluation and:

On tests of immediate and delayed recall, he was found to be significantly impaired. In general, his performance was consistent with the WAIS-IV results reported above and the percentile rankings obtained were highly similar.

[294] Finally, Dr. Nicholaichuk assessed Mr. Balbar's academic achievement by means of the Wechsler Fundamentals, Academic Skills test, Canadian Edition, and noted at p. 8 that:

His scores on this test were uniformly low and consistent with the intellectual assessment results reported above. For example, his ability to read words placed him at the Grade 2 level (7 year old equivalent). His reading comprehension was below the Kindergarten level (6 year old equivalent). Mr. Balbar's ability to spell and perform mathematical operations were both at the Grade 2 level. Given the results reported above, it is clear that Mr. Balbar has significant difficulty processing verbal information and is severely learning impaired.

[295] Dr. Nicholaichuk concluded the following at p. 8:

In summary, the results of all the testing conducted for the purposes of this assessment were entirely consistent with each other. Mr. Balbar scored at or near the first percentile on all the measures of intellectual functions tapped by this test battery. These tests results also appear to be consistent with what I was able to learn about his community functioning. Mr. Balbar appears to function best with assistance and easily qualifies as a dependent adult who is probably functioning at the seven or eight year old level in terms of his overall intellectual ability. He was probably able to function in the community because Kamloops is a relatively small city and he learned how to cope with what was likely a very familiar environment in which he may have been known. It seems clear that he can perform simple manual tasks and follow simple instructions, especially within the confines of a familiar context.

[296] Dr. Nicholaichuk did not fare well on cross-examination when the contents of his report and the basis for his opinions and diagnosis regarding Mr. Balbar were challenged. I agree with many of the Crown submissions in this regard. At the heart of his opinion, and indeed at the core of the controversy in this case, is whether Mr. Balbar has an intellectual disability and, if so, to what degree, arising from a brain injury or otherwise.

[297] In direct examination, Dr. Nicholaichuk was asked the key question as to whether he had, in fact, made a diagnosis regarding Mr. Balbar's intellectual functioning. Initially he agreed he had, referring to his comment at p. 5 of his report where he stated, "Overall, the accused scored within the Moderately Mentally Retarded range of intellectual ability."

[298] Under cross-examination, Dr. Nicholaichuk was asked to confirm that he had diagnosed the accused as Moderately Mentally Retarded and he answered that was what his report said. When it was suggested that he had been asked in direct about a diagnosis and had not answered, he said that he thought the "implication" in his report was that Mr. Balbar fell in that range. When pressed further as to whether he had actually diagnosed Mr. Balbar, he resisted that notion, but then subsequently agreed that his evidence in court was that he had made a diagnosis.

[299] In cross-examination, Dr. Nicholaichuk agreed that the "DSM IV" (DSM-IV-TR Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision Washington, DC: American Psychiatric Association, 2000) was the basis of his diagnosis of Mr. Balbar as being Moderately Mentally Retarded. The relevant pages of the DSM IV were then put to him (Exhibit 50), and he agreed that he did not have sufficient information to allow him to say that Mr. Balbar met Criterion B - a requirement of a diagnosis of Mental Retardation. When it was put to him that he had made the diagnosis anyway, Dr. Nicholaichuk again referred to the exact words quoted above at p. 5, and again said that it was the "implication" in his report.

[300] In the DSM IV definition of Mental Retardation relied upon by Dr. Nicholaichuk, the importance of meeting the additional criteria over and above low intelligence test scores is clear (at p. 41):

The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communications, self-care, home living, social/ interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C).

[301] The DSM IV states at p. 41 that general intellectual functioning "is defined by the intelligence quotient (IQ or IQ-equivalent) obtained by assessment with one or more of the standardized, individually administered intelligence tests (eg. Wechsler Intelligence Scales for Children 3rd Edition....)" It continues that significantly subaverage intellectual functioning is defined as an IQ of about 70 or below (approximately two standard deviations

below the mean) and with a margin of error of five points higher or lower. It states that it is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 "who exhibit significant deficits in adaptive behaviour"; conversely, Mental Retardation "would not be diagnosed in an individual with an IQ lower than 70 if there are no significant deficits or impairments in adaptive functioning" (at p. 42).

[302] The DSM IV recommends gathering evidence for deficits in adaptive functioning "from one or more reliable independent source" (at p. 42), which Dr. Nicholaichuk did not have. He indicated that he attempted to get this information from Mr. Balbar's mother. He also agreed that according to these criteria he did not have sufficient evidence of Mr. Balbar's adaptive behaviour to diagnose him as Moderately Mentally Retarded, and the diagnosis had not been made prior to age 18. He subsequently agreed that it was an error to have diagnosed Mr. Balbar as Moderately Mentally Retarded (Transcript, October 7, 2014, p. 34, ll. 22-35).

[303] While I am not convinced that Dr. Nicholaichuk was being deliberately obtuse with regards to the straightforward questions he was asked about his finding that Mr. Balbar scored within the Moderately Mentally Retarded range of intellectual ability, he certainly put that label or diagnosis forward without meeting the criteria required by the DSM IV. That, coupled with the scant and at times contradictory, potentially self-serving and uncorroborated information about Mr. Balbar's background and a potential brain injury, cause the Court to attach no weight to his finding that Mr. Balbar met the recognized criteria for a diagnosis of Moderately Mentally Retarded and no weight to his other conclusions drawn from his experience or inferred from inadequate and unreliable information about Mr. Balbar's background.

[304] The Court has also considered what weight, if any, ought to be accorded to the test scores that led Dr. Nicholaichuk to find that Mr. Balbar possessed an IQ of 44. In cross-examination, it was pointed out that some of his calculations and findings were potentially inaccurate and therefore unreliable.

[305] In particular, in direct examination, Dr. Nicholaichuk testified that Mr. Balbar's full-scale IQ score placed him at or near the first percentile, which he said meant that Mr. Balbar's IQ was two standard deviations from the norm and that 99 out of 100 people would score higher than him. At another point in his direct examination, he described the accused's scores on the Perceptual Reasoning Index - which he had said were at the third percentile -- as being more than three standard deviations from the norm.

[306] In cross-examination, after being provided what he conceded was an accurate representation of the Standard Distribution Curve (Exhibit 49), Dr. Nicholaichuk agreed that a score of 70 on an IQ test (where the mean is 100 and the standard deviation is 15), is two standard deviations below the mean and about the second percentile. In other words, Mr. Balbar's score on the Perceptual Reasoning Index at the third percentile was less than two standard deviations from the norm. More significantly, Dr. Nicholaichuk conceded that

the full scale IQ score that he calculated for Mr. Balbar of 44 was more than three and a half standard deviations below the mean, which, he agreed, meant that his 99 out of 100 figure was off by two orders of magnitude.

