

CANADA / JUDGMENT

## R. v. McDonald

2013 BCSC 2344

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Supreme Court of British Columbia

DECIDED

20 December 2013

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2013 BCSC 2344 R. v. McDonald

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. v. McDonald,

2013 BCSC 2344

Date: 20131220

Docket: 30925-2

Registry: Dawson Creek

Regina

v.

Thomas Anthony McDonald

Ban on publication pursuant to s. 648(1) of the

Criminal Code, R.S.C. 1985, c. C-46

### Before: The Honourable Mr. Justice Fitch

Corrected Reasons: This judgment was corrected at paras. 6, 30, 65, 125, 151, 152, 154, 169, 171, 192, 197, 212, 241, 247, 253, 283, 297, 356, 368,

and 390 on April 8, 2014.

Ruling on the Admissibility of Mr. McDonald's Pre-Arrest and

Post-Arrest Statements to the Police

Counsel for the Crown:

Clinton Sadlemyer, Q.C.

Lesley A. Ruzicka

Paola S.J. Konge

Dione F. Pizzey

Counsel for the Accused:

Janet Winteringham, Q.C.

Tam C. Boyar

Place and Date of Hearing:

Dawson Creek, B.C.

July 2-5, 8-12;

August 12-14, 19-23;

September 9-13, 16-19;

November 18-22, 2013

Place and Date of Judgment:

Vancouver, B.C.

December 20, 2013

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A. INTRODUCTION AND STATEMENT OF ISSUES

- [1] Thomas Anthony McDonald is charged with the first degree murder of Earl Dean Jones [Jones]. The offence is alleged to have been committed in the Dawson Creek area on September 26, 1981.
- [2] This omnibus ruling addresses the admissibility of inculpatory statements Mr. McDonald made to the police before and after his arrest. The admissibility of these statements was the subject of three pre-trial applications.
- [3] The first voir dire concerns the admissibility of inculpatory statements to undercover police officers who targeted Mr. McDonald with an unsolved homicide technique commonly referred to as a "Mr. Big" undercover operation. This phase of the investigation, which commenced on December 1, 2010, lasted about 10 ½ months and consisted of 86 scenarios. The scenarios gradually brought Mr. McDonald into the activities of a fictitious criminal organization and succeeded in developing a close bond between him and the primary undercover operator ("the primary"). On August 31, 2011 the police obtained one-party consent and third-party authorizations to intercept private communications, as well as a general warrant authorizing videotaping, in conjunction with the undercover operation. These intercepts were ruled admissible (2013 BCSC 2072) and some were adduced on the voir dire.
- [4] Shortly after these authorizations were obtained, the undercover investigation moved into its evidence-gathering phase. Between September 7-10, 2011 (scenarios 66-69), Mr. McDonald participated in locating an individual (played by an undercover officer) who was supposedly indebted to the fictitious criminal organization and its loan-sharking operation. He participated in locating the "debtor" and was led to believe that this person was kidnapped from his hotel room. He saw the debtor being confined by the primary and the other undercover operators he believed to be associated with the fictitious criminal organization. He was also led to believe that the cameo operators were preparing to torture the debtor to recover their money.

- [5] On September 10, 2011 Mr. McDonald was exposed to the aftermath of the feigned torture session. The debtor was made up to appear as if he had been beaten and had his index finger severed. The severed finger (a prosthetic digit created by a makeup artist) was paraded during the scenario for Mr. McDonald's benefit. All of these scenarios were, as they were intended to be, graphic, disturbing and convincing. Later that day, over lunch with the primary, Mr. McDonald made his first allusion to his involvement in the murder of Jones.
- [6] On September 20, 2011 Mr. McDonald told the primary that he was responsible for killing Jones. This confession was audiotaped.
- [7] On September 23, 2011 Mr. McDonald was taken to an apartment used by undercover officers and he provided a more detailed confession to the killing. This confession was audio and video recorded.
- [8] On September 24, 2011 Mr. McDonald travelled with the primary and a cameo operator to Dawson Creek where he participated in a re-enactment of the killing. The re-enactment was also audio and video recorded.
- [9] On October 12, 2011 (scenario 85) Mr. McDonald made a further admission to his brother, Jeremiah, which was also intercepted, that he shot Jones after an altercation in a bar in Dawson Creek.
- [10] Mr. McDonald was arrested on October 14, 2011.
- [11] Mr. McDonald seeks to exclude the fruits of the Mr. Big investigation and, in particular, the inculpatory statements he made on September 10, 20, 23 and 24, 2011. He also seeks to exclude his October 12, 2011 statement to Jeremiah, which he made when the primary was not present but the Mr. Big operation was ongoing. The defence sought, in closing argument, to extend the scope of its challenge to include the statement Mr. McDonald made to Jeremiah. It appears the Crown was given no notice until then that the challenge to the admissibility of the evidence extended to the inculpatory statement made by Mr. McDonald to his brother on October 12, 2011.
- [12] Mr. McDonald advances four grounds in support of his contention that the statements he made on September 10, 20, 23 and 24 and October 12, 2011 should be excluded.
- [13] First, he says the statements were compelled by the state in violation of the principle against self-incrimination. He invites the court to analyze this issue through the framework of principles set out in *R. v. White*, [1992] 2 S.C.R. 417.
- [14] Second, he submits that the undercover operation so controlled his life that he was "functionally detained" when he made the incriminating statements and that, as a consequence, the statements were obtained in violation of his right to silence.

- [15] Third, he argues that the conduct of the police, and, in particular, the degree of simulated violence used by them in the course of the Mr. Big investigation, amounts to an abuse of process.
- [16] Finally, he argues that his inculpatory statements should be excluded under the principled exception to the hearsay rule.
- [17] A common thread running through several of the arguments advanced in support of an exclusionary remedy is that Mr. McDonald's incriminating statements were compelled by the state in highly coercive circumstances and that serious concerns arise about the reliability of those statements. The grounds said by Mr. McDonald to justify exclusion of this evidence raise relatively novel issues that are currently before the Supreme Court of Canada in *R. v. Hart*, 2012 NLCA 61, 327 Nfld. & P.E.I.R. 178, appeal as of right to S.C.C., 35049.
- [18] The second voir dire concerns the admissibility of inculpatory statements Mr. McDonald made to Sgt. McCarl on October 14 and 15, 2011, following his arrest.
- [19] Two broad arguments are advanced in support of his submission that these statements should also not be admitted. First, Mr. McDonald submits that the Crown has not established the voluntariness of the warned statements beyond a reasonable doubt. Second, Mr. McDonald submits the post-arrest statements were obtained in breach of his right to counsel under s. 10(b) of the Charter. Specifically, he submits that the police:
- 1) failed to facilitate access to counsel without delay when he requested an opportunity to speak with a lawyer upon arrest;
  - 2) failed to meaningfully address confusion that arose about the scope of his right to counsel; and
  - 3) failed to provide a further opportunity to consult with counsel when: (a) they informed him that the 2011 interview constituted a "fresh start" and that a previous statement he had given to the police in 1983 might be inadmissible; and (b) they began revealing to him the specifics of the undercover operation to which he had been subjected.
- [20] If Mr. McDonald's post-arrest statements to Sgt. McCarl are admissible, the Crown seeks to have them admitted on the first voir dire to confirm the reliability of the inculpatory statements Mr. McDonald made to the police in the course of the Mr. Big investigation. Similarly, if I admit the October 12, 2011 statement to Jeremiah, the Crown relies upon that statement to confirm the veracity of Mr. McDonald's admissions to the undercover officers. Counsel for Mr. McDonald submits that the reliability assessment mandated by White must be restricted to a search for independent evidence that confirms the reliability of Mr. McDonald's statements. She submits that inculpatory statements Mr. McDonald made in other contexts (post-arrest and to Jeremiah) cannot be used to confirm the reliability of statements he made in the context of the undercover investigation.

[21] The third voir dire concerns the admissibility of a further inculpatory statement allegedly made by Mr. McDonald to Cst. Zwicker on September 16, 2013 when Mr. McDonald was being held in the police lockup at the Dawson Creek detachment of the RCMP pending completion of the first two pre-trial applications. The sole issue that arises with respect to this statement is whether the Crown has established beyond a reasonable doubt that it was voluntary.

## B. THE FIRST VOIR DIRE: THE ADMISSIBILITY OF MR. McDONALD'S STATEMENTS TO THE UNDERCOVER OPERATORS

### 1. Background

[22] The Crown called six witnesses on the first voir dire. Five of them are police officers with the Unsolved Homicide Unit who were engaged in the investigation. Four of the five played some role in the undercover operation. A publication ban is in place prohibiting the disclosure of information which could, directly or indirectly, disclose the identity of any police officer who participated in the undercover investigation. In light of this, I will refer to the officers throughout these reasons by identifying title only. The Crown called the team commander and file coordinator ("the team commander"), the lead investigator ("the lead investigator"), the primary, the cover man, who dictates the speed, flow and direction of the undercover operation and designs the scenarios to be used in this phase of the investigation ("the cover man") and a secondary undercover officer ("the secondary"). A number of other undercover officers were involved in this investigation and are referred to in these reasons as "cameo" operators.

[23] In addition, the Crown called a civilian witness, Mohammed Taati, with whom Mr. McDonald had an altercation arising out of a dispute about payment for services he provided to Bayshore Auto, a business run by Mr. Taati. The dispute occurred while the Mr. Big undercover operation was ongoing and Mr. McDonald discussed it with the primary. As I understand it, the Crown called Mr. Taati for two purposes: to enable a contextual assessment of the abuse of process claim by adducing evidence that further illuminates Mr. McDonald's background and tendency to aggression; and to demonstrate that a relationship of trust and confidence had developed between Mr. McDonald and the primary, that Mr. McDonald was using the primary as a confidant, and that the information Mr. McDonald provided to the primary during the course of the undercover operation, including his admission of responsibility for the shooting of Jones, is reliable.

[24] The Crown also adduced on this voir dire a considerable body of evidence respecting the history of the investigation, the mounting of the Mr. Big undercover operation, the scenarios used in that investigation and the audio and videotaped admissions Mr. McDonald made to the primary and secondary operators. As noted above, the Crown, with the consent of the defence, also tendered transcripts from the preliminary inquiry.

[25] Mr. McDonald did not testify on the voir dire.

- [26] The arguments advanced on Mr. McDonald's behalf raise fundamental questions respecting the admissibility of Mr. Big confessions. Is the broad analytical framework for self-incrimination claims developed in *White* applicable in this context? If the admissibility of a target's inculpatory statement must be assessed at the gatekeeping stage through a reliability filter, what test is a trial judge obliged to apply? Is it sufficient, for admissibility purposes, that the probative value of the statement exceeds its prejudicial effect? Alternatively, is it appropriate to adopt the threshold reliability test developed for the admission of hearsay pursuant to the principled approach? Should a test between the two be devised that takes into account the unique nature of Mr. Big investigations, the wide range of techniques used in such investigations, and case-specific concerns about reliability that may arise in that context? Does the concept of "detention" extend, for constitutional purposes, to encompass a "functional detention" in which, unbeknownst to the target of an undercover investigation, he or she is within the control of the state? Unfortunately, I am obliged to consider these issues without the benefit of the guidance the Supreme Court of Canada will undoubtedly provide in *Hart*.
- [27] As the arguments raised on Mr. McDonald's behalf involve a case-specific and highly fact-intensive inquiry, I will describe the Mr. Big investigation undertaken in this case and the context in which the inculpatory statements that are the subject of the first voir dire were made.
2. The Offence and Circumstantial Evidence Connecting Mr. McDonald to its Commission
- [28] In the early morning hours of September 26, 1981 Jones, a passenger in a vehicle driven by his wife, Marilyn, was shot and killed as they drove home after an evening of socializing and drinking in the Windsor Hotel Cabaret in Dawson Creek. The bullet entered the vehicle at the rear roof support on the driver's side, passed through Jones's head, and exited through the front windshield. The killing occurred in a rural area known locally as Fellers Heights, about 20 kilometres west of Dawson Creek.
- [29] A considerable body of circumstantial evidence connected Mr. McDonald to the shooting and he was, from the outset, regarded as the prime suspect.
- [30] The circumstantial evidence connecting Mr. McDonald to the offence is detailed in the preliminary inquiry transcript and in the affidavit of Cst. Kozlowski prepared in support of applications to authorize the interception of private communications, both of which were filed as exhibits on the first voir dire. I will not detail all that incriminating evidence or explanations that might innocently account for it. In brief, and as summarized from the preliminary inquiry transcript, the circumstantial evidence connecting Mr. McDonald to the shooting of Jones includes:
- Mr. McDonald was seen by a number of people in the Windsor Hotel Cabaret the night of the offence, including by Robert Peterson, a car salesman;

- Jones and Mr. McDonald had an altercation in the Windsor Hotel Cabaret the night of the shooting. It arose when Mr. McDonald asked Marilyn Jones [now McClarty] to dance. Jones took offence and slapped McDonald across the face several times. Mr. McDonald said he did not want to fight and walked away, kicking a chair as he withdrew;
- Shortly after the altercation, Marilyn Jones left the bar with Jones. She was driving. Jones was a front-seat passenger. She noticed the headlights of a vehicle that appeared to be following her. As she turned left onto the Heritage Highway toward Fellers Heights, Jones leaned over to open a beer. She heard shots (more than one and she was pretty sure two) and saw Jones "slump over" in his seat. She looked behind her a few times and saw a pickup with clearance lights on the cab. The pickup was a little way into the intersection. She got out of the car and ran to the nearest house. She testified at the preliminary inquiry that she did not see the pickup when she got out of the vehicle and has no recollection of seeing it leave the scene. She testified that, "I didn't see it leave, so I don't know if it left or if it just turned its lights out and I couldn't see it." She testified that her mind was not focused on the pickup. As no one was home at the first house, she went back to the car to check on Jones. She then started to run towards a house farther up the road. As she was doing so, a pickup came up behind her "real fast". It seemed to her that the truck was going to knock her off the road so she jumped into the ditch. After it passed, she proceeded to the second house and told the resident that her husband had been shot;
- The Dawson Creek detachment of the RCMP was informed of the shooting at approximately 2:40 a.m. on September 26, 1981 and attended the scene. Officers from the Fort St. John detachment of the RCMP were informed of the shooting at approximately 3:00 a.m., dispatched to set up a roadblock on the Alaskan Highway north of Taylor, and instructed to look for a green truck with clearance lights and a lone male occupant;
- Sometime after 3:00 a.m. but before 4:00 a.m. Mr. McDonald, who was alone, was stopped by Fort St. John detachment officers near Taylor. He was driving away from Dawson Creek at a higher rate of speed in a green pickup owned by his brother, Jeremiah. Mr. McDonald was staying with his brother in Fort St. John at the time;
- The pickup had clearance lights on the roof of the cab. Both of the vehicle's headlights were in operating condition;
- Mr. McDonald told one of the officers who participated in the stop that he was coming from the Windsor Hotel in Dawson Creek;
- A box marked .30-30 ammunition was found on the front seat of the pickup Mr. McDonald was driving;
- Copper jacket bullet fragments found at the scene were consistent with .30-30 caliber ammunition;
- The gun that created those bullet fragments was consistent with and "probably" was a .30-30 Winchester rifle;

- An empty gun case was found behind the seat of the pickup;
- It was subsequently determined that by travelling between 60 and 85 mph and using different possible routes, the drive from the scene of the homicide to the location at which Mr. McDonald was stopped would take between 30 and 48 minutes;
- On forensic examination, gunshot residue was found on the hood and fenders of the truck Mr. McDonald was driving the night of the offence. There is no way of determining when that residue was deposited; and
- Mr. McDonald left Fort St. John for the United States (where he was living at the time) on the afternoon of the day of the shooting despite telling an acquaintance at the Windsor Hotel that evening that he would be staying in the area for another week to get some equipment (a "Cat") in working order.

### 3. The 1983 Interview of Mr. McDonald in Redding, California

- [31] Mr. McDonald was first interviewed by Cst. Larson, the original lead investigator on the file, and Cpl. Kitzul, in Redding, California in 1983.
- [32] At the time, it was not the practice of the police to hold back investigative information. Hold-back information is information that would only be known to the perpetrator and select investigators. Information of this type is held back from the media and the larger investigative team. Only a select group of investigators are privy to hold-back information and, in accordance with current practice, they sign off on a document confirming their understanding that this information must not be disclosed. There was no investigative hold back in this case. The absence of investigative hold back is a concern on undercover operations because the police are trying to elicit from the target a truthful account - one that can be confirmed by evidence known only by a few investigators and the perpetrator.
- [33] In the course of the 1983 interview, the police revealed certain information from the investigative file to Mr. McDonald including: the name of the victim; that the shooting occurred on September 25, 1981 at 2:00 or 3:00 a.m.; that the investigation revealed Mr. McDonald and Jones may have worked together at a camp in Inuvik; that "it boils down to the fact" Mr. McDonald and Jones had an altercation in the hotel [Mr. McDonald agreed he was in the hotel, had asked a woman to dance and someone came up from behind him and punched him in the mouth]; the roadblock stop occurred at 3:40 a.m. and that the shooting took place 25 to 35 minutes before that; that the suspect vehicle had roof lights, was dark in colour and had a single headlight; the police seized a box of .30-30 caliber ammunition from Jeremiah's truck and were "quite interested" in that box of shells; that a cartridge brand found in the truck was consistent with the brand used in the shooting; and, that had Jones not been reaching toward the back seat to grab a bottle of beer when the shot was fired, nothing would have happened.