[307] Detailed statistical analyses were put to Dr. Nicholaichuk to point out the implications of such misstatements (Transcript, October 7, 2014, pp. 21-23). In essence, a score of 45 is 3.66 standard deviations below the mean (100) and is at the .013 percentile, meaning that an IQ score at or below 45 would be expected 1.3 times for every 10,000 people selected at random. My interpretation of this information is that in addition to Dr. Nicholaichuk misstating the implications of test results, the IQ of 44 that he attributed to Mr. Balbar based on the test results he received is so low as to be suspect and to raise the very real possibility that Mr. Balbar was deliberately "faking bad" on the tests, although Dr. Nicholaichuk did not consider that to be likely.

[308] There is no question that errors that affect the order of magnitude of lower IQ test results are significant, as statistics impart an authoritative and scientific air to an expert's opinion. With this type of testing it is all in the numbers. When such results are suspect through mistake or carelessness, the result is that the Court is unable to rely on them. Such is the case with the intellectual capacity test results administered to Mr. Balbar by Dr. Nicholaichuk.

[309] In addition, I note that there was a serious problem with Dr. Nicholaichuk's reliability as a witness. In cross-examination, Dr. Nicholaichuk acknowledged that evidence he had given at the first trial in this case on a material point was not true. Specifically, his notes from his interview of Mr. Balbar on September 27, 2009, disclosed during the course of his direct evidence on this voir dire, indicated that he had discussed the circumstances of the undercover investigation, as well as Mr. Balbar's version of the death of Heather Hamill, with Mr. Balbar during the second of their two interviews. That discussion occupied at least a substantial part of his seven pages of interview notes (Exhibit 52), the content of which has been set out above. The interview took place less than three weeks before the first trial.

[310] When Dr. Nicholaichuk was asked in cross-examination on the voir dire at the first trial about whether he had discussed the circumstances of the alleged offence with Mr. Balbar, the following exchange ensued:

Q You didn't, as a result, ask him about the offence or the allegations against him.

A Pardon me?

Q You didn't ask Mr. Balbar about the allegations against him. You didn't talk to him about those.

A Not to any great extent, no.

Q Well, to some extent?

A Yes

Q You didn't have him recount for you his - what - what might have been his version of -

A No

Q -- what happened...

(Appeal Book 6, Transcript October 14, 2009, pp. 977-978, ll. 47-14.)

[311] Given all the problems regarding Dr. Nicholaichuk's evidence - the lack of adequate and reliable source material, overly broad conclusions drawn without adequate foundation, errors in interpreting testing results, non-compliance with the DSM IV criteria for a diagnosis of Moderately Mentally Retarded and Dr. Nicholaichuk's incorrect and misleading testimony at the first trial regarding whether he had discussed the circumstances of the offence while interviewing Mr. Balbar - I am unable to accept his evidence.

Dr. Hugues Hervé

[312] On July 18, 2014, Mr. Balbar was assessed by Dr. Hervé at the request of defence counsel. His assessment was based on a review of file information, which was comprised of Dr. Nicholaichuk's report; a clinical interview with Mr. Balbar; and the administration, scoring and interpretation of two psychological tests - the Reynolds Intellectual Assessment Scales (RIAS) and the Validity Indicator Profile (VIP). Mr. Balbar advised that he was taking medication at the time but he was not sure what, and Dr. Hervé noted a phonetic spelling, possibly "Olaxapine". The interview and testing took place at FRCC on one occasion for about five hours.

[313] In his report (Exhibit 27), Dr. Hervé noted at the outset, "The reader should remain aware that the available file information was limited in depth and breadth. In light of contractual limitations, I did not have the opportunity to access or seek additional collateral information" (at p. 2). At various points during cross-examination, Dr. Hervé indicated that it would have been useful to have additional information to consider in relation to his findings. Dr. Hervé had no other sources of information available to him other than those stated above. In fact, he failed to note in his report or in his direct examination that he had asked for more collateral information that was refused to him, in particular correctional records and school records. This is in contradiction to his initial statement that he did not have the opportunity "to access or seek" additional collateral information.

[314] While the Court does not wish to attach too much significance to what may have been a simple oversight, when experts, including psychologists, provide their expert opinions for others to consider and at times adopt in very important matters, scrupulous attention must be paid to the nature and accuracy of their sources of information and the scope of their inquiries. To do otherwise may raise serious concerns about the weight to be attached to the experts' ultimate opinions.

[315] A careful review of Dr. Hervé's report and a comparison of it to Dr. Nicholaichuk's report reveals that Dr. Hervé simply restated many aspects of Mr. Balbar's background that originated in Dr. Nicholaichuk's report and drew the same or similar conclusions as Dr. Nicholaichuk did, with many of the same inherent problems.

[316] It appears that Mr. Balbar was more forthright about his substance abuse problems on this occasion, as Dr. Hervé noted that Mr. Balbar indicated that he became addicted to crystal methamphetamine in the years prior to being incarcerated (at p. 5).

[317] In terms of how Mr. Balbar was managing in prison, Dr. Hervé also noted at p. 6 that "[c]onsistent with Mr. Balbar's self-report, KRCC staff members described Mr. Balbar as a quiet, compliant, and vulnerable inmate who was not a management problem. He was described as spending his time watching television."

[318] In terms of intellectual testing, in his own report Dr. Hervé quoted in considerable detail the results of the tests administered to Mr. Balbar by Dr. Nicholaichuk. Dr. Hervé chose to administer two different tests, in part to avoid the "practise effect" resulting in higher scores that may occur on subsequent takings of the same test, although I note that one may question whether that effect, were it to occur, would be sustained over the almost five year gap in Mr. Balbar's testing. There may have been some utility in seeing whether Mr. Balbar tested similarly a second time on some of the same tests.

[319] Dr. Hervé said that he used the RIAS, which he described as "a short screen for intellectual function" and one not as comprehensive as the Wechsler administered by Dr. Nicholaichuk. The other test he chose, the Validity Indicator Profile, is designed to assess an individual's response style when testing abilities regarding language and verbal reasoning.

[320] As with Dr. Nicholaichuk, the Crown pointed out that in analyzing Mr. Balbar's test scores, Dr. Hervé misstated the results in relation to the comparison population. Dr. Hervé found at p. 12 with regards to the RIAS that:

Mr. Balbar achieved a [Composite Intelligence Index] score that, with 95% probability, fell within the Significantly Below Average range of general reasoning ability (below the 1st percentile, meaning that his performance was worse than 99% of the normative population).

[321] Dr. Hervé explained in his direct evidence that the RIAS provided a range of scores which, in Mr. Balbar's case, was 37 to 48. A score of 48 was at the .03 percentile, and 37 was below the .01 percentile, and also below the lowest score possible. He also said in his direct evidence that the Significantly Below Average Range was 70 and below, and interpreted the above statement in his report as meaning that there was a 95 percent chance that Mr. Balbar's IQ was below 70.

[322] Crown counsel pointed out that Dr. Hervé made the same type of error as Dr. Nicholaichuk in referring to Mr. Balbar's score as worse than 99 percent of the population. The actual figure (assuming the highest end of the range) is actually 99.97 percent -- an error of two orders of magnitude. If one assumes the lowest end of the range, then Mr. Balbar scored worse than literally 100 percent of the normative population, since 37 is an impossibly low score not contemplated by the RIAS.

[323] As well, Dr. Hervé referred to a 95 percent chance that Mr. Balbar's IQ was below 70. As he conceded in cross-examination, if one accepted the validity of either his or Dr. Nicholaichuk's IQ scores, then there was essentially a 100 percent chance that Mr. Balbar's IQ was well below 70. If one did not accept the validity of the IQ scores, then he agreed that there was no data upon which to base a statistical confidence interval.

[324] At the end of the day, this type of statistical misrepresentation undermines the confidence of the Court in the accuracy of the test scores, their meaning and comparative value in the broader population, all of which can be very important in the Court's assessment of the intellectual functioning of an accused. With regards to Dr. Hervé's report and expert opinion, without accurate and reasonably complete source material, substantially all that remains are his limited clinical observations and the test scores and their interpretation.

[325] Such low test scores raise the possibility, in light of aspects of the other evidence regarding Mr. Balbar's ability to function day-to-day, that he did not put forth his best effort on these tests because he knew it was to his potential advantage facing a murder charge to appear to have a lower level of intellectual functioning, in other words "to fake bad". The VIP test provided some information in this regard, which is captured in Dr. Hervé's overall summary at the end of his report at pp. 14-16:

As noted above, Mr. Balbar displayed variable effort during the completion of the VIP and, to a lesser extent, the RIAS. On both tests, Mr. Balbar also displayed a tendency to select a response based on its location/order rather than its content when he was unsure of the answer, a response style that is not uncommonly seen in children and developmentally delayed adults. These factors, in combination with his observed lack of confidence in his abilities, likely served to lower his test scores. Mr. Balbar's RIAS profile of scores also evidenced clinically significant subtest scatter. While his response style and subtest scatter put into question the overall validity of Mr. Balbar's RIAS index scores, in my opinion, his response style, subtest scatter, and, therefore, assessed intellectual ability accurately reflect Mr. Balbar's true level of functioning. [ ] This response style and performance profile is not uncommonly seen in individuals with significant intellectual deficits, particularly those who also have deficits in executive functions. Similarly, subscale scatter is not uncommon in individuals with neurocognitive deficits secondary to innate and/or acquired neurological insults. That his performance was impaired by specific neurocognitive deficits was also consistent with other test observations, including his tendency to get fixated on particular details rather than to consider broader categorizations (i.e., he had difficulty seeing the forest through the trees), to use a trial-and-error or experiential approach to solving problems, to have difficulty with abstract instructions, and tasks and to have a poor memory.

With that said, Mr. Balbar's performance on testing should nevertheless be interpreted with caution given the aforementioned testing caveats. I note that his performance may also have been hampered by pain symptoms, negative affect, and medication side effects, not to mention possible environmental distractions. Accordingly, Mr. Balbar's true abilities are likely to fall within the upper end of the identified confidence intervals. While his performance may be better with greater and more consistent effort, without situational confounds (e.g., pain and/or mood symptoms, medication), and in less taxing environments (e.g., in supported learning environments without time limits), it should be noted that variable effort, giving up when faced with more difficult tasks, and greater difficulty with less structured and predictable tasks are likely to be accurate representation of his abilities in his day-to-day life. That he did not appear to benefit from testing the limits is consistent with this hypothesis.

[Emphasis added.]

[326] As the Crown pointed out, Dr. Hervé discounted the results of the VIP, which contained a feature to test for malingering. Dr. Hervé noted that Mr. Balbar "produced an invalid profile that was characterized by inconsistent responding" (at p. 13), but chose to interpret the result "as reflecting his true/valid performance... rather than as reflecting poor test motivation or a conscious attempt to manipulate test results" (at pp. 13-14).

[327] Similarly, as the Crown again pointed out, Dr. Hervé discounted "subtest variability" on the RIAS that "puts into question the overall validity of the super-ordinate index scores" (at p. 12). He relied on his own observations of Mr. Balbar, Dr. Nicholaichuk's testing and Mr. Balbar's "community functioning" as suggesting that "his assessed performance may be impaired by specific neurocognitive deficits, including in executive functions" (at p. 13).

[328] Dr. Hervé then noted at p. 15 that the profile presented by Mr. Balbar's test scores and his reported personal history, "[n]otwithstanding the aforementioned caveats", support "a hypothesis that his intellectual functioning is in the Significantly Below Average range."

[329] Dr. Hervé concluded (at p. 15) by way of a diagnosis of Mr. Balbar that:

Given his current and previous test scores, level of functioning in the community, and early onset of intellectual/functional problems, Mr. Balbar impressed as meeting diagnostic criteria for Moderate Intellectual Disability, as defined by the Diagnostic and Statistical Manual of Mental Disorders V. Environmental factors during developmental years (e.g., difficulty with social functioning, changing schools, limited education), childhood ADHD, possible head injury (from a motor vehicle accident), and substance abuse problems are likely to have further affected his cognitive development and community functioning. It is possible that Mr. Balbar experienced a cognitive decline following the reported MVA and/or in light of substance abuse. If this is the case, then he may also meet DSM-V criteria for Mild Neurocognitive Disorder due to Traumatic Brain Injury and/or Substance Use.

[Emphasis added.]