- [34] The absence of investigative hold back, and the information said to have been "fed" to Mr. McDonald by the investigative team in 1983, are important components of his contention that the statements he made to undercover officers in 2011 are unreliable.
- [35] The transcript of the 1983 interview of Mr. McDonald is before me as evidence on the first voir dire for the purpose of enabling whatever reliability assessment this Court determines to undertake.
- [36] In 1986 and again in 1988, Crown counsel reviewed the file and advised the police there was insufficient evidence to prosecute Mr. McDonald for the homicide of Jones.
4. Mr. McDonald's Departure from the United States and his Conviction in England for Manslaughter
- [37] Mr. McDonald was eventually deported from the United States in 2002 or 2003.
- [38] He lived in England for a time and was convicted there of the manslaughter of Roger Wilton in 2004. The offence occurred in 2003. Mr. McDonald was sentenced to six years' imprisonment.
- [39] In the course of the Mr. Big investigation, Mr. McDonald also told undercover officers about the Wilton manslaughter.
- [40] During the first voir dire, the Crown sought to adduce (on the voir dire only) photographs of the crime scene depicting the very substantial injuries Mr. Wilton sustained in the beating perpetrated by Mr. McDonald, as well as the Reasons for Sentence of the English trial judge. The horrific nature of the injuries Mr. McDonald told the primary undercover officer he inflicted upon Mr. Wilton are, in general terms, confirmed by the photographs and Reasons for Sentence. There are also some discrepancies between the account related by Mr. McDonald to the primary undercover officer and the known circumstances of the manslaughter offence as reflected in the photographs and Reasons for Sentence. Having said that, the Crown argued (and counsel for Mr. McDonald did not dispute) that this evidence was relevant to any inquiry the court undertook into the reliability of the statements Mr. McDonald made to the undercover officers in 2011 about the killing of Jones.
- [41] I admitted this evidence on the first voir dire (see 2013 BCSC 1977) for two purposes.
- [42] First, the reliability of Mr. McDonald's statements to the undercover officers is front and center on at least two of the questions raised for determination on this voir dire. It forms an important component of Mr. McDonald's constitutional argument that his right against self-incrimination was infringed by the manner in which the Mr. Big investigation was conducted. In addition, if Mr. McDonald succeeds in his argument that the statements he made to the undercover officers are hearsay, it will be necessary to consider whether those statements meet the test of threshold reliability under the principled approach. If McDonald provided an accurate account of his involvement in the English manslaughter, this constitutes circumstantial evidence from which an inference might be drawn that he was

also being truthful when he disclosed to the undercover officers the details of his involvement in the Jones killing. Put differently, to the extent the photographs and Reasons for Sentence tend to confirm that Mr. McDonald was being candid in describing to the undercover officers the circumstances of the manslaughter, it makes more likely the proposition that he was also being candid in describing his involvement in Jones's killing.

- [43] Second, the circumstances surrounding the English homicide are relevant to Mr. McDonald's abuse of process argument. The extent to which the police can use simulated violence in an investigation of this kind without attracting constitutional censure is a case-specific inquiry which must take account of a range of considerations, including the target's background and predisposition to violence.
- [44] Whether it is necessary for me to have regard to this evidence in resolving the issues that arise for determination on the first voir dire is a question I will address later in these reasons.
5. Mr. McDonald's Return to Canada, Lifestyle Surveillance and the Commencement of the Mr. Big Investigation
- [45] In 2009, the police learned that Mr. McDonald had violated his parole in the United Kingdom and was back in Canada.
- [46] Investigation revealed that Mr. McDonald renewed his driver's licence in October 2008. He provided what the lead investigator described as a "mishmash" of an address in Crofton on Vancouver Island, along with a post office box number in Maple Ridge. He provided ICBC with two cell phone numbers, neither of which was in service. Mr. McDonald also gave a phone number to ICBC that matched Jeremiah's landline except that one number was off. He was using the name Tony (not Thomas) McDonald.
- [47] The investigation into the Jones murder, project named EPAPYRI, was rekindled in 2009 and Mr. McDonald was the subject of considerable lifestyle surveillance.
- [48] Police investigation revealed that when Mr. McDonald came to Canada in 1974 he reported having 14 years of schooling, two years of vocational training, and four years of related experience as an apprentice. He described himself as a diesel mechanic.
- [49] Mr. McDonald was determined to be residing alone at the Haney Hotel in Maple Ridge. Attached to the hotel are a liquor store and a strip bar.
- [50] Mr. McDonald worked for Nickel Bros., who are in the business of moving mobile homes and other structures. He was also employed (at a later date) by Kiewit in connection with construction work that was then ongoing on the Port Mann Bridge. He was noted to be working six days a week and 12 to 13 hours a day. He was also working as a self-employed mechanic and welder, and was known to hand out business cards.

- [51] Mr. McDonald had two vehicles registered in his name. He was believed to own property in Idaho.
- [52] He was known to frequent thrift stores in the area. By the end of 2000, the police were aware that Mr. McDonald had attended an employment insurance office and was selling equipment at auction.
- [53] He was assessed to be a fairly solitary person with no friends or personal relationships outside of work. He was, however, observed to be outgoing by nature. He was seen striking up conversations with waitresses and others. He was known to go to the strip bar and also had encounters with prostitutes. Otherwise, he was described as keeping a low-key lifestyle.
- [54] Further investigation revealed that Jeremiah McDonald lived in a converted bus at the Town and Country trailer park in Surrey and that the two brothers enjoyed a close relationship, which included frequent telephone and in-person contact.
- [55] The police knew Mr. McDonald had a Canadian record for impaired driving (1975 and 1979), assault (1980), and property-related offences. The police also learned of a separate incident at the Dawson Creek Hotel where Mr. McDonald got involved in an altercation and had a tire wrench wrestled away from him.
- [56] Mr. McDonald's ex-wife described him as a binge drinker with violent tendencies when he drank to excess.
- [57] Mr. McDonald was also determined to be a multi-state offender in the United States with charges in California, Washington, Oregon, Idaho and Utah for impaired driving, other driving-related offences, theft and resisting arrest. These offences led to his deportation from the United States.
- [58] The police also sought from the Dorset Police Department details about Mr. McDonald's conviction in England for the manslaughter of Roger Wilton. They learned that Mr. McDonald had an altercation with the victim over money. Both were sharing a room in a boarding house at the time. The altercation occurred in the kitchen area. The police learned that Mr. McDonald admitted striking the deceased with a sledgehammer but claimed to be acting in self-defence. They learned that the deceased was struck on the forehead, sternum and pelvis. The deceased's heart and lungs were dislodged from his body cavity in the attack.
- [59] The information gathered by the police through covert lifestyle surveillance provides insight into a potential target's residence, the vehicles and phones he uses and his employment, interests, associates and personality. All of this information is provided to the cover man to assist in the development of scenarios designed to befriend the target and enlist his trust. Mr. McDonald was considered to be a good target for an undercover investigation.
- [60] An Operational Plan was prepared in January 2010. It contained a summary of the offence and the police theory of the crime, and proposed use of an unsolved homicide undercover technique commonly referred to as a Mr. Big investigation. It was contemplated that the

Operational Plan would be run in conjunction with Part VI authorizations to intercept private communications between Mr. McDonald and the undercover officers and between McDonald and third parties, including Jeremiah. The objectives of the investigation were to determine the knowledge and involvement, if any, of Thomas McDonald and Jeremiah McDonald in the homicide of Jones. The Operational Plan was reviewed and approved at the management level in February 2010. Due to inadequate resources, the undercover investigation could not proceed at that time.

- [61] In November 2010 it was agreed that one of the management level officers who reviewed the Operational Plan would act as the primary. In a perfect world, the primary undercover operator would not know any of the details of the investigation. In the normal course, the primary gets only a Fact Sheet advising that the suspect is being investigated for a particular offence in relation to a named victim that is alleged to have been committed on a particular date. On occasion, information is also supplied to alert the primary to known or suspected violence in the target's background. No other details are provided. This practice is followed to ensure that: (a) the primary does not inadvertently compromise the investigation by saying something he could not possibly know; and (b) any statement the target determines to make is untainted by any knowledge the primary has about the offence or anything the primary may have said to the target about the offence.
- [62] The cover man testified that although he knew the primary had seen the Operational Plan, he was not concerned because he knew that critical portions of the undercover operation would be audio and video recorded. He testified that the primary was approached to become involved in this investigation because he is very experienced and "the best". In addition, the primary and target were thought to be compatible and a "perfect match". He acknowledged, however, that the primary initially indicated he was not sure about becoming involved in the investigation in this capacity. The team commander testified that even though it was "not ideal" and "contrary to best practices", a decision was made to insert into the investigation a primary undercover operator who had file knowledge. The team commander testified the police determined this arrangement could work and that she wanted this primary operator because of his experience. While the lead investigator was not as closely involved in the decision to select the primary, she also testified that the primary was chosen because of his age and experience. She testified that Mr. McDonald was considered to be a "wiley" target and the primary's experience was considered to be necessary in this case.
- [63] The primary testified that although the arrangement agreed upon in this case was not typical, he felt the risks could be mitigated given his experience (the primary had participated in a couple hundred undercover investigations and about 60 Mr. Big interviews), his awareness of the risks, and his knowledge of the care that he would have to exercise not to mention anything about the investigation in the presence of the target.

## 6. The Mr. Big Investigation

- (a) The Credibility, Bonding and Grooming Scenarios: December 1, 2010 - August 31, 2011

- [64] The "bump" (or introductory scenario) occurred on December 1, 2010. It involved a "chance" meeting between the investigative team commander, cover man and Mr. McDonald at an auction house. The scenario was designed to establish contact between Mr. McDonald and the primary. It succeeded. Mr. McDonald mentioned that he had a mobile welding truck and charged \$40 per hour. The cover man said that he had a friend (the primary) who was looking for someone to do some welding work. Mr. McDonald gave the cover man his number for the primary to get in touch with him.
- [65] The first scenario between Mr. McDonald and the primary occurred on January 19, 2011 at a covert police warehouse, which Mr. McDonald was led to believe housed the primary's business operations. The primary met with Mr. McDonald, told him he got Mr. McDonald's number from a friend and asked for an estimate on some welding work for a bike trailer. The primary told Mr. McDonald he was in the asset recovery business. In the second scenario, the primary told Mr. McDonald he was in the motor vehicle repossession business.
- [66] The early scenarios were designed to develop a bond between Mr. McDonald and the primary and to establish the credibility of the primary's business.
- [67] Mr. McDonald told the primary on January 20, 2011 that he had done welding work for Nickel Bros., but was laid off in December, 2010.
- [68] On January 24 and 25, 2011 Mr. McDonald advised that he was starting work full time with Kiewit doing 12-hour shifts but would do the bike trailer welding work for the primary on the weekends. The cover man testified that the speed, flow and direction of an undercover operation are influenced by a number of factors, including the availability of the target. The primary provided similar evidence and testified that the speed of the investigation will also be influenced by a target's willingness to participate and his response to the scenarios. In this case, a constant theme was that while Mr. McDonald continued to do work for the fictitious criminal organization the primary fronted, he always had other jobs (with Nickel Bros., Kiewit, and as a self-employed welder) and that he was jumping in and out of the undercover operation. The investigation took longer because Mr. McDonald had other outside work.
- [69] As Mr. McDonald worked on the primary's bike trailer, repossession scenarios were being played out in front of him. Both the primary and cover man testified that Mr. McDonald was a very hard worker who, on occasion, seemed not to take in the "show" that was being mounted for his benefit. Mr. McDonald was eventually led to believe that the primary had a thriving and lucrative business with a number of employees.
- [70] Some hints that the primary was engaged in potentially shady business deals were introduced early on. The primary told Mr. McDonald during scenario #2 (January 25, 2011) that he had a guy who would build compartments in shipping containers.

- [71] In scenario #3 (January 28, 2011), which also occurred at the warehouse, the primary and a cameo operator talked about making \$10,000 on the repossession of an Infinity motor vehicle. Mr. McDonald advised the primary that he could not go to the United States because he had been deported for not reporting income.
- [72] In scenario #4 (January 29, 2011), the primary had a cameo operator deliver to him a briefcase with a combination lock on it. Again, the primary was uncertain whether Mr. McDonald was taking note of what was playing out in front of him.
- [73] By scenario #5 (January 30, 2011), Mr. McDonald was joining the primary and his associates after work at a pub for drinks, dinner and socializing. This became a fairly regular feature of the interactions between Mr. McDonald and the primary as the scenarios developed. The primary complimented Mr. McDonald on his hard work. One of the cameos present that evening emphasized the importance of working smarter, not harder.
- [74] The cover man testified that he had concerns about the impact of alcohol on Mr. McDonald. Accordingly, he set the bar low on alcohol consumption in designing the scenarios. This became a theme throughout the undercover investigation and was referred to as the "two beer limit". The cover man was aware that on a few occasions the rule was exceeded and that three or possibly four drinks were consumed. Even so, he testified that drunkenness was not permitted in any of the scenarios.
- [75] The objective of scenario #6 (February 5, 2011), was to determine Mr. McDonald's work schedule. The primary wore a Rolex watch and two diamond rings to emphasize his wealth. Mr. McDonald told the primary he hated his job with Kiewit because of the rules, paperwork and the fact that it was shift work involving outside jobs in the rain. The primary emphasized that he had lots of work for Mr. McDonald. During the course of their discussions, the primary pretended to get a phone call from an employee about a debtor who could not pay money owed to the fictitious criminal organization. The primary showed his edge by saying in front of Mr. McDonald in a louder tone of voice that he better not have to come down there to deal with it.
- [76] It is evident that these initial scenarios worked to develop a bond of friendship and trust between Mr. McDonald and the primary. Mr. McDonald was paid regularly for his work and clearly enjoyed working with the primary.
- [77] On February 9, 2011 (scenario #8), Mr. McDonald continued to do welding work for the primary at the warehouse. Mr. McDonald advised the primary that Kiewit wanted him to work weekends as well. The primary told Mr. McDonald that he had lots of indoor work for Mr. McDonald to do but that it was up to him. Mr. McDonald said he would let the primary know about his availability for future work.
- [78] On February 11, 2011 Mr. McDonald called the primary to cancel his agreement to work that Sunday, advising that he had to work overtime with Kiewit.

- [79] On February 19, 2011 (scenario #9), the primary engaged Mr. McDonald to assist with a vehicle delivery to Whistler. Mr. McDonald again told the primary that he did not like working at Kiewit and that Nickel Bros. wanted him to come back to work for them. The primary staged receiving a call from his accountant and discussed going to Cancun to meet with him. He told Mr. McDonald that his accountant was someone who worked with a pencil and eraser - this was to emphasize the primary was not an "above the board" person.
- [80] On February 20, 2011 (scenario #10), Mr. McDonald told the primary he was planning on working for Kiewit for two more weeks before going back to work with Nickel Bros. The primary asked Mr. McDonald if he was interested in doing repossession work for him in the future - like the vehicle delivery to Whistler. Mr. McDonald said he would be interested and that working for the primary was like "a paid vacation".
- [81] On February 25, 2011 Mr. McDonald told the primary that he quit his job with Kiewit and that his schedule was now wide open. He told the primary that he would be working for Nickel Bros. as of March 15, 2011 but not on a full-time basis. Mr. McDonald again told the primary that he was available to do repossession work.
- [82] Later, he told the primary that he was interested but also apprehensive about repossession work because people might get upset. The primary told Mr. McDonald he did not have to do anything he was uncomfortable with and that if he was uncomfortable with anything, Mr. McDonald should just let him know.
- [83] On March 9, 2011 (scenario #14), Mr. McDonald gave the primary an invoice in the amount of \$1,040 for materials and labour in relation to work on the bike trailer. Mr. McDonald wrote on the invoice, "I enjoy working with you."
- [84] Scenarios that more explicitly portrayed the primary as engaging in "shady" business transactions commenced with scenario #15 on March 10, 2011. Mr. McDonald was engaged on this occasion to conduct surveillance on an individual the primary was meeting in a pub. The primary said he was considering loaning money to this person. After this scenario, for which he was paid, Mr. McDonald agreed right away to do a Victoria vehicle delivery, saying that it would be "like a holiday".
- [85] On March 15, 2011 Mr. McDonald advised the primary that he had work with Nickel Bros. for the next two weeks, seven days a week, and could not do the Victoria vehicle delivery. The primary informed Mr. McDonald this was not a problem and that while he was looking to throw work Mr. McDonald's way, he had other guys to do it.
- [86] On March 24, 2011 (scenario #16), Mr. McDonald advised the primary that he would be finishing his job with Nickel Bros. by the end of the following week and talked of moving to Kelowna. The primary said that was too bad because while he had some work for Mr. McDonald in the interior, more of his work was in the Lower Mainland. The primary then paid a cameo operator \$800 in front of Mr. McDonald for doing the Victoria vehicle delivery. He did so to impress upon Mr. McDonald the remuneration he was missing out on.

- [87] In the early part of April, 2011 the primary had difficulty engaging Mr. McDonald because of Mr. McDonald's work commitments with Nickel Bros.
- [88] On April 14, 2011 (scenario #17), Mr. McDonald advised the primary that he was still working at Nickel Bros. The two men met in a pub. Mr. McDonald again brought up the possibility of moving to Kelowna. Mr. McDonald agreed to assist the primary with the repossession of a vehicle in Harrison. That scenario was executed on April 16, 2011. The primary led Mr. McDonald to believe that he had ways of locating people. The scenario was also designed to plant the seed that the primary was in the loan-sharking business. When the two men stopped for lunch, Mr. McDonald informed the primary that he had lived in Dawson Creek but did not say when. Mr. McDonald also told the primary that, moving forward, he had no fixed work schedule with Nickel Bros. Mr. McDonald also told the primary that he liked getting cash payments under the table.
- [89] On April 20, 2011 (scenario #19), Mr. McDonald accompanied the primary to the River Rock Casino to complete a vehicle sale. The primary told Mr. McDonald that the buyer was in security and that he might be a helpful contact down the road. The primary also told Mr. McDonald that while he had more work for him, he needed a commitment because if Mr. McDonald was unavailable the primary had to scramble around to find someone else to do the job. The primary reminded Mr. McDonald how much money the cameo operator was paid for the Victoria vehicle delivery Mr. McDonald was unavailable to do.
- [90] On April 27, 2011 (scenario #20), Mr. McDonald assisted the primary with the delivery of a repossessed vehicle to Penticton. The primary asked Mr. McDonald if he was okay with doing surveillance the following day while the primary met with another potential borrower. Mr. McDonald laughed and said, "No problem". Over dinner that evening the primary told Mr. McDonald he was with the Hells Angels in Calgary when he was much younger and did "bad things" to people.
- [91] On April 28, 2011 Mr. McDonald complained to the primary that Nickel Bros. owed him money. The primary used the opportunity to assure Mr. McDonald that he would not be out-of-pocket while working for him. The primary confirmed with Mr. McDonald that he was okay with conducting surveillance while he met with a prospective borrower. The primary said that he needed to know if Mr. McDonald was not okay with doing this. Mr. McDonald confirmed that he was okay with assisting the primary in this way. The primary then met with a cameo operator and discussed a \$200,000 loan at 20 per cent interest, which would compound weekly. At the end of this scenario, the primary reinforced with Mr. McDonald that he needed him to be available on a reliable schedule.
- [92] On May 3, 2011 (scenario # 22), Mr. McDonald assisted the primary with the delivery of a speedboat to a client in Osoyoos. The two men stayed in the area overnight. They had dinner together and talked about their personal lives, including their ex-wives, prostitutes and a woman Mr. McDonald was seeing in Maple Ridge. Mr. McDonald said he had been arrested and deported from the United States because of an immigration issue; he previously told the

primary that it was because of his failure to report income or tax. Mr. McDonald mentioned to the primary he had done some nasty things in the past. The primary did not pursue it.

- [93] On May 4, 2011 (scenario #23), Mr. McDonald assisted the primary with the repossession of a vehicle in Kelowna. In dealing with the owner of the repossessed vehicle, the primary suggested that he was in the loan-sharking business but made it clear that he did not normally put out small loans and would not be as nice as the bank if the customer did not pay.
- [94] On May 5, 2011 (scenario #24), Mr. McDonald assisted the primary in a loan-sharking transaction by escorting a client to a hotel room and counting out a \$100,000 loan the primary was making to the client (a cameo operator). Once again, the primary told Mr. McDonald that he did not have to do anything he did not want to do and asked whether Mr. McDonald was okay with the scenario. Mr. McDonald confirmed that he was and said that he would be okay doing payment pickups in the future.
- [95] All of these scenarios were to the end of continuing to develop a bond between Mr. McDonald and the primary, and establish the credibility of the primary's business.
- [96] On May 11, 2011 Mr. McDonald told the primary that he bought a trailer and was planning on moving it to Kelowna to live there.
- [97] On May 13, 2011 (scenario #25), Mr. McDonald was supposed to be in Penticton looking for a vehicle. When the primary found out that Mr. McDonald was in the Lower Mainland he called Mr. McDonald, gave him "shit", told Mr. McDonald he was paying him to be in Penticton, acted angry, and then hung up.
- [98] On May 17, 2011 Mr. McDonald again told the primary that he was done with Nickel Bros. and that he was moving to Kelowna to live in his trailer.
- [99] As the scenarios progressed, the activities engaged in by the primary became more explicitly criminal and Mr. McDonald was given a more important and trusted role. Mr. McDonald also told the primary he was beginning to rely on the money the primary was paying him. Despite this, Mr. McDonald also put the primary off on other occasions telling him he had other work to do.
- [100] On May 18, 2011 (scenario #26), Mr. McDonald assisted the primary with the sale of fraudulent debit cards to another undercover operator. There were 180 cards, each of which supposedly had a \$1,000 withdrawal limit. The transaction was, therefore, represented to be worth \$180,000. After the scenario, the primary asked Mr. McDonald if he was okay with what had occurred. Mr. McDonald said that he was not sure and expressed worry about getting caught. The primary said that the real money was in this kind of transaction and that his repossession business was just a front. Mr. McDonald said that he did not want to know in the future what he was moving. The primary assured him that he was not into drugs and emphasized the importance of Mr. McDonald trusting him as he trusted Mr. McDonald. He also told McDonald that whether he participated in future transactions like

this was up to him.

- [101] On May 19, 2011 (scenario #27), Mr. McDonald gifted to the primary his NASCAR-style racing jacket.
- [102] On May 28, 2011 (scenario #28), Mr. McDonald assisted the primary in transporting a vehicle in which diamonds had been concealed from the United States border to the Lower Mainland. The diamonds were secreted in a pop can and when Mr. McDonald saw this he said he was surprised and impressed and that it "blew him away". The primary explained to Mr. McDonald the hierarchy of the organization and that the primary had people to answer to as well. He described himself as a second-level guy. Mr. McDonald was paid \$800 for his assistance in this scenario. Mr. McDonald mentioned to the primary that he was doing work for Persians on the King George Highway (Bayshore Auto) but was not being paid. He told the primary he did not know what he would have done the past few months if not for the work the primary was giving him.
- [103] On May 31, 2011 Mr. McDonald told the primary that he got into a dispute with the "Persian guy" over nonpayment of the bill. Mr. McDonald told the primary he took a pick tool used for logging and slammed it on the Persian's desk saying to him that he would pay one way or another. Mr. McDonald told the primary that if the Persian made a move towards him, he would have nailed him with the pick. The primary sought to mitigate the situation by asking Mr. McDonald to bring to him the bill he presented to Bayshore Auto. He also counselled Mr. McDonald to stay away from there. A few days later, Mr. McDonald gave the primary the bill he presented to Bayshore Auto.
- [104] Mohammed Taati testified that he runs Bayshore Auto. He confirmed that he got into a payment dispute with Mr. McDonald and that Mr. McDonald came into his office holding a "digging pick" above his head or at shoulder level, yelling and demanding payment. The digging pick had a wooden handle with a steel pick that was sharpened on both ends. The police were called. Mr. Taati admitted that in his statement to the police he referred to the implement Mr. McDonald was holding as a saw. He testified that he later sought out an English translation of the Farsi word for the implement McDonald was holding and learned that it was called a digging pick. Mr. Taati's description of the implement used is generally consistent with the version of events related by Mr. McDonald to the primary. I accept Mr. Taati's evidence about what occurred and the type of implement Mr. McDonald used in this dispute.
- [105] The team commander testified that she reviewed the police investigative file into this incident and concluded that what occurred was essentially as Mr. McDonald had described it to the primary.

- [106] The team commander took steps to ensure the incident was investigated. Undercover officers removed Mr. McDonald's sawhorses from Bayshore Auto to eliminate any incentive on his part to have further dealings with the business owners. She testified that the incident was initially characterized as a causing a disturbance file but that the police officer assigned to the investigation ultimately determined it to be a civil matter. Mr. Taati was not interviewed by the police at all until June 2013.
- [107] On June 2, 2011 (scenario #29), Mr. McDonald transported a bag from a locker at IKEA to a hotel. He saw the primary remove diamonds from the bag and engage in a \$150,000 diamond sale transaction.
- [108] On June 3, 2011 (scenario #30), Mr. McDonald assisted the primary with a vehicle movement scenario in the interior. After completing the scenario, the two of them socialized and drank a couple of beers at Mr. McDonald's trailer in Kelowna. The primary told Mr. McDonald that he did four years for manslaughter after pushing or punching a guy who fell down some stairs.
- [109] Further vehicle repossession and vehicle movement scenarios followed in June, 2011. By this time, Mr. McDonald was living with his brother at the trailer park in Surrey. At the end of each day, Mr. McDonald would ask the primary to drop him off outside the trailer park. He was embarrassed about where he was living and described the trailer park as a "shit hole".
- [110] In mid-June, 2011 Mr. McDonald told the primary his schedule was open and he was available for work. He did mention, however, that he had other work with a guy in Oliver.
- [111] On June 17, 2011 (scenario #34), Mr. McDonald assisted the primary with another vehicle delivery to the Okanagan. He was paid \$700 for the two previous scenarios. He advised the primary he was not going to work for the guy in Oliver. Mr. McDonald told the primary that he wanted to continue to work for him. The primary told Mr. McDonald there was a big job coming up in a few months and that while the two of them were just getting to know one another, the primary might be able to get Mr. McDonald in on the job. The primary emphasized it was not his call and that he had to be sure. He said Mr. McDonald stood to make between \$20,000 and \$25,000 on this "big score." Mr. McDonald asked the primary if moving to Kelowna would screw up his work for the primary. The primary said it would not but that it was easier to give Mr. McDonald work in the Lower Mainland.
- [112] On June 22, 2011 (scenario #36) Mr. McDonald assisted the primary in escorting the undercover officer to whom the \$100,000 loan was made on May 5, 2011 to a hotel room where he counted \$110,000 representing a cash repayment. The primary testified that Mr. McDonald had no reaction to this money counting scenario and seemed comfortable with it. After the scenario he asked Mr. McDonald if he could travel by bus to Kelowna that week to put a bag in a bus station locker. The primary again asked Mr. McDonald if he was okay with that and Mr. McDonald said he was. The primary also brought up with Mr. McDonald the possibility of him travelling to Montréal to deliver a thumb drive (a so-called "iron key"),

waiting for a few days and then bringing something back with him to Vancouver. Mr. McDonald said right away he would do it. The primary asked Mr. McDonald if he was okay with it and Mr. McDonald said he was. Mr. McDonald was told there was two weeks of work in it for him.

- [113] The theme of the June 24, 2011 scenario was the importance of trust, honesty and loyalty. Mr. McDonald was again tasked with travelling by bus to Kelowna to put a bag he was carrying in a bus station locker. The primary met Mr. McDonald after the scenario at a pub in Kelowna. The primary asked Mr. McDonald, "What do you think about today, are you okay with it?" Mr. McDonald responded that he had not seen anything to worry about yet. The primary again emphasized that if Mr. McDonald had any issues about what they were doing he should let him know. The primary emphasized the importance of trust and loyalty and said that the two of them should not "bullshit" one another. He also said he had big plans for Mr. McDonald.
- [114] On June 27, 2011 (scenario #38), Mr. McDonald assisted the primary by moving a bag from Kelowna to the Lower Mainland. The primary told Mr. McDonald that the bag contained a CD with the shift list for the Kelowna RCMP detachment. When Mr. McDonald asked how the primary got this information, the primary replied, "That is a trade secret". Mr. McDonald again mentioned that he planned to stay in Kelowna for good. The primary reiterated that he had big plans for Mr. McDonald, referenced the "big score" again and emphasized that the more work Mr. McDonald did for him, the stronger the case the primary could make for including him in the "big score".
- [115] On June 30, 2011 Mr. McDonald told the primary he had been offered a month of work in Kelowna but turned it down to work for the primary. He also said that he was keeping busy when not working for the primary.
- [116] Scenarios 39-46 (June 30 to July 16, 2011) involved Mr. McDonald taking the train to Montréal to deliver a thumb drive. Mr. McDonald told the secondary operator who drove him to the train station that he turned down work that paid really well to take the trip to Montréal. When in Montréal, Mr. McDonald socialized with undercover officers there who were held out as members of the primary's criminal organization. Mr. McDonald followed the instructions he was given throughout the course of these scenarios. He repeatedly advised the Montréal undercover officers how much he liked working for the primary. He also advised them that he had done a few things in his past that he would never tell anyone about. The purpose of the Montréal trip was to show Mr. McDonald the lifestyle that would be available to him in the criminal organization. At the end of each evening, Mr. McDonald was dropped off at his hotel room. No steps were taken by the police to secure that room. It was emphasized to Mr. McDonald both before and after this trip that he was increasingly being entrusted with more important tasks.

- [117] Following his return from Montréal, Mr. McDonald assisted the primary in counting and loaning a further \$150,000 to the same person who had borrowed money on May 5, 2011. He also told the primary that he had attended an auction and bought two trucks that he was going to fix up and sell.
- [118] On July 27 and 28, 2011 (scenarios 48 and 49), Mr. McDonald was tasked with moving a bag containing fraudulent debit cards and counterfeit casino chips.
- [119] On August 3, 2011 (scenario #51), Mr. McDonald and the primary met with the same borrower who was requesting a further \$250,000 loan. The primary noted that the borrower would then be indebted to the tune of \$400,000.
- [120] On August 6, 2011 (scenario #52), Mr. McDonald was present when the further \$250,000 loan was made. The primary warned the borrower that there could not be any problems with repayments on a loan of this amount. The primary told the borrower it would be a big mistake to miss a payment and the borrower should not underestimate him or mistake his easy-going manner for weakness. After the scenario, Mr. McDonald talked to the primary about renting a place. The primary told him to hold off because he had a couple of apartments, one of which Mr. McDonald might be interested in. Mr. McDonald was later told that the apartment was worth \$600,000.
- [121] On August 9 and 11, 2011 (scenarios 53 and 54) Mr. McDonald assisted the primary with some further orchestrated loan-sharking transactions. The primary introduced Mr. McDonald to one of the borrowers as a newer guy who was fast becoming his right-hand man. Mr. McDonald told the primary on August 9, 2011 that he lived in England between 1996 and 1998 and that he went there from Ireland, after being deported from the United States. On August 11, 2011 the primary showed his fully furnished apartment to Mr. McDonald.
- [122] On August 15, 2011 (scenario 56), a counterfeit credit card sale was designed to lead Mr. McDonald to believe that he was being given more responsibility for conducting transactions on behalf of the criminal organization. The primary told Mr. McDonald he wanted him to take the lead in conducting this \$120,000 transaction because he would eventually be doing this kind of work on his own. The primary told Mr. McDonald that he had big plans for him. After the scenario, the primary asked Mr. McDonald how he thought it went. Mr. McDonald said "good" and confirmed he was okay doing this sort of thing on his own. The primary again emphasized that if Mr. McDonald did not want to do certain things "that it's fine, I just need to know." Mr. McDonald replied that he was fine with all of it so far.
- [123] On August 17 and 18, 2011 (scenarios 57 and 58), Mr. McDonald assisted the primary in testing counterfeit casino chips. When Mr. McDonald expressed some nervousness about testing the chips, the primary told him he did not have to do it. Mr. McDonald said that he was "in" and assisted in testing the chips.

- [124] On August 22, 2011 (scenario # 59), Mr. McDonald assisted the primary with the sale of diamonds to another undercover officer in a transaction said to be worth \$266,000. In this scenario, Mr. McDonald gifted a pair of reading glasses to the primary (the primary was constantly borrowing Mr. McDonald's reading glasses). Mr. McDonald confirmed his interest in the primary's Lower Mainland apartment. The primary indicated that the timetable for that was October and that it would be rent-free but that Mr. McDonald would occasionally have to look after a package or host a few guests. By this time, the police were aware that Mr. McDonald was living in his brother's converted bus in the trailer park and sometimes staying in his own trailer when he was in Kelowna.
- [125] On August 24, 2011 (scenario #60), Mr. McDonald did a debt collection of \$5,000 on his own. The primary asked Mr. McDonald if he was good to do this. Mr. McDonald said "sure". After this scenario, Mr. McDonald met with the primary and other cameo operators. One of the cameo operators introduced an upcoming big job but the primary told him not to talk about it. When the primary went to the washroom, the rest of the undercover operators spoke in front of Mr. McDonald about how much money they had made in the last big score.
- [126] On August 30, 2011 Mr. McDonald assisted the secondary with testing counterfeit chips at a casino. The two of them talked about the importance of honesty and loyalty and the upcoming big score. The secondary told Mr. McDonald that he would not have to worry about money if he was chosen for the big score. Mr. McDonald said he had no complaints about the primary and thought he was an outstanding person. Mr. McDonald said that he would be in Kelowna but for the work the primary had been giving him. Mr. McDonald also said that if he went to jail he had no one to blame but himself. Mr. McDonald told the secondary he was okay with work that falls in the "grey area" but it would be a different story if he had to meet someone in an alley with a gun. He also mentioned that he owned two properties in the United States, including an 8-acre parcel of land in Oregon.
- [127] The authorizations to intercept (and videotape) private communications were granted on August 31, 2011. From this date, the police had consent and non-consent audio and video interception capability and a tracking device warrant.
- (b) The Evidence Gathering Scenarios: September 1, 2011
- October 14, 2011
- [128] The primary testified he was aware by September, 2011 that Mr. McDonald was not taking on any work except that supplied by the fictitious criminal organization. The evidence suggests that Mr. McDonald worked exclusively for the primary from about the end of July, 2011.
- [129] The team commander testified that scenarios 65 and following were evidence-gathering scenarios designed to elicit relevant conversation between Mr. McDonald and the primary.