[330] The DSM V diagnostic criteria for Intellectual Disability, formerly Mental Retardation in the DSM IV, have changed. Dr. Nicholaichuk was relying upon the DSM IV criteria for Mental Retardation, whereas Dr. Hervé relied upon the DSM V criteria for Intellectual Disability, referring to the same condition. The DSM V diagnostic criteria for Intellectual Disability (Exhibit 51, p. 33) are stated to be:

Intellectual disability (intellectual development disorder) is a disorder with onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social and practical domains. The following criteria must be met:

A. Deficits in intellectual functions, such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience, confirmed by both clinical assessment and individualized, standardized intelligence testing.

B. Deficits in adaptive functioning that result in failure to meet developmental and socio-cultural standards for personal independence and social responsibility. Without ongoing support, the adaptive deficits limit functioning in one or more activities of daily life, such as communication, social participation, and independent living, across multiple environments, such as home, school, work and community.

C. Onset of intellectual and adaptive deficits during the developmental period.

[331] In addition, the DSM V diagnostic criteria contain the following important note as a "specifier":

The various levels of severity [Mild, Moderate, Severe and Profound] are defined on the basis of adaptive functioning, and not IQ scores, because it is adaptive functioning that determines the level of supports required. Moreover, IQ measures are less valid in the lower end of the IQ range.

[Emphasis added.]

[332] Simply put, the key component of this diagnosis is the information about how the person functions in the world, accompanied by onset of intellectual and adaptive deficits while growing up. The diagnosis does not stand on intellectual test scores alone. When one looks at the tables setting out the severity levels for Intellectual Disability, there was insufficient reliable information available to Dr. Hervé to permit him to place Mr. Balbar on that spectrum of disability, in the event the overall diagnostic criteria were met. This became very clear during Dr. Hervé's cross-examination on Mr. Balbar's probation records as a young person and assumptions Dr. Hervé made about Mr. Balbar being unable to care for his son without assistance.

[333] In particular, after reviewing the probation documents (Exhibit 30), which commenced when Mr. Balbar was 17 years old in 1989 into his late 20s, Dr. Hervé conceded that he did not find support in the records for his diagnosis of Moderate Intellectual Disability. He subsequently agreed that if he accepted the facts put to him from the crime boss confession (particularly the "Easy-Off" passage, Exhibit 21A, p.19), it showed Mr. Balbar at a higher level of functioning inconsistent with his diagnosis.

[334] The evidence of Dr. Hervé establishes that apart from the intellectual testing results that may be suspect due to interpretation, Mr. Balbar deliberately setting about to do poorly upon them or a combination of both, Dr. Hervé had no independent information available to him to support how Mr. Balbar actually functioned in the world. In particular, he did not have any education records, no criminal record, no medical information, no information about the reported head injuries and no information from KRCC or FRCC where Mr. Balbar had spent years in custody. Dr. Hervé's sole sources of information for two of the key criteria of his diagnosis of Moderate Mental Disability were what Mr. Balbar had reported to Dr. Nicholaichuk in 2009, as supplemented by his own interview with Mr. Balbar in 2014, and the information conveyed by Dr. Nicholaichuk in his 2009 report, the sources there being Mr. Balbar and a phone call to Mr. Balbar's mother on September 29, 2009.

Summary of Findings regarding Mr. Balbar

[335] Dr. Hervé stated in his report that "[i]ntelligence tests measure the capacity of an individual to understand the world about him/her and his/her resourcefulness to cope with its challenges." That may be so, properly administered and interpreted. However, the DSM IV and DSM V criteria for Mental Retardation and Intellectual Disability respectively, place considerable weight on adaptive functioning, which was not properly assessed in relation to Mr. Balbar by either Dr. Nicholaichuk or Dr. Hervé.

[336] The expert opinions of Dr. Nicholaichuk and Dr. Hervé with regards to Mr. Balbar's intellectual capacity as expressed in their reports and their testimony in court do not provide the Court with reliable evidence in this regard for the reasons set out above. Unable to attach any appreciable weight to either of these reports and the lack of other evidence of this nature leaves the Court in the difficult position of having to make an assessment from the remainder of the evidence, which is mainly comprised of the evidence about Mr. Balbar's functioning in the Mr. Big operation, also set out above.

[337] On this basis, I am unable to find that Mr. Balbar had a sufficiently low level of intellectual capacity or adaptive functioning so as to warrant a finding that he was too vulnerable a person to be a target in Project Eventail. To the contrary, the evidence of how Mr. Balbar actually behaved during the Mr. Big operation and the very limited evidence about his background and lifestyle portrays a person who may be of limited intelligence, yet, for whatever reason, possesses considerable "street smarts" and an eclectic store of knowledge and skills, the full extent of which remains unknown.

XIII. The Hart Analysis

Probative Value

[338] As previously set out, assessing the probative value of evidence requires the Court to engage in a preliminary weighing of the evidence in order that the trial judge, as gatekeeper, may determine threshold admissibility and not the ultimate question of whether the evidence should be accepted. Mr. Big confessions derive their probative value from their reliability: Hart, at para. 99. Truthful statements by an accused that he or she has committed an unlawful homicide are clearly probative in relation to the prosecution of the offence arising from the unlawful homicide.

[339] Here, Mr. Balbar's statements to C. during the undercover operation and his confession to H. in the crime boss interview are probative of the identity of Ms. Hamill's killer, the actus reus of the offence, the mens rea of the offence and a possible defence of self-defence.

[340] The reliability of a confession is to be assessed by the trial judge taking into account the factors listed in Hart, which are not to be considered mechanically as a checklist but by examining "all the circumstances leading to and surrounding the making of a confession" (at para. 104).

[341] The factors relating to the circumstances of the confession (at para. 102) to be considered are:

1. Length of the operation;
2. Number of interactions between accused and police;
3. Nature of the relationship between accused and police;
4. Nature and extent of inducements offered;
5. Presence of any threats;
6. The conduct of the Mr. Big interrogation;
7. Personality of the accused, including age, sophistication and mental health.

[342] The factors to be considered in terms of markers of reliability (at para. 105) are:

1. Level of detail in the confession;
2. Whether additional evidence was discovered as a result of confession;
3. Whether the confession identifies elements of crime that have not been made public;
4. Whether it accurately describes mundane details that accused would not otherwise have known.

[343] Before setting out my findings on each of these factors in turn, I note that clearly these factors are not to be weighed as of equal importance.

[344] In Hart, Mr. Justice Moldaver placed particular emphasis on the personality of the accused, stating (at para. 103), "A confession arising from a Mr. Big operation that comes from a young person or someone suffering from mental illness or disability will raise greater reliability concerns." On the other hand, Moldaver J. held (at para. 105) that strong confirmatory evidence could counterbalance weaknesses arising from the first seven factors: "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."

[345] Before turning to the factors listed above, I note that this is not a closed or exhaustive list, as in Hart the fact that the April 10 confession was not recorded militated against its admissibility, and in Mack 2014 the fact that there was consistency between what the accused had said to friends about his involvement in the murder and his confession to undercover officers supported the admissibility of the Mr. Big confession.

[346] With regards to the length of this Mr. Big operation and the number of scenarios, it was not overly long, nor was it intense. Here, there were 37 scenarios over a period of less than three months. Mr. Balbar expressed that he was quite happy to be away from Kamloops for the scenarios that took him elsewhere. There were breaks in between scenarios and upon occasion he opted to stay in the Lower Mainland as opposed to travelling back to Kamloops. While it seems overly mechanical to count scenarios, I note that this operation is comparable to the 30 scenarios over a period of approximately three months in Mack 2014, and much less extensive than the 63 scenarios over four months in Hart. In McDonald, Mr. Justice Fitch determined that a Mr. Big confession obtained in an investigation comprised of 86 scenarios over more than ten months was admissible, concluding with respect to its reliability that "there is no realistic possibility the circumstances of the investigation are such that Mr. McDonald would falsely confess to shooting Jones" (at para. 219).

[347] With respect to the nature of the relationship between Mr. Balbar and the undercover operators, the evidence is that Mr. Balbar liked C. from the outset, enjoyed the work and was keen to continue to be involved in work for the organization, even to the extent of calling C. to ask if there was additional work available for him towards the end of the operation. Early on, Mr. Balbar gave C. a small Halloween ornament, but other than that rather odd event the evidence does not suggest that their relationship was anything like the bond between Mr. Hart and his operators that led Mr. Hart to repeatedly say he loved them: Hart, at para. 137. The closest that Mr. Balbar came to expressing sentiments of affection was when he said he would do jail time for C. in the event that something went wrong on one of their jobs for the organization, and in his statement to H. that C. treated him "better than my own brother..." (Exhibit 21A, p. 9 l. 203). Mr. Balbar appeared to enjoy being associated with C. and the other members of the organization. Mr. Balbar's comment that

he trusted C. and not his friends is hard to assess, and may be more indicative of the accused's milieu in Kamloops, rather than some special bond. I note that Mr. Balbar was quite prepared to back out on the upcoming big job in his conversation with C. on December 19, 2007, when C. initially refused to go back to the area by the Halston Bridge to check for tire tracks (Exhibit 47A, Tab 2, ll. 12-24). This, based on the extent to which C. said he had vouched for Mr. Balbar with the crime boss, was not an expression of affection or loyalty by Mr. Balbar towards C. The Crown also pointed out that while C. contributed $200 towards an iPod for Mr. Balbar towards the end of the undercover operation as a Christmas gift, there was no indication that Mr. Balbar was inclined to reciprocate.

[348] There were a number of inducements provided by the undercover operators to Mr. Balbar that were clearly designed to keep him interested in working with C. for the criminal organization. First, there was money. The accused's pay varied, but amounted to a total of $4130 or a little more than $300 per week of the operation. He was typically paid small amounts and upon occasion C. would rip a $50 bill in half and give Mr. Balbar one half with the other to be provided when they next met. As Mr. Balbar became more involved in simulated crimes and could be viewed as providing a service to the organization, he received a few hundred dollars at the end of each scenario. There was no reliable evidence as to how much Mr. Balbar made from the sale of stolen copper wire, nor is it clear how much or what kind of financial assistance he was receiving monthly as either social assistance or disability assistance (briefly referred to as about $1000 per month). However, it is likely that the money Mr. Balbar received in the undercover operation was an incentive for him to want to continue to work for the criminal organization. He appeared to be poor, but there is no evidence that he was in desperate straits or lacking basic food and accommodation. At various times during the scenarios, Mr. Balbar was provided with meals, accommodation, several cell phones (as he lost a couple), some clothes and a suitcase.

[349] Apart from the information that Mr. Balbar provided to C. that he was living at his friend Mike's residence in Kamloops, where C. dropped him off and picked him up on occasion, not much is known about Mr. Balbar's lifestyle or personal and financial circumstances in 2007. Several times when C. called the number associated with that residence and asked to speak to Mr. Balbar, he was told that Mr. Balbar did not live there.

[350] More significantly, Mr. Balbar understood that he stood to receive $20,000 if he participated in the "big job" (C. showed him the cash placed into a safety deposit box), and regular work transporting diamonds to Montreal and collecting payments from the Nanaimo massage parlour. It appears that Mr. Balbar was not particularly motivated by the prospect of this money. He said that $20,000 was not much money, that he would do the "big job" for free, and that he would have been excited about $200,000 instead.

[351] What appears to have been more significant to the accused was the lifestyle the organization promised, including easy work and the prospect of moving away from Kamloops. He was particularly interested in having his own apartment, something that the

undercover operators held out as in his future, along with New Year celebrations in Whistler that involved a good time and female company. The future trips to Nanaimo to collect the payments from the Nanaimo massage parlour were to be accompanied by Mr. Balbar having his choice of any of the sex trade workers who worked there free of charge as an additional perk.

[352] I find that while there were several inducements of a type that could have had a coercive impact on an undercover target, there was no evidence that any of the inducements actually had that effect on Mr. Balbar. The only evidence is that Mr. Balbar liked the work, the easy money and the lifestyle. As I have already indicated, Mr. Balbar remained able to assert himself and to choose what suited him right to the end.

[353] As the Crown pointed out, the only time where Mr. Balbar perceived that work for the organization conflicted with his self-interest, he chose the latter. This arose after the re-enactment scenario (Scenario 37, December 18, 2007), when Mr. Balbar told C. and J. that going with them to the scene where he dumped the body was the "stupidest thing in the world" (Exhibit 46A, p. 70, ll. 1590 -1592). Then, as referred to above, the next day, over the phone, when C. initially declined to go back to the North Thompson River to look for tire treads, Mr. Balbar said: "I'll get back to ya, you... you don't got a... a replacement for me if I can't make it?" (Exhibit 47A, Tab 2, p. 1, ll. 23-24), which was in reference to him possibly declining to participate in the upcoming big job and foregoing his promised payment of $20,000.