- [130] It is fair to say that by the time the evidence-gathering scenarios were implemented, a relationship of trust had developed between the primary and Mr. McDonald. The relationship was an easy one, characterized by the sharing of confidences, life experiences, the telling of bawdy stories that passed as humour and, at least in Mr. McDonald's mind, a close bond of friendship. The cover man testified that the two men bonded so well, they appeared to be "an old married couple". On the evidence before me, the characterization is an apt one.
- [131] On September 6, 2013 (scenario #65), Mr. McDonald assisted the primary with a gun sale to undercover officers posing as gang members. Mr. McDonald was tasked with dropping off what he believed to be a bag of guns (which actually contained pipes) to a hotel room where the guns were examined by the potential buyers and the terms of the transaction were discussed. The primary testified that Mr. McDonald's demeanour appeared to be fine and that he did not seem to have a problem with the scenario. In fact, the primary testified Mr. McDonald looked a bit amused and was smiling a little as one of the undercover officers postured with a gun.
- [132] During this scenario, the primary engaged Mr. McDonald in what was described in the evidence as a "limitation talk". The primary told Mr. McDonald that he was an "A to Z guy" (a "Z guy" being someone who was prepared to kill) and asked Mr. McDonald where he was on the scale. The primary told Mr. McDonald he wanted to know in order not to put him in a situation he was uncomfortable with. Mr. McDonald replied, "I haven't been, at any time, uneasy around, you know, your situations" and "I've had no problems with anything so far". He mentioned again to Mr. McDonald "that other shit I told you about, where I fucking killed that guy." The primary referred to one of the cameo operators as a guy with "no limits" and someone who "doesn't give a fuck, whatever needs to be done, he does". The primary said that he did not care where Mr. McDonald fell on the scale, he just needed to know. In response, Mr. McDonald said, "I guess now is as good a time as any to tell you I killed a motherfucker in England." Mr. McDonald said he was sentenced to six years' imprisonment but served four before being paroled. He told the primary that after being paroled he took off to Ireland and then came back to Canada. Mr. McDonald said the offence happened when he came home one night and found "the cunt ... rifling through my shit". Mr. McDonald said he went crazy, threw the victim down the stairs and "kicked the crap out of him". Mr. McDonald said, "I was so fucking mad, I could have ripped his head off" and that, "I just kept going 'til he was fucking dead."
- [133] The primary asked, "You're not shitting me, are you"? Mr. McDonald said, "No, no". The primary told Mr. McDonald that he did not have to impress him by telling a story like this because he was already impressed with him. Mr. McDonald said that he never told anyone except his family what happened that day.
- [134] The primary told Mr. McDonald a story about someone else who said that he was an "A to Z guy" but got sick when the time came and "we had to kill a fucking guy". Mr. McDonald told the primary that he was an "A to Q guy" and that, depending on what was happening, he

might have to do some soul-searching. The primary asked Mr. McDonald if he could be a "Z guy" in a pinch if things went sideways. Mr. McDonald replied, "Oh yeah, yeah, well that guy, definitely." The primary said that he would not put Mr. McDonald in that situation. Mr. McDonald said that the situation he would be "more scared of would be a fucking undercover cop or something" and that while he did not like cops, "I don't want to fucking end up killing one of them " The primary again told Mr. McDonald, "Don't try to impress me cause if you're just good with doing fucking repos, I don't give a shit" but that the repo work did not pay as much. The primary also said, "Let's just leave it at that then and ah, but at any time, if, you know what, I ask you to do something that you don't want to fucking do, as I've told you before, you don't have to do it." Later in the conversation, Mr. McDonald agreed with the primary that revenge was sweet and said "I've always gotten mine so. There's been a few that got away on me but not very far".

[135] The two men then went to Brewster's pub. The primary told Mr. McDonald that someone shot him 12 or 13 years ago. When Mr. McDonald asked if the guy who did that is pushing up daisies, the primary replied that he was.

[136] As noted earlier, scenarios 66 to 69 (September 7-10, 2011) involve a series of events orchestrated to reflect the response of the fictitious criminal organization to the borrower's default on the \$400,000 loan. Mr. McDonald was engaged by the primary on September 7, 2011 to conduct surveillance on an apartment in North Vancouver and look for the debtor. The primary testified that he was acting intense as they searched for the debtor and said that he was going to pay. He told Mr. McDonald he knew where the debtor's family lived, where his wife worked and where his children went to school. He testified there was nothing remarkable about Mr. McDonald's demeanour during this scenario and that Mr. McDonald was actively engaged in the search and going into the parking lot of the apartment building to look for the debtor's car. The secondary operator also testified that Mr. McDonald appeared to be calm, friendly and talkative and that he referred to the debtor as a "fucking cunt".

[137] On September 8, 2011 the search for the debtor continued and the primary acted more intense, advising Mr. McDonald that he was going to tax the debtor on top of what he already owed. He also talked about making the debtor pay even if he had to send "pieces" to his family. The primary said that no one was going to get killed, at least until they pay up. Mr. McDonald chuckled and said, "I am kinda' waitin' to see how it all washes out in the end". The primary said, "I'm gonna take everything he is and everything he's gonna be". Mr. McDonald chuckled and said, "You haven't found him yet".

[138] Mr. McDonald gave the primary additional information about the English manslaughter saying that, "I just kicked him to death" and that after the offence, "The guy's layin' there dead with a big fuckin' whole in the side of his head and his brains are hangin' out and his eye was out of his socket." The photographs of the English homicide scene clearly depict that Mr. Wilton's forehead was fractured in the attack. The primary assured Mr. McDonald that he was not going to ask him to kill the debtor and Mr. McDonald did not need to worry

about that. Mr. McDonald suggested that they "shoot him up with fuckin' drugs".

- [139] On September 9, 2011 a scenario was orchestrated that led Mr. McDonald to believe the debtor had been located at a motel in Surrey. Mr. McDonald was tasked with watching the hotel and determining the debtor's room number. The cameo operators arrived, including the one with "no limits". That cameo operator was acting "amped up" and showed Mr. McDonald a bag that contained a fish knife and some rope. When Mr. McDonald said he should also have bear spray, the cameo operator showed Mr. McDonald that he did have bear spray in the bag. The cameo commented that he forgot to bring his vice-grips. The cameo operators eventually pretended to abduct the debtor from the motel. The primary testified that neither he nor Mr. McDonald were in a position to witness the actual abduction. They did hear doors slamming and saw the cameo undercover officers depart from the parking lot. The primary and Mr. McDonald followed them to the warehouse. On route, the primary referred to the operator with "no limits" as a "sadistic motherfucker" and said that the reason he wanted vice grips was to crush and twist off the debtor's fingers. Mr. McDonald said they should put him on a hot plate and "start cookin' him from the ground up".
- [140] The primary testified that when he arrived with Mr. McDonald at the warehouse, the undercover officer playing the role of the debtor had a sock in his mouth and duct tape over his face. He was bleeding from an actual head wound accidentally caused by the cameo operators when they abducted him and tossed him headfirst into the back of the van. There was a tarp on the floor and a knife and some tape on the tarp. The cameo operator with "no limits" was testing a power grinder.
- [141] It is necessary to reproduce some of the language used in this intercepted scenario to convey an accurate sense of the atmosphere in the room. The primary pretended to be enraged and lunged at the debtor, screaming at him that he had better come up with the money, "Cause if you don't, these boys here are gonna mail a piece a you home to mommy every fuckin' day until I get it, you understand me?" The primary screamed at the debtor, "I just wanna fuckin' hammer you in the fuckin' head." The cameo operators, one of whom slapped the undercover officer playing the role of the debtor in the face, reminded the primary that he should not "get dirty". As he left the warehouse, the primary wiggled his pinky finger and told the cameo operators that he wanted a "souvenir" and that they should make sure to clean everything up. The post-abduction scene at the warehouse lasted about eight minutes. Mr. McDonald was standing behind the primary by the door, about 10 to 15 feet away. A secondary operator testified on the voir dire that Mr. McDonald appeared to remain calm and did not say anything.
- [142] The primary testified that, although he made no specific note of this, Mr. McDonald seemed perfectly calm, conversational and on a pretty even keel when they left the warehouse. The intercepts (which reflect Mr. McDonald's verbal response to the scenario) tend to confirm the primary's testimony on this point. One of the first things Mr. McDonald said upon leaving the warehouse is, "I'd like to hear the fucker squeal". The primary referred to the

shape the debtor would be in after the boys were done with him to which Mr. McDonald replied, "Probably be walkin' sideways for a while". Mr. McDonald then suggested using some sort of castrating implement "to hang that fucker on his balls". When the primary mentioned taking "one of his fuckin' digits", Mr. McDonald said, "I'd take the fuckin' index finger. That's the one you use the most". He also suggested turning a pit bull loose on the debtor and hog tying him to a chair and leaving him for three days. The primary testified that after the scenario Mr. McDonald "seemed totally normal as he had been for the whole time I had been with him."

- [143] The two men then proceeded to a bar. The primary complimented Mr. McDonald on his good work saying, "It's gonna go a long way down the road." As he was accustomed to doing, Mr. McDonald engaged in a wide ranging conversation with the primary and made a number of sexual comments relating to women in the bar. He also said that he would like a trophy from the debtor, "like an ear or maybe a nose" and suggested other ways of torturing him.
- [144] The primary pretended to receive a call from his associates at the bar and advised Mr. McDonald that the debtor would have the money by tomorrow. Mr. McDonald chuckled and asked if they had them hanging up by the heels because he should definitely be given something to remember. When the primary again complimented him on his work, Mr. McDonald said, "Well it all turned out good."
- [145] The team commander testified she was made aware of the conversation between the primary and Mr. McDonald in the bar after they left the warehouse. The lead investigator listened to the audio intercepts between the primary and Mr. McDonald where Mr. McDonald suggested cutting off the debtor's index finger. The lead investigator also received information from someone in the monitor room that Mr. McDonald had a conversation with Jeremiah at the end of the day and was briefed on the substance of that call. That intercepted call is in evidence before me on this voir dire. Mr. McDonald advised Jeremiah that they had a "fierce day" and that "the fucker he's in one place I wouldn't wanna be tonight". Mr. McDonald laughed and told Jeremiah the debtor would be down on his knees tonight and praying and that there would be five guys with him all night. The team commander testified there was nothing in the phone call between the brothers that suggested Mr. McDonald was frightened or traumatized by what had happened, or that he had any concerns about the primary.
- [146] A briefing occurred at the end of the day and the officers engaged in the investigation discussed planning a scenario for the following day. There were no notes taken of this debriefing session. The RCMP's Major Case Management Policy requires the documentation of investigative decisions, including the rationale for those decisions.

- [147] It was decided that a makeup artist would be engaged to work on the debtor to make it appear as if he had been beaten. In addition, the cover man would ask the makeup artist if she could simulate an amputated finger. It was agreed that if the makeup artist was able to do this, the amputation scenario would be rolled out the next day.
- [148] The cover man testified that whether Mr. Big scenarios involving simulated violence will be used depends on the matter being investigated. Homicide investigations involve scenarios with different levels of simulated violence, but simulated violence is a feature of all investigations of this kind. If the investigation concerns an offence involving extreme violence, the police may decide to "up the ante". The team commander, the lead investigator and the cover man all testified that the police use simulated violence to demonstrate to the target that the organization tolerates violence. This, in turn, is designed to give the target some comfort level that it is acceptable to talk about his past violent conduct with the undercover officers. All of them testified Mr. McDonald's reactions to the kidnapping scenario (laughing about the kidnapping, suggesting which finger should be cut off and proposing castration) were factors taken into account by the police in designing the scenario for the following day.
- [149] The cover man, team commander, lead investigator and primary all testified they did not have concerns about the proposed scenario. The team commander, in particular, testified that the level of simulated violence to be used was not disproportionate to the offence being investigated or to Mr. McDonald's background, character and history of violence. She referred to the circumstances of the offence under investigation, the circumstances surrounding the English manslaughter, and the incident at Bayshore Auto. The lead investigator also referred to Mr. McDonald's violent disposition, noting that he told the primary about assaulting a prostitute by pulling her hair. The secondary testified that Mr. McDonald also told him about this incident and seemed to regard it as a funny story. Although not specifically referenced by the witnesses, Mr. McDonald recounted to the primary his involvement in a number of other violent incidents, including assaulting a man with a two-by-four. The investigators regarded Mr. McDonald as a man capable of and comfortable with violence.
- [150] The investigators did not seek legal advice before resorting to the use of simulated violence in the course of the investigation.
- [151] On September 10, 2011 (scenario #69), the primary picked up Mr. McDonald and they drove to the hotel where the debtor was being confined. He had been made up to appear as if he had been beaten and that his index finger had been severed at the knuckle. When Mr. McDonald got into the car he asked the primary, "How did it go with numb nuts?" The primary said that, "He needed a little convincing". Mr. McDonald replied, "That stupid son of a bitch. He should've been blessing himself to be fuckin' saved, to be alive". The primary told Mr. McDonald that the debtor's brother had come up with the money. Mr. McDonald said, "I'll tell you what, I'd have him down on all fours fuckin' stripped naked with a fuckin' bag of rocks tied to his nuts". When the primary told Mr. McDonald the boys had worked

him over pretty good, Mr. McDonald replied, "Good".

- [152] The primary and Mr. McDonald entered the hotel room together. Mr. McDonald stood behind the primary, closer to the door. The debtor had a pillow case on his head. He was strapped to a chair. His hand was on a towel and his index finger was made to appear as if it had been severed. The primary pretended to be very angry and commented on the severed finger. He yelled at the debtor, "You're lucky to be fuckin' alive. You know that right? You fuck with me again and I'll kill ya " One of the cameo operators held up a Ziploc bag containing a bloody prosthetic device held out to be the debtor's severed finger. The debtor was seated and moaning. One of the cameo operators acted agitated and slapped him. The primary testified that because Mr. McDonald was behind him, he did not have much of an opportunity to observe Mr. McDonald's reaction. Mr. McDonald did not say very much during the scenario. Mr. McDonald was instructed to meet the debtor's brother in the lobby of the hotel and bring him up to the room. After that, he was instructed to put a towel under the door so no one could hear. He was then instructed to assist one of the cameo operators in counting the money the brother brought with him. As they were doing so, Mr. McDonald said, "Well, I'm sure that cocksucker's pride is hurt." Before leaving, the primary told the debtor that he owed another \$40,000 in tax. The primary's notes to the cover man regarding this scenario suggest that Mr. McDonald looked nervous in the hotel room.
- [153] Although none of these scenarios were videotaped (even though the police had authorization to do so) the finger-severing scenario was documented with photographs the lead investigator took on her personal phone after completion of that scenario. The photographs were put before me on this voir dire and depict how realistic and convincing the scenario was.
- [154] In cross-examination, the team commander, cover man and primary all agreed that (resources aside) the police could have video recorded the scenarios following the kidnapping and further agreed that a video recording would be the best evidence of the tone of the scenario and the target's reaction to it. The cover man agreed that in light of the dynamic of the warehouse scenario, there would be little opportunity for the undercover operators to watch Mr. McDonald's reaction to the rapidly unfolding events.
- [155] After leaving the hotel, the primary and Mr. McDonald went to Brewster's pub. On the way to Brewster's pub, the primary said to Mr. McDonald, "Like I told you a long time ago, it's all about trust loyalty [and] honesty be straight with each other, don't bullshit each other. And anybody lies to me that works for me, I fire 'em, they're gone. I don't want nothin' to do with them".
- [156] Despite the disturbing nature of the scenario, the primary testified that Mr. McDonald's demeanour and mood seemed to be normal. The interception of the conversation that followed between them confirms the primary's observations. The substance of what Mr. McDonald said to the primary after witnessing this scenario, his tone and apparent mood all suggest he was unfazed by what he had seen. When the primary told him he called his

associates after Mr. McDonald suggested cutting off the debtor's index finger to instruct them to act on that suggestion, Mr. McDonald chuckled and said that he [the debtor] would miss the finger when he was driving. He also asked whether the primary had the finger and again chuckled when the primary said that he did not want it. Mr. McDonald also said to the primary that the debtor would have some explaining to do to his buddies about his finger now and that he would not be shaking hands for a while. Mr. McDonald later mentioned to the primary that he found the scenarios anxiety provoking. When the primary laughingly asked what he had to be anxious about given that it was not his money, Mr. McDonald replied, "I'm always worried about like, the police aspect, y'know."

- [157] The recording device temporarily malfunctioned when the two men were in Brewster's after the scenario. The primary testified that during this period Mr. McDonald again mentioned some of the circumstances of the English manslaughter and told the primary that he did "another one" before and that it was messy. Mr. McDonald told the primary he would never speak about the details on that other one and that he would "die with it". The recording then restarted and the intercept reflects that when the primary said to Mr. McDonald that he thought he was "bullshitting", Mr. McDonald said that he was not "bullshitting" and that it was why he left Canada. Mr. McDonald repeated that he would not talk about the details. The primary acted indifferent and said that was fine with him.
- [158] Before leaving the pub, the primary repeated to Mr. McDonald that, "I trust you a lot and you're good man, you're doin' good work and you don't have to tell me shit to fuckin' impress me". The primary said, "I don't wanna call bullshit on anything" and told Mr. McDonald it did not matter. Mr. McDonald responded, "No, don't call bullshit because I will eventually reveal to you but not two in one week. I can't do two in one week." As they left, and as this conversation was ongoing, the primary said, "I don't wannna know". Mr. McDonald said as they parted, "The first one is still an open fuckin' book."
- [159] The primary testified that he did not seek to elicit more information from Mr. McDonald about the "other one" for fear of raising suspicions in Mr. McDonald's mind. What Mr. McDonald said to the primary while the recording device was operating is consistent with what the primary testified Mr. McDonald said to him during the malfunction. I accept the primary's evidence about what Mr. McDonald said to him when the recording device was not operating. Neither the credibility of the primary on this point, nor the reliability of his testimony, was contested by the defence on the voir dire.
- [160] Mr. McDonald was paid \$1,200 for his role in the kidnapping. The primary told him the other cameo operators (including the operator with "no limits") were paid more because they did the dirty work.
- [161] Three days after the finger-severing scenario, Mr. McDonald assisted the primary with counting a \$150,000 down payment for the purchase of guns. The primary testified that Mr. McDonald appeared to be completely normal that day and they talked about a wide variety of topics.

- [162] The audio intercepts tend to confirm that there is nothing about this or any subsequently recorded scenario that suggests Mr. McDonald was emotionally disturbed about what he had witnessed.
- [163] On September 15, 2011 (scenario #71), Mr. McDonald accompanied the primary to visit a hospital patient (a cameo operator) who was held out to be dying of cancer and desperate for money. The objective of the scenario was to plant the seed that the cancer patient might, if paid enough, agree to take the fall for the Dawson Creek homicide in the event that Mr. McDonald later admitted to the primary his responsibility for the offence.
- [164] On September 16, 2011 (scenario #72), Mr. McDonald was led to believe that the primary could assist a member of the organization, who was subject to a police investigation and from whom the police had taken a DNA sample, by arranging for another DNA swab to be taken from the organizational member which would then, with the assistance of an insider, be switched out in the DNA databank. The objective of the scenario was to emphasize to Mr. McDonald the breadth of the organization's influence and the extent to which it would go in helping one of its members.
- [165] On September 19, 2011 (scenario #73), the primary and Mr. McDonald went to a bank and rented a safety deposit box. The primary put \$30,000 in the safety deposit box and Mr. McDonald was told the money would be his when the "big score" was over. The cover man described this scenario as "dangling a carrot."
- [166] On September 20, 2011 (scenario #74), the primary and Mr. McDonald were having lunch at an Earls restaurant. The primary received a \$40,000 payment from a cameo operator, representing the amount the debtor had been taxed. The primary testified there was nothing remarkable about Mr. McDonald's behaviour that day and he appeared to be in a good mood.
- [167] Mr. McDonald made a reference at Earls restaurant to someone dying and that the police were looking for him on it and even came down to California to interview him. He said there was no statute of limitations on it. The primary asked, "But you're good on that thing? They got nothin' on you, right?" Mr. McDonald said, "Well it was never cleared up see? [It's] still like an open book". He told the primary that he had to pack up and leave Canada on the first flight before the police came to arrest him. He told the primary that Jeremiah was the only one who knew what happened. He also told the primary that the police had nothing to connect him with the incident except that he was driving a vehicle with one headlight. He then admitted to shooting Jones and provided the primary with the following information about the offence:
- It started in a nightclub;
  - He was sitting in a bar with a car salesman;

- He had an altercation or a bit of a "punch up" with Jones in the bar. Jones tapped him on the shoulder when he was talking to his wife. When he turned around, Jones punched him in the face. Mr. McDonald did not swing back. He suggested to Jones that they take it out into the parking lot. Jones did not take him up on this but Mr. McDonald told the primary he was not going anywhere "without a piece of him";
- He knew the victim and had worked with him on the oilfields in Inuvik. They previously had a "punch up" about a work-related matter. He knew that he lived outside of Dawson Creek, down around Fellers Heights;
- He did not know the victim's wife;
- He was driving Jeremiah's truck;
- As he was warming his rig outside, the victim left by the side door of the nightclub trying to sneak away on him;
- The victim got in the front passenger seat of the vehicle because he was drunk. The vehicle was a 1969 Chevy Malibu. The victim's wife was driving;
- They drove out of the parking lot and he followed them;
- He had a .30-30 caliber hunting rifle in the car;
- He pulled into a cross street behind the Jones vehicle;
- He fired one shot from the rifle from about a city block away;
- The victim's car swerved and pulled over on the shoulder. His wife got out of the car screaming and jumping up and down. He knew then there was a chance the victim had been hit by the shot. He just kept driving;
- What brought the victim down was a single shot "right through the fuckin' head";
- He got rid of the rifle about a mile before he was pulled over by the police in a roadblock by throwing it off a bridge into the Kiskatinaw River halfway between Dawson Creek in Fort St. John;
- The incident occurred in September 1981;
- He stole the gun used in the shooting from someone who was living in his brother's basement;
- He wiped down the inside windows and driver's side of the truck with a wet towel because he fired the gun out the open window;
- A casing went down into the heater vent and the last thing he did before leaving that morning was pull out the truck's heater vent and remove the casing;
- He threw the casing into a field on the way to the airport;
- The cops said that the bullet came through the back window, through the victim's head and out the front window. The police did not have the bullet or any DNA connecting him to the offence;

- He read a newspaper report in which it was suggested that somebody used a .30 caliber rifle to commit the offence;
- He told the primary he knows exactly what he told the police in 1983 because he wrote it all down and went over and over it, making little corrections here and there;
- After the shooting, he went to his ex-wife's house in Dawson Creek and stayed there for two or three hours;
- He wasn't aiming to kill Jones and could not even see his head. He just wanted to give him "a good fuckin' scare". He was hoping that he "didn't kill the bastard";
- The police searched Jeremiah's truck and found some .22 caliber shells but no big caliber ammunition;
- The police told him in the 1983 interview that the victim was shot as he leaned over to get a beer from the back seat.

[168] The primary asked Mr. McDonald if he wanted him to check on the status of the investigation, and said he had a couple of ideas about how to make the thing go away. Mr. McDonald said he wanted to leave it for now. The primary said, "Yeah, but if you just leave it what happens if one day and plus, you are working with me now. I can't fuckin' have that shit". Mr. McDonald said that he hated to stir the pot again. Later in the conversation, the primary returned to the subject and said that Mr. McDonald should trust him to make some inquiries "to see if it's dead or not". Mr. McDonald said that he had spent a lot of time going over it himself trying to figure out a way to make it go away. The primary suggested that his friend dying of cancer in the hospital might take the fall for the offence for \$40,000 or \$50,000.

[169] Mr. McDonald then told the primary that he left a few things out of the story that the guy dying of cancer would have to know if he was going to take responsibility for the offence. He added:

- That he followed Jones about 5 miles out of town before shooting him;
- On the way back into Dawson Creek he saw the emergency lights of two police cars coming and pulled off the highway in behind some dumpsters at a transfer station and waited for them to go by;
- He went to his ex-wife's house and hid there for three or four hours;
- He then went to a Shell gas station in Dawson Creek that had an adjacent restaurant and bought a coffee;
- He spoke to a guy there who worked driving a tow truck and asked him if he knew where he could get a headlight for his truck;

- His conversation with this person put him in Dawson Creek an hour after the incident, which really threw the police for a loop.

[170] The primary told Mr. McDonald he would have to sit down with the fall guy and give him the full story so the fall guy could credibly confess to the homicide. Mr. McDonald agreed and said that he would pay the fall guy for doing this.

[171] On September 23, 2011 (scenario #76), Mr. McDonald met the primary at the apartment. Their interactions were audio and video recorded. The primary again testified that he noticed no substantive change in Mr. McDonald's behaviour or demeanour at any point during the day. The audio and video recording confirms that Mr. McDonald appeared to be at ease throughout the conversation. The primary informed Mr. McDonald of the "bad news" that he learned through his contacts that the case was still open and that it might be coming up in the next little while. The primary also informed Mr. McDonald that he received from his boss the go-ahead to proceed with the fall guy idea, but that this needed to be taken care of before the "big score" could go ahead. He told Mr. McDonald that he wanted Mr. McDonald to tell him everything again, without leaving anything out, and that it had to be right. Mr. McDonald asked if he should write it down. The primary testified that he was not prepared for the possibility that Mr. McDonald would offer to write it down and hesitated because creating a record of the confession seemed inconsistent with his cover story. He told Mr. McDonald that they could write it down later but that Mr. McDonald should tell him the story now because the primary was going to be the one dealing with the fall guy. Mr. McDonald proceeded to relate to the primary a detailed account of his responsibility for the shooting. The version he provided is generally consistent with the information he related to the primary at Earls restaurant. He added that:

- He followed the Jones vehicle for about 8 miles to Fellers Heights Road;
- They turned left on Fellers Heights Road and continued on;
- He pulled halfway into the intersection, looked out the driver's side window and fired the shot;
- Jones' wife drove across the highway to the left shoulder or ditch, jumped out and looked back in his direction;
- He fired a second shot over her head to scare her back into the car;
- She hid down in the ditch and probably didn't see him drive away;
- He had his lights on but there was moonlight and it was very bright;
- When he was pulled over in the roadblock, the police wanted to know what happened because he had blood on his face. He told the police that someone punched him in a bar;
- The .30-30 caliber rifle he used was a Winchester;

- The only thing the police had on him was that there were some .30-30 caliber bullets in a case in the truck;
  - The police told him in 1983 that the shooter used a .30 caliber rifle.
- [172] Both the team commander and the cover man testified that the first time the police attempted to get a confession from Mr. McDonald was during the interview conducted by the primary in the apartment. Both said the confession made at Earls restaurant was more in the nature of an unprompted and unexpected statement.
- [173] The primary suggested, and Mr. McDonald agreed, to travel to Dawson Creek to participate in a re-enactment so that the primary could get a better sense of what happened and communicate it to the fall guy. The primary and secondary operator and Mr. McDonald then left for the airport.
- [174] While the primary, Mr. McDonald and the secondary operator were having dinner at the Vancouver airport waiting for their flight, Mr. McDonald thanked them for what they were doing for him.
- [175] On September 24, 2011 (scenario #77), Mr. McDonald participated in a re-enactment of the offence in Dawson Creek in the presence of the primary and secondary operator. The re-enactment was audio recorded. Much of it was also video recorded by the secondary. The primary drove the vehicle throughout the re-enactment. The Windsor Hotel Cabaret was no longer there and the highways had changed in the 30 years since the shooting. A bridge that existed in 1981 leading to the Fellers Heights turn had been removed. The route Mr. McDonald said he took from the hotel to the scene of the shooting dead-ended. Mr. McDonald said that he knew the shooting occurred on the Fellers Heights Road. The group spent a considerable time driving around before identifying the intersection. I do not need to resolve for the purposes of this ruling whether Mr. McDonald directed the undercover officers to the intersection or whether the undercover officers drove him there guided by directions they were receiving from the cover man who was sending the primary text messages. Once the intersection was identified, Mr. McDonald demonstrated how he had pulled out partway into the intersection and shot at the Jones vehicle from his truck. He related a version of events consistent with the confession he made at Earls and at the apartment. He showed the undercover officers where the transfer station was located, and where he disposed of the rifle in the Kiskatinaw River.
- [176] The secondary operator testified that Mr. McDonald's disposition was unchanged and that he was laughing and joking throughout the day. The audio and video intercepts confirm that evidence. The secondary also testified that on the way back to Vancouver Mr. McDonald insisted on buying everyone a drink and thanked them again for helping him.
- [177] After the re-enactment, everyone returned to Vancouver and Mr. McDonald was dropped off at a hotel and told to guard a bag. Mr. McDonald was led to believe that the primary was working out the details of the fall-guy scenario. The hotel room was wired to monitor Mr.

McDonald and keep track of his movements. In cross-examination, the cover man testified that Mr. McDonald's movements were not being "controlled" but the investigators were concerned about him fleeing, particularly if he spoke with his brother and his brother questioned him as to why he had confessed, and raised with Mr. McDonald the spectre that the primary and secondary might be undercover police officers.

[178] A police dive team extensively searched the Kiskatinaw River for the rifle Mr. McDonald said he threw off the bridge 30 years earlier but nothing was found.

[179] The police determined to seek charge approval and prepared a Report to Crown Counsel. On October 3, 2011 the team commander was advised that charge approval would take some additional time. To occupy Mr. McDonald in the intervening period, he was enlisted to transport the bag he had been guarding on a second trip to Montréal. Mr. McDonald travelled alone and was not fitted with a tracking device for the second trip to Montréal. Investigators were concerned Mr. McDonald might flee because suspicions sometimes creep in once the target has made inculpatory statements. Mr. McDonald was given his own hotel room in Montréal and returned to that room at the end of each day. Mr. McDonald's calls were being monitored throughout this time and undercover officers would be in communication with him daily to determine where he was. The lead investigator testified that the main risk was that Mr. McDonald could get off the train and leave at any point during the trip to and from Montréal.

[180] Mr. McDonald returned from Montréal, unaccompanied, on October 12, 2011 and was picked up by the primary at the train station (scenario #85). The primary drove Mr. McDonald directly to Vancouver Island saying that they had some work to do there. The team commander testified that Mr. McDonald was given no opportunity to go home because the police were moving into a scenario that involved Jeremiah and they wanted to guard against the potential for concoction between the two brothers in advance of the meeting. The primary testified Mr. McDonald appeared to be in a good mood and seemed relaxed. On route, the primary told Mr. McDonald that he wanted him to give Jeremiah a call and arrange a meeting with them on the Island so he could hear from Jeremiah's mouth that Jeremiah did not tell anyone else what he knew about the offence.

[181] When they arrived on the Island, the primary instructed Mr. McDonald to take a cab to his brother's residence and bring him back for and in-person discussion with the primary. Mr. McDonald did so. The conversation he had with Jeremiah (in the absence of the primary) was intercepted. That conversation includes:

Jeremiah: Well don't want anybody looking into the fuckin' thing you'll open up the whole rats nest again don't you?

Thomas: No, he [the primary] says there's a uh, they've got cops in, in Montréal that can look into all this shit for them.

Jeremiah: Yeah.

Thomas: They said that they got me on a five year thing that every five years they'll review it.

Jeremiah: The cops came to see me five even 10 years ago. The last time, the guy says, well we just wanna, I just gotta review this statement as a formality. I said I have no idea what I even said so how the hell am I going to be able to go over it?

Thomas: Yeah. Well, that's, that's all you need to tell [the primary]

Jeremiah: I said, I, I, fuckin'

Thomas: But he, he, he will probably ask you how, what I told you and just tell him hey, that uh, that I told him the - there was a fuckin' fight and uh, I think that I killed a guy.

Jeremiah: Oh, yeah.

Thomas: Because I didn't even know I killed him 'til about a week later -

Jeremiah: Yeah

Thomas: I, y'know who I got the news from? My lawyer up in Fort St. John.

Jeremiah: Which guy are we talking about now, the guy in Dawson Creek?

Thomas: Yeah, yeah

Jeremiah: That wasn't, that wasn't a fight, that was a fuckin' you fired the shot took the guy out.

Thomas: Yeah, yeah, no there was, started out as a fight in the bar, see.

Jeremiah: Oh yeah, I know yeah.

Thomas: I don't know if you ever told anyone but just tell him you didn't

.

Thomas: No, that's another thing. I, we've already been up in Dawson Creek a couple of weeks ago and I showed them all the roads and the names of the streets and everything and then I took him up to the old Kiskatinaw Bridge and on my way to Fort St. John I threw that rifle over the bridge into the river.

Jeremiah: Okay.

Thomas: And then don't even mention any gun unless he does.