[354] There is no evidence to support the suggestion that the undercover officers threatened Mr. Balbar in any way. While Mr. Balbar was present in scenarios where violence was threated to others and in close proximity to feigned violence of a rather extreme nature (in Scenarios 14 and 17), for the reasons I have previously set out, it does not appear that he was disturbed to any significant degree by these incidents. Rather, he was a willing participant with suggestions as to how to make the incidents more successful from the point of view of C. and the criminal organization. Although C. made it very clear that the organization did not tolerate "rats" and would harm or even kill them, and made inquiries as to whether Mr. Balbar's son may have ratted him out after they were stopped by the police in the traffic stop scenario (Scenario 33), Mr. Balbar's subsequent comments about his son in his confession to the crime boss, which included details about what his son might have seen of the killing of Ms. Hamill, put to rest any notion that Mr. Balbar felt that his son would be harmed by the criminal organization. There is simply no evidence to support a finding that Mr. Balbar interpreted anything that the undercover operators said or did as a personal threat to him or his son.

[355] As previously set out, the crime boss interview was not confrontational or aggressive, and took the form of a conversation rather than an interrogation. Mr. Balbar spoke freely and in detail about the Kamloops situation upon H. making the comment that Mr. Balbar had "another situation" that they had to deal with. Thereafter, Mr. Balbar talked, gestured and drew diagrams, acting at times with enthusiasm and chuckled as he described what had happened to Ms. Hamill.

[356] With regards to the personality of the accused, including his age sophistication and mental health, I have set out my detailed findings above. Although I accept that Mr. Balbar is not an educated or sophisticated man in any way, he does come across as someone who is street-smart and wily. While he is not educated or worldly beyond his own world, which appears at the material time to have been the local drug culture in Kamloops, he was able to manoeuvre his way through the everyday challenges of that life and beyond, when he was motivated and perceived it to be in his own best interest to do so. He appeared during the Mr. Big operation to function reasonably well, given his ongoing addiction to methamphetamines and the fact that he appeared to be facing new challenges in different environments. This is borne out by many aspects of his conduct in the Mr. Big operation.

[357] I turn now to the markers of reliability in Mr. Balbar's confession and what he told C. and J. during the re-enactment.

[358] This evidence correctly described the manner of Ms. Hamill's death by blows to the head, six of which showed a circular aspect consistent with the shape of the weapon Mr. Balbar said he used (namely a hammer or hammers), and the disposal of her body in a manner consistent with how and when it was found. As well, the statements by Mr. Balbar to C. and H., in which he provided details about how and where he disposed of Ms. Hamill's body, led to the discovery of the evidence of Mr. Rugolo, and Cst. Buckle. It is consistent with the phone records from Ms. Hamill's cell phone. The phone records show calls made to Mark Nelson and Yellow Cab at times that fit with the evidence of Nelson, Rugolo and Buckle in terms of Mr. Balbar setting the wheels in motion to dispose of the cooler containing Ms. Hamill's body.

[359] In addition, there is the additional evidence that only recently came to light that Mr. Balbar confessed to killing Ms. Hamill to Dr. Nicholaichuk, which is a separate confession apart from anything Mr. Balbar said during the Mr. Big operation. Mr. Balbar told Dr. Nicholaichuk that he made up "a whole bunch of stuff to make it look like he was tough", including the parts about the three different hammers, that he killed Ms. Hamill later because he did not want C. to think that she was trying to kill him, and that he was sure she was dead the first time he hit her. Although it varies from what Mr. Balbar told the crime boss in material respects, this separate confession greatly enhances the likelihood that what Mr. Balbar said in the Mr. Big operation with regards to the identity of Ms. Hamill's killer is truthful.

[360] Mr. Balbar's confession to the crime boss is very detailed. For example, when H. asked Mr. Balbar whether he thought that Ms. Hamill was still alive in the cooler, he responded, "Well she was still blowin' bubbles, so " (Ex. 21A, p. 40, l. 953). This unusual observation fits with the evidence of Dr. Stephen that the appearance of a "foam cap" may occur in cases of severe head injury due to respiratory complications in the stages preceding death. It is highly unlikely that Mr. Balbar would know of this medical fact other than having observed it himself.

[361] In his confession to H., Mr. Balbar described hitting Ms. Hamill over the head with progressively heavier hammers after having incapacitated her and put her in a cooler, which is a possible explanation that accounts for the large and lethal injuries to the left side of her head, labelled D and E by Dr. Stephen.

[362] While Mr. Balbar exaggerated the number of blows (50 or 60 blows) that he delivered to Ms. Hamill's head in speaking to the crime boss (Exhibit 21A, p. 14, l. 336), he appears to have been sufficiently assured by the criminal organization's insistence on honesty that he spoke freely about the difficulty he had finishing off an unconscious woman in a cooler, an activity that those proficient in providing violent endings for others might not be impressed with. While there is no corroboration as to the accused using three different weapons, this makes what Mr. Balbar had to say about how he killed Ms. Hamill highly probative and important evidence for the trier of fact to weigh.

[363] With regards to whether Mr. Balbar's confession identifies elements of the crime that had not been made public (i.e. holdback evidence) I am satisfied that the mechanism of her death was not made public and was known only to a very few police officers, Dr. Stephen and presumably the morgue attendant. Because of how her body was lodged against the snag in the North Thompson River, even Cpl. Muir, who retrieved her body, did not see the injuries to her head. He placed the body in a bag while still in the river and it does not appear to have been opened except in the presence of Cst. Kelly and/or Sgt. Gehl and during the autopsy. This effectively rules out dissemination of this information by random passersby or other professionals who responded to the call of a dead body in the river. The photographs and the autopsy report are reported to have been kept in a locked safe and their distribution limited to police officers who gained access to the contents of the holdback envelope as needed. The evidence of now retired Cpl. Mathieu is relevant in this regard.

[364] Although police procedures regarding holdback in this case are somewhat lacking by today's standards, it is sheer speculation without a shred of evidence in support, to say that Mr. Balbar might have gained his knowledge of how Ms. Hamill died from anything other than personal knowledge. The corroboration of Mr. Balbar's account of how he disposed of the cooler by Mr. Rugolo is utterly consistent with Ms. Hamill's body being in the cooler, which in turn fits with Mr. Balbar's account as to how she came to be there in her deceased state.

[365] In terms of mundane details likely only known to the accused, once Mr. Balbar is associated with disposing of the cooler via the evidence of Mr. Rugolo and to a much lesser degree Mr. Nelson, Mr. Balbar's comments on the difficulty he encountered when Ms. Hamill's foot popped up out of the cooler and deposited some blood outside the cooler is one such mundane and striking detail. Another is about how he got the cooler to the dead end lane behind the Sydney Apartments, how he placed it under a table that still appeared to be there in the photographs taken in 2007, and how he placed a pebble on top of the cooler when he left it in order to know whether anyone had disturbed it in his absence.