Jeremiah: Oh, I won't I'm not gonna mention nothing

Thomas: He's not a fuckin' detective he's on my side he just wants, he wants to make sure that there's nothing out there that can come back.

- [182] As noted earlier, despite this conversation occurring only as between Mr. McDonald and Jeremiah McDonald, and that it has been ruled admissible following a Garofoli application, counsel for Mr. McDonald takes the position that this conversation forms part of the Mr. Big investigation and ought to be excluded on the same constitutional grounds underpinning the application to exclude the statements made by Mr. McDonald to the primary and secondary operators.
- [183] After this scenario, the primary left for the Lower Mainland while Mr. McDonald stayed overnight at Jeremiah's residence on Vancouver Island.
- [184] On October 14, 2011 the primary arranged to meet Mr. McDonald at an A&W parking lot in Surrey. When Mr. McDonald arrived for the meeting, he was arrested.
- [185] Mr. McDonald was paid just over \$25,000 in cash in the course of the Mr. Big investigation.
- [186] The cover man testified that the length of the undercover operation (about 10 months) is just about the norm. He testified that Mr. McDonald's availability for work affected the length of the operation. He also testified that there is a lot of information in the public domain about the Mr. Big investigative technique and, as a consequence, the police are now doing more front-end scenarios not involving criminality in order to build trust.

## 7. Issues and Analysis

### (a) The Self-Incrimination Claim

#### (i) The Application of the White Framework to Mr. Big Confessions

- [187] The right against self-incrimination is a principle of fundamental justice under s. 7 of the Charter and an overarching principle within our criminal justice system. The principle has two key purposes: to protect against unreliable confessions, and to protect against abuses of power by the state. The onus rests upon Mr. McDonald, the Charter claimant, to establish that the statements he made to the undercover officers were obtained in breach of that right.
- [188] In *R. v. White*, [1999] 2 S.C.R. 417, the Court held that the use at a criminal trial of statements made under statutory compulsion by a motorist involved in an accident violates s. 7 of the Charter. For the Court, Iacobucci J. identified a number of principles informing the scope of the right against self-incrimination. Most importantly, for present purposes, he held that "the principle against self-incrimination demands different things at different times, with the task in every case being to determine exactly what the principle demands, if anything, within the particular context at issue (at para. 45). The Court held that the principle can, itself, be the source of new rules in appropriate circumstances (at para. 44).

- [189] The White court identified four factors to assist in determining what, if anything, the principle demands in a given case: (i) the existence of coercion; (ii) an adversarial relationship productive of pronounced psychological and emotional pressure; (iii) the prospect of an unreliable confession; and (iv) the concern that permitting the use of "compelled" statements for incrimination purposes would increase a likelihood of abusive conduct by the state.
- [190] In *R. v. Osmar*, 2007 ONCA 50 at paras. 33-36, Rosenberg J.A., for the Court, held that assuming (without deciding) that the contextual analysis set out in *White* could be applied to a self-incrimination claim made in the context of the Mr. Big investigation, no constitutional violation had been demonstrated in that particular case:

The context in this case does not violate the principles of fundamental justice. There was little, if any, coercion. The appellant was seeking employment in what he believed was an illegal enterprise. While he had been the subject of intense surveillance many months earlier, the overt surveillance had ceased. He claimed that he was unable to secure other employment but this is belied by the evidence that he had refused to follow up an offer of legitimate employment. The motion judge dismissed the claim that the appellant was effectively prohibited from finding employment because of the actions of the police. He also rejected the claim that the appellant was "inflicted with emotional and psychological trauma because of the intense surveillance".

I accept that the appellant and the police were in an adversarial relationship, but the appellant was not under "pronounced psychological and emotional pressure". The motion judge found to the contrary; that the appellant "displayed a composed and stable personality" during his interviews with the undercover officers.

Finally, this example of the Mr. Big strategy does not contain the elements of a real possibility of an unreliable confession because of abuse of power by a person in authority. There was no abuse of power. The appellant was presented with an opportunity to obtain employment in a criminal organization, but he was not threatened or intimidated. Even if it is possible to apply the *White* analysis to this case, the evidence and the findings of fact by the motion judge undermine any claim to a violation of s. 7.

- [191] The *White* framework has been applied to assess the admissibility of inculpatory statements made in the context of a Mr. Big investigation in at least four post-*Osmar* cases: *Hart*; *R. v. Niemi*, 2012 ONSC 6385; *R. v. Perreault*, 2013 QCCA 834; and, *R. v. N.R.R.*, 2013 ABQB 288.
- [192] The Crown submits that the *White* framework is inapplicable to the circumstances of the case at bar and that the test set out therein was only intended to apply to statements made under statutory or legal compulsion. In addition, Crown counsel argues that applying the *White* framework in this case would be inconsistent with governing authority. She cites *R. v. Grandinetti*, 2005 SCC 5, for the propositions that: (i) when an accused "confesses to an undercover officer he thinks can influence his murder investigation by enlisting corrupt officers, the state's coercive power is not engaged" (at para. 44); and (ii) where statements

made in the context of undercover operations arise in such coercive circumstances that their reliability is jeopardized, the admissibility of such statements is determined through application of the abuse of process doctrine (at para. 36). She submits that it makes no sense to apply the White criteria to Mr. Big confessions where the essential focus of the inquiry (the existence of coercion and the reliability of statements obtained) are factors the Supreme Court of Canada has said do not apply or fall to be assessed under a different analytical framework.

[193] While the position of the Crown may ultimately be determined to have merit, I do not consider it open to me on the current state of the law in this province to forgo a White analysis. In *R. v. Earhart*, 2011 BCCA 490, it was argued that the Court should introduce prerequisites for the admissibility of Mr. Big statements in recognition of concerns that have been articulated about the potential for this investigative technique to produce false confessions. In disposing of this argument, Bennett J.A., for the Court, said:

This protection already exists, and each statement is considered in the context in which it was made. The question of reliability was considered in *Osmar*. Mr. Justice Rosenberg, for the Court, discussed the concerns regarding the admission of the Mr. Big statements. In doing so, he reviewed the principle of self-incrimination in depth, and in particular, affirmed, at paras. 31-32, the necessity for a contextual analysis as was set out in *R. v. White*, [1999] 2 S.C.R. 417 at para. 45, where Iacobucci J. said, "[t]he principle against self-incrimination demands different things at different times, with the task in every case being to determine exactly what the principle demands, if anything, within the particular context at issue".

[194] In light of the decision in *Earhart*, it is incumbent upon me to address the admissibility of Mr. McDonald's statements to the undercover operators and, specifically, whether they were obtained in a way that infringed his right against self-incrimination, against the framework of principles set out in *White*. It is to that issue I now turn.

#### (ii) The Existence of Coercion

[195] Mr. McDonald argues that his incriminating statements were obtained in the context of an investigative technique that was lengthy and involved a high degree of coercion, and that he was subjected to pronounced psychological and emotional pressure throughout the undercover operation. He says the undercover operators used extraordinary threats and inducements to compel him to make the statements in issue.

[196] In support of this submission, Mr. McDonald argues that the undercover operation removed him from the life he had chosen and transplanted him into the fictional underworld created by the police. He says he was persuaded to give up legitimate employment and remain in the Lower Mainland to work for the criminal organization. He was befriended, groomed as the primary's right-hand man, and expected to follow the primary's directions. He was offered the use of an apartment and led to believe that he stood to earn \$30,000 in the big score. Immediately before the confession was given in the covert apartment on September 23, 2011 he was advised that the Dawson Creek matter

needed to be dealt with before the big score could proceed. He submits that the undercover investigation and, in particular, the kidnapping scenarios, "created an environment of fear and oppression which allowed the state to extract a confession". He notes that he made his first incriminating statement just a few hours after the finger-severing scenario. Finally, he submits that the statements he made to the primary about what should be done with the debtor "are of little use in assessing his mental state" or the coercive impact of the investigation.

[197] I am unable to accept these arguments. The circumstances of this case are, in many ways, dissimilar to the facts in Hart. Although the surveillance evidence established that Mr. McDonald kept to himself, he was not the impoverished, poorly educated, socially isolated and vulnerable target Mr. Hart presented. In Hart, the scenarios to which the target was exposed led him to believe that the fictitious organization would use violence against its own members to keep them in line. No such scenarios were used in this case. In Hart, the target (who was being investigated for murder in connection with the drowning deaths of his two daughters) was asked "loaded questions" during the crime boss interview, including "what brought this about this killing your daughters tell me". When Hart maintained his innocence, he was repeatedly accused of lying. The majority in Hart found that the interview with the crime boss likely produced a coercive-compliant confession. The "pressure" to which Mr. Hart was subjected and the anger displayed by the crime boss when he asserted his innocence left Mr. Hart with a stark choice - to admit guilt and tell the crime boss what he apparently wanted to hear, or jeopardize access to the lavish lifestyle involvement with the fictitious criminal organization entailed. By contrast, Mr. McDonald was told only that he would lose his job with the organization if he lied, not if he failed to accept responsibility for the crime. In addition, Mr. McDonald never asserted his innocence to the undercover officers only to find himself confronted with allegations that he was lying. Finally, although it is true Mr. McDonald confessed to the primary in the covert apartment after being informed that the big score would not go ahead until the Dawson Creek matter had been resolved, it bears repeating that Mr. McDonald had already provided an unprompted confession, rich in detail, to the primary at Earls restaurant.

[198] As Rosenberg J.A. noted in *Osmar*, the White framework requires a close examination of the facts to determine whether the right against self-incrimination has been infringed. I make the following factual findings in this case:

- Throughout the course of the investigation Mr. McDonald had legitimate work available to him, whether as a self-employed welder or as an employee of Nickel Bros. and/or Kiewit. The primary testified at the preliminary inquiry that Mr. McDonald always seemed to have money on hand and he was not getting all of it from the fictitious criminal organization. During the course of the undercover operation, Mr. McDonald purchased a \$4,000 travel trailer and two trucks at an auction for resale. He was, in short, not destitute when Mr. Big came calling;

- Mr. McDonald had 14 years of schooling, two years of vocational training and four years of related experience as an mechanic's apprentice;
- Although the lifestyle surveillance suggested Mr. McDonald had no personal relationships outside of work, it must be remembered that Mr. McDonald had violated the terms of his parole in England by coming to Canada. He had a powerful incentive to keep a low profile. Further, as the investigation unfolded, it became apparent that Mr. McDonald had long-standing friendships, numerous, albeit shallow, relationships with women, and a very close and supportive bond with Jeremiah;
- Mr. McDonald made a choice to work for the criminal organization because it provided him a sense of belonging, friendship and, most importantly, access to relatively easy money compared with the physically demanding work he was required to perform for Nickel Bros. and Kiewit in harsh weather conditions;
- Mr. McDonald was highly motivated to continue working for the criminal organization to participate in the big score;
- Mr. McDonald is, by nature, an extrovert and a talker. As early as scenario #6, the primary described him as a "topper" - a person who always wanted to tell a story that was better than the last one told by someone else. It is an apt characterization. Mr. McDonald is a raconteur and an embellisher. He is disinclined to let the truth stand in the way of a good yarn. His stories are often vulgar and crudely told. Some are hyper-sexualized and demeaning to women. Others reflect racial bias or intolerance. Still others reflect a broad range of interests ranging from road construction, to politics, to the History Channel and Sudoku. While Mr. McDonald expresses himself in racist and misogynistic terms, he is not unintelligent. He may be unrefined, but he is not inexperienced, unworldly or slow-witted. He is a hard-working, plain-speaking man from a hardscrabble background who has made his way in this world on his work ethic, wits and mechanical ability;
- Mr. McDonald was never forced to do anything he did not want to do. The primary repeatedly checked with Mr. McDonald, before and after scenarios were undertaken, to satisfy himself that he continued to be "okay" with what he was witnessing and was prepared to continue on with scenarios that were more explicitly criminal in nature and/or required of him more hands-on involvement;
- To the extent Mr. McDonald expressed concern about his participation in any of the scenarios, they tended to focus on his desire to avoid getting caught. Even after witnessing the finger-severing scenario, Mr. McDonald advised the primary that his anxiety about the situation stemmed from his worries about "the police aspect", not from what he had just seen;
- No violence or aggression was ever directed at Mr. McDonald;

- No violence or aggression was ever directed at any operator playing the role of an organizational member in Mr. McDonald's presence. Organizational members were portrayed as loyal and closely bonded individuals who would help one another. The organization itself was portrayed as one which would come to the assistance of its members. That assistance would extend to "fixing" a criminal investigation targeting an organizational member;
- Mr. McDonald was not unaccustomed to violence. The circumstances surrounding the English homicide are particularly brutal. In addition, from the stories he related to the primary, he appeared to regard his own acts of violence as fodder for another good yarn. He spoke casually of assaulting a man with a two-by-four, and jokingly of assaulting prostitutes who crossed him;
- There is no evidence before me that the scenarios, even those involving a high degree of simulated violence, caused Mr. McDonald to be fearful, or inflicted emotional or psychological trauma, or created a coercive atmosphere;
- With respect to the confession to the primary in the covert apartment, it is noteworthy that Mr. McDonald offered to write down the circumstances of the offence to enable the fall guy to credibly confess to the shooting. He offered to pay the fall guy a substantial amount of money for doing so. He repeatedly thanked the primary and secondary operators for helping him with a scheme that would enable him to avoid liability for the shooting. None of these circumstances are suggestive of an atmosphere of coercion or oppression, let alone one that compelled Mr. McDonald to reveal his involvement in the offence;
- The evidence overwhelmingly establishes that Mr. McDonald was unfazed by what he had witnessed. Indeed, he was eager to offer ideas about additional ways in which the debtor might be tortured;
- Mr. McDonald displayed a composed and stable personality throughout the investigation. That did not change in the course of the kidnapping scenarios;
- There is no evidence before me that Mr. McDonald was, in any meaningful sense of the word, compelled to tell the primary about his responsibility for the shooting of Jones. He was not confronted by the primary with an accusation concerning his involvement in the homicide, nor was he subjected to the type of coercive interrogation that occurred in Hart. As noted above, although it was made clear to Mr. McDonald during the interview in the covert apartment that the big score would not proceed until the police interest in him as a suspect in the Dawson Creek killing was put to rest, Mr. McDonald had, by that time, already confessed to the primary at Earls restaurant;
- While it is true that Mr. McDonald's first allusion to the Dawson Creek killing occurred the day he was exposed to the finger-severing scenario, he did not make a confession to the primary about his responsibility for the Jones shooting until 10 days later. The inculpatory statements Mr. McDonald made that day were unprompted by any questioning, let alone interrogation, conducted by the primary. Indeed, they were entirely unexpected;

· Having considered the length of the investigation and the nature of the investigative scenarios comprising it, particularly those mounted in the evidence-gathering phase, I am satisfied that Mr. McDonald made a choice to reveal to the primary (someone he considered to be a friend and confidante) his responsibility for the shooting. As in *R. v. Fliss*, 2002 SCC 16 at para. 79, Mr. McDonald was not compelled to confess to the murder; rather, his inculpatory statements were freely volunteered to a friend and benefactor, and someone he thought he could safely confide in.

[199] In its written submission, the Crown said this about the undercover operation:

The fiction was compelling, as it was intended to be, and so the accused believed, as he was intended to believe, that it was in his interests to participate in the business of the criminal organization and in his interests to tell [the primary] about the killing of Earl Jones. He was, ultimately, wrong. The choices he made, in light of the truth about the undercover organization were not wise, but clearly they were his own.

I agree with and adopt this submission.

[200] Despite the absence of proper notice, I will also deal with the merits of the argument that Mr. McDonald's statement to his brother violated his right against self-incrimination. In my respectful view, and for many of the same reasons, Mr. McDonald has failed to demonstrate that the statement he made to his brother on October 12, 2011 was the product of coercion or that he was in any way compelled to confess to Jeremiah his responsibility for the shooting of Jones. Although this statement was intercepted at a time when the Mr. Big investigation was ongoing, that is the only contextual connector between the statement and the investigation itself. The statement reflects the sharing of what was anticipated to be a private confidence between brothers and reflects Mr. McDonald's desire to ensure that Jeremiah confirm with the primary that he told no one else about the offence, but not say anything more than was absolutely required. In no sense can this statement be regarded as having been extracted from Mr. McDonald in oppressive circumstances. To the contrary, the intercept supports a finding that Mr. McDonald was at ease and highly motivated to prime Jeremiah about what to say to the primary so the fall-guy scenario could be concluded, thus paving the way for the big score. Although the inducements to continue to speak about the offence were powerful, Mr. McDonald made a choice, motivated by self-interest, to make inculpatory statements to both the primary and Jeremiah.

### (iii) The Existence of an Adversarial Relationship

[201] In *White*, the Court addressed the need to consider the existence of an adversarial relationship producing an atmosphere of pronounced psychological and emotional pressure. This criterion does not transfer well or easily to undercover investigations. While an adversarial relationship exists, the target is unaware of it. The framework in *White* assumes the person making the incriminating statement is aware they are speaking to a person in authority and this awareness forms part of the emotional dynamic of the encounter. That is, of course, not this case.

[202] For reasons already expressed, I do not accept that the relationship created a psychologically oppressive environment. My findings in this regard extend to the kidnapping scenarios.

[203] In *Niemi*, at para. 166, and *R. v. Decoine-Zuniga*, 2013 ABQB 563 at para. 77, the Court was prepared to proceed, as am I, on the footing that this criterion, as applied to undercover investigations of the sort mounted in the case at bar, is a neutral factor.

(iv) The Reliability of the Statements

[204] Counsel for Mr. McDonald submits that the reliability of the statements is intimately connected to the degree of coercion used in the undercover operation. I have already found that there was very little coercion at play when Mr. McDonald made inculpatory statements to the primary and Jeremiah. The assessment of reliability-based concerns must take that finding into account.

[205] Counsel for Mr. McDonald raises a number of other concerns relating to the reliability inquiry, including: the absence of hold back and, more particularly, the fact that investigators supplied Mr. McDonald with information in 1983 about the circumstances of the offence and the police theory in relation thereto; the possibility of contamination arising from the primary having considerable file knowledge; the possibility of contamination arising from the assistance the primary received from the cover man in the course of the re-enactment conveying Mr. McDonald to the scene of the shooting; his own tendency to tell exaggerated, if not untrue, stories and the fact that some of the information he supplied to the undercover officers was determined to be false (e.g. that he was born in Nova Scotia, that he got a speeding ticket one day when he was driving to meet the primary, that he owned a Silverado truck, that Jeremiah killed three men in a bar fight, that he was turning 59 when he was, in fact, turning 60, that he won money in a casino chip-test scenario, and that he went back to Ireland in 2004 when he was actually arrested in the United States and deported in 2003). In addition, counsel for Mr. McDonald argues that he provided to the primary conflicting accounts of the events giving rise to the manslaughter of Roger Wilton in England, as well as information seemingly inconsistent with the known circumstances of that offence.

[206] Perhaps most significantly, counsel for Mr. McDonald argues that there are a number of inconsistencies between the versions of the shooting he related to the primary and the evidence given by the witnesses who testified at the preliminary inquiry, including:

- Mr. McDonald repeatedly told the primary that the truck he was driving the night of the shooting had only one headlight. Marilyn Jones testified that she noticed a set of headlights following her from the bar. In addition, one of the officers testified that both headlights were functioning when Mr. McDonald was pulled over near Taylor after the shooting;
- The route Marilyn Jones says she followed from the hotel to the homicide scene appears to conflict with the route Mr. McDonald says they took;

- The version Mr. McDonald gave to the undercover operators that he was in the middle of the intersection when he fired the shots is inconsistent with forensic evidence suggesting that the bullet was fired before Mr. McDonald reached that intersection;
- The version Mr. McDonald gave to the undercover operators was that he fired one shot at the vehicle which then pulled over to the left side of the highway. He said that he fired a second shot over Marilyn Jones's head after she got out of the vehicle. Ms. Jones testified that she heard two shots pretty close together as she was in the driver seat. She made no mention of a third shot being fired after she got out of the vehicle and agreed that she pulled over on the right side of the highway after the shooting;
- Mr. McDonald's version to the undercover operators that it was a bright moonlit evening conflicts with the evidence of police officers who attended the scene and testified that it was very dark and there was little moonlight; and
- Mr. McDonald's statement to the primary that the police officers who stopped him near Taylor wanted to know what happened to his face because he had blood on it is inconsistent with the evidence of one of the officers who participated in the 1981 stop that he observed no injuries to, or blood on, Mr. McDonald's face that evening.

[207] There is no evidence properly before me, expert or otherwise, that false confessions occur more often in Mr. Big undercover operations than in other circumstances. In addition, such statements are not, as a matter of law, considered to be inherently unreliable: *R. v. Terrico*, 2005 BCCA 361. Rather, a trial judge presiding with a jury has the discretion to fashion an instruction appropriate to the circumstances of the case. The instruction should alert the jury to concerns about the reliability of the statement and direct the trier of fact to undertake the reliability assessment with regard to evidence that confirms or undermines the veracity of the target's account. Further, while a trial judge has both the authority and responsibility to prevent the admission of evidence that would cause a trial to be unfair, the admission of evidence which may be unreliable does not per se render a trial unfair: *R. v. Buric* (1996), 106 C.C.C. (3d) 97 (Ont.C.A.), aff'd [1997] 1 S.C.R. 535; *R. v. Dikah* (1994), 89 C.C.C. (3d) 321 (Ont.C.A.), aff'd [1994] 3 S.C.R. 1020. The notion that a trial judge should exclude relevant and material evidence, the probative value of which outweighs its prejudicial effect, because it may be unreliable seems out of step with foundational evidentiary principles. Having said that, the law of evidence has adapted to our growing appreciation of the risk of false confessions and, related thereto, the specter of wrongful convictions. Individuals who are targeted with a Mr. Big investigation will often have a motive to lie in circumstances where they are led to believe that falsely confessing to the offence carries no downside risk. The framework developed in *White* permits evaluation of potential reliability-based dangers as one factor in considering whether that statement was obtained in violation of the right against self-incrimination. As such, it stands as an important safeguard against the risk of admitting false confessions - one of the principal causes of wrongful convictions.

- [208] A central question to be resolved, and one which divides the Crown and defence, is the test a trial judge should apply in considering the reliability prong of the White analysis. The challenge is to devise a threshold test that guards sufficiently against the risk of admitting a false confession but at the same time does not usurp the province of the trier of fact by addressing issues that form part of the ultimate reliability assessment.
- [209] Counsel for Mr. McDonald invites the Court to adopt a standard of threshold reliability similar to that which governs the admission of hearsay under the principled approach. In addition, she argues that the search for extrinsic evidence confirming or undermining the reliability of the statement must be restricted to independent evidence. Under the principled approach, the fact that a declarant may disclose similar information to a number of people is not independent evidence and cannot be used to confirm the reliability of the disclosures: *R. v. Couture*, [2007] 2 S.C.R. 517 at paras. 83 and 126-127. I understand counsel for Mr. McDonald to suggest that a similar approach should be used in assessing the reliability of a Mr. Big confession as part of the White analysis. In particular, she argues that statements Mr. McDonald made to individuals other than the primary (to Jeremiah and to Sgt. McCarl following his arrest) even if admissible, cannot provide independent confirmation of the reliability of Mr. McDonald's statements to the primary and secondary operator.
- [210] Counsel for the Crown, relying on the judgment of Boswell J. in *Niemi*, argues that, "for s. 7 purposes the salient question is whether the circumstances [of a particular Mr. Big operation] created an environment where there existed the real possibility that [the target] would falsely confess" (at para. 167).
- [211] In my view, the test proposed by counsel for Mr. McDonald erects too high a threshold for the admission of evidence of this kind. The threshold reliability test that applies under the principled approach responds to the fact that hearsay evidence is presumptively inadmissible. That the proponent of the hearsay evidence must meet the threshold reliability test in order to gain its admission reflects this reality. The converse is true in this context. The evidence is admissible (subject only to the trial judge's discretion to exclude evidence where the prejudicial effect of that evidence exceeds its probative value) unless the defence can establish that it was obtained in violation of the investigative target's s. 7 right against self-incrimination.
- [212] I also reject the notion that only evidence independent of the target can be considered in assessing the reliability of a target's inculpatory statements to undercover police officers. Accepting this proposition would oblige me to disregard evidence that Mr. McDonald admitted to Jeremiah that he was the shooter. In my respectful view, it would make little sense to disregard this evidence in assessing reliability-based concerns. I say this because the unreliability of Mr. McDonald's inculpatory statements is said to be sourced in the uniquely coercive context of the Mr. Big investigation. His statements to Jeremiah when they were alone confirm the reliability of what he told the primary because they are divorced from that context and made to a brother and life-long confidante. Ignoring

statements of this kind would impair the interest of the community in ensuring that criminal trials achieve their truth-seeking function.

- [213] The test proposed in Niemi strikes an appropriate balance between the need to identify unreliable confessions made in a Mr. Big context on the one hand, and preserve the traditional role of the trier of fact to make ultimate determinations about the reliability of evidence on the other.
- [214] In addressing reliability-based concerns, counsel for Mr. McDonald and for the Crown engaged in a detailed analysis about whether information supplied by Mr. McDonald to the primary about the offence was, or could have been, tainted by the 1983 interview and/or inconsistent with the known circumstances of the offence.
- [215] Counsel for Mr. McDonald emphasized that he told a number of lies to the primary about collateral issues in the course of the undercover operation and that he has a tendency to fabrication. Crown counsel countered that Mr. McDonald provided to the primary what were confirmed to be truthful accounts on a number of other points, including: what precipitated the Bayshore Auto altercation and how Mr. McDonald responded to it; that Mr. McDonald made a complaint to the police that a prostitute had stolen from him money and hotel keys; and that he had been convicted in England of manslaughter and sentenced to six years' imprisonment. Counsel for Mr. McDonald emphasized the information concerning the Dawson Creek offence that was supplied to him during the 1983 interview and submitted that much of what Mr. McDonald told the primary could have amounted to parroting back information he had been fed. The Crown responded that certain details conveyed by Mr. McDonald to the primary could only have been known by the perpetrator. For example, he told the primary that he used a .30-30 caliber Winchester rifle in the shooting. The forensic evidence, as I understand it, is that a .30-30 caliber rifle was used in the shooting and that it was "probably" a Winchester brand. In addition, Mr. McDonald told the primary he fired two shots, which corresponds with Marilyn Jones's evidence at the preliminary inquiry. The defence replies to both these points by noting that Mr. McDonald was told in the 1983 interview that the police seized a box of .30-30 caliber shells from Jeremiah's truck and were quite interested in them. While the Crown concedes this point, it notes that Mr. McDonald was not supplied with information about the make of the weapon that was probably used in the shooting. With respect to the number of shots fired at the scene, the defence notes that while Mr. McDonald told the primary he fired the second shot over Marilyn Jones's head after she got out of the vehicle, Marilyn Jones testified at the preliminary inquiry that both shots were fired while she remained seated in the vehicle.
- [216] These examples illustrate the microscopic level of detail that infused the arguments made by counsel respecting the reliability of Mr. McDonald's inculpatory statements. I intend no criticism of counsel on this issue. It is understandable that counsel would endeavour to closely mine the record for details supportive of their respective positions. But the assessment of reliability-based concerns as part of the constitutional inquiry must not go so far as to intrude on the trier of fact's domain. The experience of the law with Mr. Big

investigations suggests that there will almost always be inconsistencies between some of the details related by the target of the investigation and the known circumstances of the offence. Our experience also suggests that cases of this kind are often fought over the question of whether the target could have learned about the offence details related in a confession from other sources. Where, as here, the police were investigating a homicide alleged to have been committed 30 years ago before investigative hold back was an accepted best practice, it is hardly surprising that inconsistencies and concerns of the sort identified in the case at bar are present. The offence occurred a long time ago. It was an unimaginably traumatic event, certainly for Ms. McClarty. It would not be surprising if memories have faded. These are the kinds of issues that the ultimate trier of fact must wrestle with in virtually every case of this kind: see *R. v. Vuozzo*, 2013 ABCA 130 at para. 72.

[217] I wish to emphasize that I do not discount the importance of carefully considering reliability-based concerns of the sort raised by counsel. But, consistent with the self-incrimination inquiry, the test I have determined to apply is whether this investigation created an environment where there existed a real possibility that Mr. McDonald would falsely confess to the crime. I have already come to the conclusion that Mr. McDonald's confessions were not compelled in an atmosphere of coercion or oppression. Mr. McDonald chose, for his own reasons, to tell the primary, his trusted friend and mentor and someone he believed to share a similarly violent past, that he was responsible for the shooting of Jones. Nothing about the context in which those confessions were made raises reliability concerns.

[218] Further, and taking a broader view of the issue, the reliability inquiry must take account of:

- The considerable body of circumstantial evidence connecting Mr. McDonald to the offence, including evidence of motive, that he was apprehended driving away from the scene at a time proximate to the killing and in possession of ammunition consistent with the caliber used in the shooting, and post-offence conduct consisting of flight. The case is, in this respect, quite unlike *Hart* where there was no circumstantial evidence capable of confirming the truthfulness of his confession;
- The context in which the confessions were made and the absence of coercive influences when they were made;
- The trust relationship between Mr. McDonald and the primary when the confessions were made;
- The absence of any evidence in this case that the decision to use a primary with file knowledge tainted the reliability of Mr. McDonald's inculpatory statements;

- The fact that Mr. McDonald made his first detailed confession at Earls restaurant before he was advised by the primary that the police continued to investigate his involvement in the Dawson Creek shooting, that it was a liability, and that it needed to be eliminated before the big score could proceed. In short, he had nothing to gain by referencing the offence on September 10, 2011 at Brewster's pub, or by confessing to the offence on September 20, 2011 at Earls restaurant;
- The spontaneity of the disclosure at Earls restaurant;
- The degree of detail supplied by Mr. McDonald about the offence and the general consistency with which the various versions of his participation in the offence were related to the primary;
- The fact that the importance of honesty was repeatedly emphasized with Mr. McDonald during the course of the investigation;
- The further admission made by Mr. McDonald to his brother that he was responsible for the shooting of Jones;
- The trust relationship existing between Mr. McDonald and Jeremiah when this further admission was made and the absence of any motive Mr. McDonald had to falsely confess to his brother that he was responsible for the shooting;
- The further admissions made by Mr. McDonald to Sgt. McCarl and Cst. Zwicker. [For reasons that follow, I have determined that the Crown has established beyond a reasonable doubt that both statements were voluntary. In the result, I would admit both of those statements at trial and also on this voir dire as being relevant to the reliability assessment.]

[219] Assessing this body of evidence collectively, I conclude that there is no realistic possibility the circumstances of the investigation are such that Mr. McDonald would falsely confess to shooting Jones. Indeed, I would have come to the same conclusion had I adopted the higher threshold reliability standard proposed by the defence.

[220] The weight to be given this evidence is properly a matter for the jury to consider: *R. v. Roberts* (1997), 90 B.C.A.C. at para. 16; *R. v. Langlet*, 2012 BCSC 1621 at paras. 151, 157.

[221] I wish to be clear that I have come to this conclusion without reference to the details surrounding the English manslaughter, and without resolving whether those details support or undermine the reliability of Mr. McDonald's inculpatory statements.

[222] Although it was not specifically argued before me, I am also satisfied that (subject to entertaining submissions defence counsel may wish to make with respect to editing) the probative value of this evidence outweighs its prejudicial effect.

(v) Abuse of Power

[223] In *White*, Iacobucci J. described the concern underlying this factor in these terms: permitting the use of compelled statements might cause the police to abuse their power by providing them with a strong incentive or perhaps unconscious inclination to overemphasize the extent of the statutory duty to report an accident in order to obtain

relevant information (at para. 64). The concern in White was police exploitation of a statutory provision compelling motorists to provide post-accident statements. The concern in the case at bar is future exploitation by the police of a legitimate investigative technique, but one that may be susceptible to abuse.

- [224] Counsel for Mr. McDonald submits that he was subjected to a highly coercive and lengthy investigation that demonstrated a complete disregard for his personal autonomy and psychological well-being. She submits the Mr. Big technique is ripe for abuse and excluding Mr. McDonald's incriminating statements would provide a much-needed incentive for the police to develop fair and consistent guidelines addressing such issues as the use of simulated violence in scenarios, the adoption of best practices to mitigate the risk of statement contamination, and safeguarding the psychological well-being of the target.
- [225] Mr. McDonald was not coerced or compelled to confess to the undercover operators his responsibility for the shooting. The investigation was not highly coercive and, in this respect, reflects no abuse of power. There is no evidence Mr. McDonald's psychological well-being was impaired by this investigation. Mr. McDonald was not a vulnerable target like Mr. Hart.
- [226] With respect to the incentives excluding this evidence might entail, it is noteworthy that the primary testified on the voir dire that best practices have developed over time with experience in the utilization of this unsolved homicide technique. They include: the target is never forced to do anything they do not want to do; no violence is ever directed at the target; no violence is ever directed at any member of the fictitious criminal organization for whom the target thinks he is working; no offences are actually committed in any of the scenarios; the use of hold back as an investigative strategy; the general policy of ensuring that the primary has no file knowledge; and, scenarios are developed that are considered to be appropriate in light of the nature of the crime being investigated, the target's background and history, and the target's response to past scenarios, including those involving threats of violence or simulated violence.
- [227] It is also worth emphasizing that the unsolved homicide technique used in this case is not problematic per se. Properly employed, it has long been recognized as a legitimate law enforcement strategy: *R. v. Moore* (1997), 94 B.C.A.C. 281 at para. 19. While no two manifestations of the technique are the same, the one used in *Roberts* was characterized as a clever policing (at para. 23). In *Fliss*, the Mr. Big confession was noted by Binnie J. to have come about as a result of "skillful police work" (at para. 21). Apart from the degree of simulated violence employed in the kidnapping scenarios (an issue I will address separately under Mr. McDonald's abuse of process ground) I agree with the conclusion reached in *Niemi* (at para. 185) that finding an abuse of power on the facts of this case would be tantamount to finding that Mr. Big scenarios are, per se, abusive. On the current state of the law, it is not open to me to come to that conclusion.