[366] Several inconsistencies arise in relation to what Mr. Balbar told H. or C. and J. during the re-enactment and other evidence. On the evidence of Cst. Buckle, the large white cooler she saw was in the kitchen and not Mr. Balbar's bedroom as Mr. Balbar indicated when the police attended in the early morning hours of July 30, 2003. Her evidence about what occurred when she and Cst. Gable attended the apartment is at odds with that of Mr. Balbar in some other respects, including that neither she nor Cst. Gable sat on the cooler. There are several slight variations regarding a small portion of the route Mr. Balbar described he and Mr. Rugolo took to transport the cooler to the area of the North Thompson River by the Halston Bridge during the re-enactment, and as testified to by Mr. Ruguolo. However, I do not regard those to be significant. In addition, I note that whereas Mr. Balbar was somewhat vague about where he dumped the cooler in speaking with H. during the crime boss interview, and did not tell H. about leaving the cooler and riding his bike back later at night to dump the body from the cooler and then dispose of the cooler, he provided those additional details to C. and J. in the re-enactment the day after the crime boss interview. The extent to which these variations amount to important inconsistencies is for the ultimate trier of fact. However, I do not regard them to be serious inconsistencies, such that they significantly detract from the other compelling indicia of reliability that attach to the confession and other incriminating statements made by Mr. Balbar during the Mr. Big operation.

[367] For these reasons I find the probative value of the Mr. Big evidence that the Crown seeks to place before the trier of fact to be high.

Prejudicial Effect

[368] In the present case, the moral prejudice of the Mr. Big evidence is significantly reduced by the Crown's position that it does not propose to lead a great deal of the Mr. Big evidence at trial. The Crown seeks to place before the trier of fact only three of the undercover scenarios, including the crime boss interview, and not to lead any evidence that Mr. Balbar participated in or endorsed simulated criminal activity or simulated violence. Nor does the Crown seek to lead any evidence concerning the accused's criminal history or history of violence.

[369] The three scenarios that the Crown intends to put before the jury are: the recording of conversation made after the cameo appearance from Scenario 30 (December 6, 2007), which is Exhibit 42 and 42B; the recording of conversation after the "Traffic Stop", Scenario 33 (December 11, 2007), which is Exhibit 44 and 44A; and the "Crime Boss Interview", Scenario 36 (December 17, 2007), which is Exhibit 21 and 21A. The Crown also proposes to redact certain portions of Exhibit 42B to remove any references to criminal or immoral activity unconnected to the charge before the Court. In relation to C., the primary undercover operator, the Crown proposes to lead specific and limited evidence, and not to call other evidence of the undercover operation at trial.

[370] The Crown submits that this proposal effectively eliminates the moral and reasoning prejudice discussed in Hart (at paras. 73-74 and 106-107), its theory being that if the jury accepts the accused's admissions that he killed Heather Hamill, the evidence that he had the required mens rea is overwhelming, even without the sort of contextual evidence that is often used by the Crown to bolster Mr. Big confessions.

[371] In my view, while it cannot be said that the limited use of this Mr. Big evidence eliminates moral and reasoning prejudice, the proposed reduced exposure to the trier of fact of what the Crown agrees is extraneous evidence of bad character serves to reduce both forms of prejudice. The reasoning prejudice in this case is minimal, as the less trial time that is consumed by such evidence that is not accompanied by factual disputes, the less reasoning prejudice it attracts.

[372] However, one must not lose sight of the inescapable moral prejudice in this case that arises from the fact that the accused has confessed his involvement in the alleged offence to the boss of a criminal organization to "clear up" a past problem and pave the way towards his future participation. The character of the accused is still tarnished before he steps into the witness box.

Weighing Probative Value and Prejudicial Effect

[373] In this case, I find that the probative value in admitting this evidence far exceeds its prejudicial effect. This has been established by the Crown on a balance of probabilities. The Mr. Big evidence emanating from Mr. Balbar has been shown by independent evidence to possess a number of compelling indicia of reliability. While there were inducements offered to the accused to engage him with the undercover operators and several of the scenarios contained a high level of simulated violence, there is no evidence that this impacted upon Mr. Balbar's decision to talk freely to C. and the crime boss when he considered it to be to his advantage. He bought into the ruse and decided to speak about Ms. Hamill's death to avail himself of the assistance that the crime boss could apparently offer to eliminate his jeopardy and to advance in the organization.

[374] In the event that I had accepted the expert opinions of the two psychologists called by the defence with regards to Mr. Balbar's reduced level of intellectual ability, it would have been a closer call in terms of assessing the degree of vulnerability of the accused as against the reliability of his statements in the Mr. Big investigation: Hart, at paras. 102-103.

Abuse of process

[375] I have previously set out the principles that inform a finding of abuse of process in relation to a Mr. Big confession. The onus is upon the defence to establish an abuse of process: Hart, at para. 113.

[376] As I mentioned at the outset, the defence position is that the average Canadian would be truly shocked by aspects of this Mr. Big operation such that it offends community values and cannot be condoned by the admission of evidence obtained in such egregious circumstances. The following aspects of the Mr. Big operation, considered cumulatively, are submitted to warrant a finding of abuse of process.

[377] The defence points to the cost of this undercover operation (in excess of $150,000, excluding base salaries), in large part spent on handsomely paid undercover officers spending time at strip clubs, consuming alcohol or socializing with each other barbequing steaks and watching porno movies while making explicit, crude comments about how they liked or disliked specific sexual performances, comprising of abusive conduct worthy of condemnation. The defence further submits that community standards do not extend to the truly gross, abhorrent racist and misogynistic language frequently used by the undercover officers in this case.

[378] As well, the defence submits that it is offensive and inappropriate that C. would tell Mr. Balbar to call him first if he ever got into trouble and not "a mouthpiece", undoubtedly referring to a defence lawyer, although I note that Sgt. G.'s evidence on this point was that it related to events during the undercover operation and no one intended to interfere with Mr. Balbar's Charter rights in the event he was charged with a criminal offence.

[379] In addition, the defence submits that the level of feigned violence went far beyond community standards when, in the simulated robbery, C. put a handgun that Mr. Balbar would have believed to be loaded into the mouth of a male undercover officer as part of a robbery scenario to compel him to turn over the cash. Threats to injure and kill those who did not meet their financial obligations to the criminal organization occurred in a number of scenarios, including threats to kill people's wives and children. Given that the undercover officers knew that Mr. Balbar had a young son of whom he was fond, the defence submits that this went beyond the pale in terms of an acceptable level of staged violence and threats of violence.

[380] In assessing the issue of abuse of process in the context of a Mr. Big operation I find the following summary by Mr. Justice Fitch in McDonald to be helpful (recognizing that this decision preceded Hart):

[247] Whether a particular manifestation of the Mr. Big strategy constitutes an abuse of process is a case-specific inquiry. It must take into account "all the circumstances". Without being exhaustive, the following considerations may be relevant to the analysis:

· The nature of the offence being investigated: United States of America v. Burns (No.1), 94 B.C.A.C. 46, 117 C.C.C. (3d) 454 at para. 11, where Hollinrake J.A., for the Court, quoted with apparent approval the extradition judge's conclusion that the Mr. Big technique, as applied in that case, "would not shock the sensibilities of an informed community considering the brutality of the crimes then under investigation ", and Rothman at p. 697-98;

· The background of the target as it is known to the police, including factors going to his character or disposition, life experience, and particular vulnerabilities arising from such things as age, addiction and emotional health: Langlet at paras. 115-120;

· The extent to which the investigation exploited the unusual vulnerabilities of the target: N.R.R. at paras. 425-432;

· The extent to which the implementation of the Mr. Big technique was coercive having regard to the length of the investigation and its overall nature or tone: Langlet at paras. 114-115, 121-129;

· The target's known or suspected criminal history: Langlet at para. 120;

· The target's known history of violence (apart from the offence being investigated) including its nature, degree, frequency and temporal connection to the offence under investigation;

· The reaction of the target to scenarios he or she would regard as involving overtly criminal acts before scenarios involving simulated violence were introduced: Langlet at para. 126;

· The reaction of the target to the scenarios incorporating simulated violence: Perreault, at paras. 8 and 42; R. v. Decoine-Zuniga, 2013 ABQB 563 at para. 57;

· The nature and extent of the simulated violence utilized in the investigation; and

· The reliability of the evidence obtained through this investigative technique: Grandinetti, at para. 36.

[381] The background and life experience of Mr. Balbar are not shown on the evidence to establish any particular vulnerabilities. There is no evidence that the police preyed upon Mr. Balbar's apparent addiction to methamphetamines. In fact, there is evidence to the contrary. With regards to a particular vulnerability due to limited intellectual functioning, had Mr. Balbar's behaviour and reliable psychological testing borne out a low level of intellectual functioning, then targeting him in the Mr. Big operation might well have constituted an abuse of process. However the totality of the evidence before the Court does not support such a finding.

[382] While the Court is, of course, reluctant to be seen to condone any sort of violence, threatened violence, racism or misogyny, it must be remembered that in terms of violence and threatened violence, it is all staged, feigned and designed for a very specific purpose. The words spoken and the activities of the police officers are directed at creating an atmosphere considered appropriate for their investigation. While I am of the view that some of what was said and done in the present case may have been gratuitous and unnecessary, the evidence of Sgt. G. in particular was to the effect that the police gauge the reaction of their target as they proceed, and in the event that the target shows reluctance to participate in an upcoming scenario involving staged crime or violence they take a different tactic or "dial it down."

[383] Mr. Balbar was more than willing to participate in activities involving crime and threatened and feigned violence directed towards others. His prior criminal record and other evidence indicate that Mr. Balbar had a familiarity with crime and a lifestyle associated with illegal drugs and property offences. He was not personally threatened and he obviously did not perceive his son to be in danger as a potential "rat" given how freely he talked to C. and the crime boss about what his son likely saw in terms of Ms. Hamill's demise. In comments Mr. Balbar made to C. after the traffic stop in Scenario 33, he displayed how astute and discerning he could be in terms of not having talked about Ms. Hamill's death previously and concerns about their conversation being recorded. There is no evidence of coercion in this case.

[384] Even if the Court found that staying the proceeding in light of impugned conduct would do further harm to the integrity of the justice system (which I have not), the Court is still obliged to consider whether any other remedy other than a stay is capable of redressing the prejudice: Babos, at para. 38. Here, the remedy would be an exclusion of the evidence. I am not able to conclude in all the circumstances of this case, despite what may be regarded as some excessive feigned violence in the Mr. Big scenarios referred to, that an abuse of process is made out. The police are alerted to the risk of including gratuitous violence in Mr. Big scenarios in the future or running the risk of the exclusion of the Mr. Big evidence. Unquestionably, the police business of investigating unsolved homicide cases using the Mr. Big technique is a nasty one, both in terms of the kinds of scenarios to be run and the nature of the offence under investigation. The killing of Ms. Hamill was a brutal event involving multiple blows to her head by a blunt object with a curved end, any one of which could have been fatal. Her body was then dumped into the North Thompson River, disposed of in a manner that her killer hoped would remove all trace of her and evidence of any wrongdoing. She was clearly a vulnerable woman in terms of her lifestyle and addictions.

[385] Properly run, the Mr. Big technique produces results. The Supreme Court of Canada in Hart has provided trial judges with the two-pronged test, the latter relating to abuse of process. Mr. Balbar's incriminating statements to C. and his confession to the crime boss have been found to be highly probative and of minimal prejudicial effect. While I am of the

view that the police must be very careful about scripting excessive violence into these operations because of its potentially coercive effect upon the target or because they exceed what the community will tolerate, it cannot be said that in the circumstances of the present case that a "reasonable well-informed member of the community" would be shocked by police misconduct: Roberts, at para. 15; McDonald, at para. 243. I find that the defence has failed to establish an abuse of process.

XIV. CONCLUSION

[386] For these reasons, I find that the evidence obtained in the Mr. Big investigation that targeted the accused, Mr. Balbar, may be admitted into evidence at trial. More specifically, I have found that the Crown has established that the evidence contained in Scenario 30 (audio from December 6, 2007, after the "Crime Boss Cameo", Exhibits 42 and 42B), Scenario 33 (audio from December 11, 2007, after the "Traffic Stop", Exhibits 44 and 44A) and Scenario 36, the video-recorded "Crime Boss Interview" between Mr. Balbar and H. (December 17, 2007, Exhibits 21 and 21A) may be admitted at trial. The probative value of this evidence significantly exceeds its prejudicial effect. Further, the defence has failed to establish an abuse of process based on the manner in which the Mr. Big investigation was carried out or based on the nature of its target, Mr. Balbar.

"Arnold-Bailey J."

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