[228] For the foregoing reasons, I dismiss Mr. McDonald's application to exclude the inculpatory statements he made to the undercover officers and to Jeremiah on grounds that they were obtained in breach of his right against self-incrimination.

(b) The "Functional Detention" Claim and the Alleged Breach of the Right to Silence

[229] It is well-established that the right to silence, which is predicated on a suspect's right to choose freely whether to speak to the police or to remain silent, is only engaged upon detention. In *R. v. Hebert*, [1990] 2 S.C.R. 151 at para. 74, McLachlin J. (as she then was) said this about the scope of the right to silence:

it applies only after detention. Undercover operations prior to detention do not raise the same considerations. The jurisprudence relating to the right to silence has never extended protection against police tricks to the pre-detention period. Nor does the Charter extend the right to counsel to pre-detention investigations. The two circumstances are quite different. In an undercover operation prior to detention, the individual from whom information is sought is not in the control of the state. There is no need to protect him from the greater power of the state. After detention, the situation is quite different; the state takes control and assumes the responsibility of ensuring that the detainee's rights are respected.

[230] The Supreme Court of Canada has repeatedly affirmed this proposition, most recently in *R. v. Singh*, [2007] 3 S.C.R. 405 at para. 32.

[231] In *R. v. McIntyre*, [1994] 2 S.C.R. 480, the Court affirmed the application of *Hebert* to Mr. Big investigations holding that the target of an undercover operation was not detained when he made the incriminating statements (see also *Fliss*, at para. 79 where Binnie J. found that the subject of a Mr. Big investigation was not detained when he confessed to the murder).

[232] In *R. v. Grant*, 2009 SCC 32 at para. 41, the Court undertook a comprehensive restatement of the meaning of "detention" for constitutional purposes. By way of summary:

1. Detention under ss. 9 and 10 of the Charter refers to a suspension of the individual's liberty interest by a significant physical or psychological restraint. Psychological detention is established either where the individual has a legal obligation to comply with the restrictive request or demand, or a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply.
2. In cases where there is no physical restraint or legal obligation, it may not be clear whether a person has been detained. To determine whether the reasonable person in the individual's circumstances would conclude that he or she had been deprived by the state of the liberty of choice, the court may consider, inter alia, the following factors:
  - (a) The circumstances giving rise to the encounter as they would reasonably be perceived by the individual: whether the police were providing general assistance; maintaining general order; making general inquiries regarding a particular occurrence; or, singling out the individual for focussed investigation.

- (b) The nature of the police conduct, including the language used; the use of physical contact; the place where the interaction occurred; the presence of others; and the duration of the encounter.
- (c) The particular characteristics or circumstances of the individual where relevant, including age; physical stature; minority status; level of sophistication.

[233] I make two observations about Grant. First, the Court concluded that determining whether a psychological constraint amounts to a detention (where no legal compulsion exists) involves an objective inquiry. The focus must be on the state conduct and how that conduct would be perceived by a reasonable person in the same situation (para. 31). The inquiry is an objective one because, "the police must be able to know when a detention occurs in order to allow them to fulfill their attendant obligations under the Charter" (at para. 32). Second, although he concurred in the result, Binnie J. rejected the "claimant-centered approach" of the majority holding that more attention should be paid to the objective facts of the encounter, whether or not such facts are apparent to the person stopped:

A central problem with the claimant-centred approach, as I see it, is that it does not take adequately into account what the police know and when they knew it except insofar as this information is conveyed to the person stopped, but which the police may not consider to be in their interest to convey. Police may know if a crime has allegedly been committed and whether they are making the approach to an individual with a view to obtaining general information or, on the other hand, corralling a suspect and collecting admissible evidence to bring him or her to justice. Possession of such knowledge may in fact place the police in an adversarial relationship to the person approached whether that person is aware of the jeopardy or not. It is the adversarial relationship together with the "stop" that generates the need for counsel. At that point, the power imbalance is significant. The unsuspecting suspect may fatally compromise his or her position simply through ignorance of his or her rights and the fact the police have now adopted an adversarial position. At that point, as Le Dain J. put it in *Therens*, [page 436] "a person may reasonably require the assistance of counsel" (pp. 641-42), but may not have any idea of the perilous turn of events.

These remarks do not, however, represent the views of the Court.

[234] As Mr. McDonald was not detained within the meaning of Grant while the Mr. Big operation was unfolding, this well-settled body of law stands as a formidable obstacle to the successful advancement of an argument that the inculpatory statements he made to undercover police officers were obtained in breach of his right to silence.

[235] He asserts, however, that the door to an exclusionary route for Mr. Big confessions, grounded in the right to silence, has been left ajar. He relies, in this regard, on the obiter remarks of Rosenberg J.A. in *Osmar* (at para. 42) that:

It may be that the right to silence recognized in Hebert could be extended to a case where the accused, although not in detention, was nevertheless under the control of the state in circumstances functionally equivalent to detention and equally needing protection from the greater power of the state. But that is not this case. This appellant was not under the control of the state nor was the context such as to require that he be protected from the greater power of the state.

[236] The concept of a functional detention was addressed in this province a decade before Osmar was decided in Moore, also a case involving a Mr. Big investigation into a murder. The target was taken from the Lower Mainland to Jasper by undercover police officers. He had no independent means of transportation, little money and was kept under surveillance. He argued that the circumstances were "tantamount to a detention" because of the degree of control the police exercised over him. The argument was rejected. For the Court, Proudfoot J.A. noted that the target voluntarily accompanied the investigating officers, did so with an expectation that he would be paid for his service, and retained his freedom of movement. She concluded that, "the fact pattern hardly qualifies as describing a situation where someone has been detained" (at paras. 15-20).

[237] The issue was raised again in R. v. Earhart, 2011 BCCA 490. The Court took note of the dicta in Osmar and addressed an argument that Ms. Earhart, who was also the target of a Mr. Big investigation, was "functionally detained" because she was on judicial interim release when that investigation commenced. While I do not read the Court's judgment in Earhart as necessarily adopting the notion of a functional detention, Bennett J.A. proceeded to dispose of the argument on its merits, concluding (at paras. 72-75):

Ms. Earhart was not under "pronounced psychological and emotional pressure" when she spoke with the undercover operator (Osmar at para. 35). The trial judge states at para. 33 of Voir Dire 2: "While something "functionally equivalent to detention" may be somewhat different from detention in this sense, it cannot be a situation far removed. At least such a situation must involve state control such that the accused reasonably believes that he or she must follow a demand or direction."

This "Mr. Big" operation was relatively benign, and there was no physical or psychological constraint imposed on Ms. Earhart by the police. She was free to agree or decline to speak to the undercover operator.

In my respectful view, the trial judge made no error in concluding that Ms. Earhart was not detained when she spoke to police operatives on May 4, 2006.

[238] I have concerns about adopting a definition of detention that is considerably broader than that which was established by the Court in Grant. Osmar was decided well before Grant. Adopting the notion of a "functional detention" in the context of an undercover operation like the one mounted in the case at bar risks undermining the Grant court's objective of defining "detention" in such a way as to enable the police to know, in advance, when a detention has occurred. In addition, as a "functional detention" would trigger the right to

counsel, a legitimate investigative technique might prematurely be brought to an end in a way that does not properly reflect the careful balance the Supreme Court of Canada has attempted to maintain between the protection of individual rights and the public interest in the effective investigation of crime. Finally, it is difficult to square the notion of a "functional detention" with the claimant-centered objective test for psychological detention established in *Grant*. I am satisfied that Mr. McDonald did not perceive himself to be detained at any point in the investigation. That will inevitably be the case in all Mr. Big investigations that proceed to fruition. No person entirely taken in, as Mr. McDonald was, by the compelling fiction created by the police undercover operators in this case would reasonably perceive the circumstances as amounting to a detention or a deprivation by the state of the liberty of choice. To establish a "functional detention" it would be necessary to look at the issue from the perspective of what the police knew and how, with that knowledge, they managed the target of the investigation by manipulating his or her movements. Such an inquiry seems to me to be quite at odds with the approach of the majority in *Grant*. It reflects more closely the views of Binnie J. that were not adopted by the Court.

- [239] Having expressed these reservations, I note that the "functional detention" analysis left open in *Osmar* has been applied in *Hart*, *Niemi* and *N.R.R.* In *Hart*, for example, Green C.J.N.L. held for the majority that "the right to silence is not necessarily limited to persons in detention; rather, the real issue is state control" (at para. 198). In the unique circumstances of that case (Mr. Hart was socially isolated, poor, living on welfare, using a food bank, and without a bed or furniture) a finding was made that the state's control over Mr. Hart was thorough enough to be equivalent in degree to the control the state has over a person in detention (at para. 205). The law continues to develop in this area. It can be expected that additional guidance will be provided by the Supreme Court of Canada in *Hart*. In light of the existing uncertainty in this area of the law, I have determined to consider whether Mr. McDonald has established that he was functionally detained during the course of the undercover operation in an *Osmar* or *Hart* sense.
- [240] Counsel for Mr. McDonald argues that the psychological and emotional pressures brought to bear in the course of the investigation, along with the threats of violence and promises of material gain, were sufficient to bring him within the control of the state. She submits that his movements were manipulated. She notes that Mr. McDonald was taken to Dawson Creek to participate in the re-enactment immediately after the confession in the apartment was made. She notes that he was picked up from the second Montréal trip and driven directly to the Island for the meeting with Jeremiah without being given a chance to go home. She further notes the evidence of the lead investigator who agreed in cross-examination that there was no need to devise a disaster plan when "Special I" officers were installing a tracking device in Mr. McDonald's vehicle because he was then in "the control" of the undercover team. Finally, she submits that Mr. McDonald was groomed to follow instructions without hesitation and that this also served to bring him within the effective control of the state.

[241] I do not accept these arguments. In my respectful view, the record does not come close to establishing that Mr. McDonald was, at the time he made the inculpatory statements, under the control of the state in circumstances functionally equivalent to detention. I have come to this conclusion for the following reasons:

- Mr. McDonald made a choice to work for the criminal organization;
- Although he was offered powerful inducements to continue working for the organization, I am satisfied he was not psychologically or emotionally pressured to submit to the primary's directions concerning his movements under a reasonable apprehension that he had no choice but to do otherwise;
- Mr. McDonald voluntarily accompanied the primary and other undercover operators because it was in his interests to do so, both financially and because he saw continuing association with the fictitious criminal organization as the means through which he could shield himself from further police investigation into the Dawson Creek shooting;
- Mr. McDonald went home at the end of every scenario except those involving overnight trips. He lived independently. He had other work available to him. Days and sometimes weeks passed between scenarios. He was not the impoverished and vulnerable target Mr. Hart was;
- Mr. McDonald was never threatened, nor were any of his associates in the criminal organization threatened in his presence;
- Mr. McDonald did not testify on the voir dire. While this will not be required in every case, there is no evidence before me from which I can infer Mr. McDonald could reasonably have concluded that his freedom of choice had been constrained: see *R. v. Atkins*, 2013 ONCA 586 at para. 11;
- The lead investigator's adoption in cross-examination of the word "control" has no real significance in the determination of the legal issue that arises in this case. The lead investigator was merely adopting a word introduced by defence counsel to explain that as Mr. McDonald was in the company of the primary when the installation was being done, his movements were being controlled at that moment and there was no need for the development of a disaster plan because there was no risk he would unexpectedly show up;
- After Mr. McDonald made the inculpatory statements the police were obliged to await charge approval and sought to keep him busy by getting him to guard a bag in a hotel and sending him on the second trip to Montréal. Although the police manipulated Mr. McDonald's movements and kept track of him in the period pending charge approval more closely than they had previously, it would have been irresponsible for them to do otherwise. Mr. McDonald had, by this time, provided two full confessions to the murder of Jones. More importantly, there is no evidence that Mr. McDonald was in the "control of the state" even after he made the incriminating statements in issue. For example, after the first three inculpatory statements were made to undercover officers, Mr. McDonald travelled, unaccompanied, to and from Montréal. Even after the fourth inculpatory statement was made to Jeremiah near the conclusion of the investigation, Mr. McDonald was permitted to stay at his brother's residence overnight while the primary returned

to the Lower Mainland. This evidence is simply inconsistent with a conclusion that Mr. McDonald was functionally detained at any point during the investigation.

[242] Looking at the circumstances in a cumulative way, Mr. McDonald was not, at any point in the investigation, in the control of the state in circumstances akin to detention. His application to exclude the inculpatory statements on grounds that they were obtained in breach of his right to silence is, therefore, dismissed.

(c) The Abuse of Process Allegation

[243] Mr. McDonald argues that the simulated violence used by the police during the staged kidnapping and torture scenarios so "shocks the conscience" of the community that the inculpatory statements he made following his exposure to those scenarios should be excluded. His argument is premised on the "residual discretion" trial judges have under s. 7 and 24 of the Charter to provide an exclusionary remedy to preserve the good repute of the administration of justice. The remedy is designed not to preserve trial fairness but to protect the integrity of the justice system: *R. v. Nixon*, 2011 SCC 34 at paras. 33-43. Whether the conduct of the police triggers the community shock doctrine and a consequent constitutional remedy, such as the exclusion of evidence, must be considered from the perspective of a reasonable, well-informed person who is dispassionate and fully apprised of all the circumstances: *Roberts* at para. 15; *R. v. Rothman*, [1981] 1 S.C.R. 640; *R. v. Mack*, [1988] 2 S.C.R. 903 at 971.

[244] To recap, Mr. McDonald first made reference to his involvement in the Dawson Creek homicide the day he was exposed to the finger-severing scenario. Ten days later he provided a detailed inculpatory statement to the primary admitting responsibility for the shooting. That confession was unexpected and unprompted. The confession in the covert apartment occurred three days later. The re-enactment took place the day after that.

[245] Scenarios involving feigned violence are a common feature of Mr. Big investigations. Indeed, in many homicide cases it will be necessary for the police to create an environment in which the target perceives that admissions of violence will be tolerated, if not condoned. There is a strong community interest in the vigorous investigation of serious crime. As Lamer J. (as he then was) famously observed in *Rothman* at 697, "the investigation of crime and the detection of criminals is not a game to be governed by the Marquess of Queensbury rules". A reasonable and well-informed member of the community would, in a homicide investigation, expect its police force to be as ingenious in enforcing the law as criminals are in breaking it and in attempting thereafter to avoid detection. Used properly, there can be little doubt the Mr. Big investigative technique represents ingenious and skillful policing. It is a technique capable not only of identifying perpetrators but eliminating suspects. The primary testified that about 20-30 per cent of individuals targeted with this technique are cleared of the crime being investigated. In recognition of these considerations, the police have been given "considerable latitude" in executing investigative strategies incorporating simulated violence: *Moore*, at para. 20. The

standard for finding that a technique used by the police in the context of an unsolved homicide investigation shocks the conscience of the community is high: *R. v. Welsh*, 2013 ONCA 190 at para. 105; *Niemi* at para. 124;

[246] While courts should not be too quick to second-guess the exercise of police discretion in the utilization of unsavoury investigative techniques in serious cases, police conduct so egregious that it shocks the conscience of the community must not be condoned: *Welsh*, at paras. 94-95.

[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.

The weight to be given any one of these factors will vary with context. The inquiry must also take account of the governing jurisprudence and where the technique used in a particular case fits within that body of law. It is to that issue I now turn.

- [248] In McIntyre, the accused was suspected in the shooting death of a nun. The case involved a Mr. Big sting. The primary undercover officer portrayed himself as being involved in prostitution and the black-market sale of cigarettes and guns. Mr. McIntyre was offered work with the organization on the condition that he satisfy the primary he was capable of killing. After some initial resistance, he recounted in detail how he killed the victim. On appeal to the Supreme Court of Canada, the Court held "the tricks used by the police were not likely to shock the community "
- [249] In Burns, the undercover officers portrayed themselves as killers involved in the gun trade. Burns, a 19-year-old with no prior criminal involvement, was exposed to a scenario in which one of the undercover officers simulated roughing up someone indebted to the criminal organization (another undercover officer) by punching him. The target was told not to disclose anything about the nature of the organization and warned that if someone betrayed the organization, that person or that person's family could suffer extreme violence. Burns was led to believe that if he did anything to displease the primary undercover officer, he risked death. Burns was noted to be quite nervous during some of the scenarios and one undercover officer agreed that both Burns and the co-accused Raffay may have participated in the scenarios out of fear. This particular manifestation of the Mr. Big investigative technique was determined to "fall far short" of that required to constitute an abuse of process (at para. 26).
- [250] In Roberts, the undercover officers, posing as "violent and merciless criminals", threatened a man and his pregnant wife (both of whom were also undercover officers) with "serious harm" if he did not come up with money purportedly owed to the criminal organization. In dismissing the abuse of process claim made in that case, Hall J.A. (at para. 15) held that, "The reasonable, well-informed member of the community would not be at all shocked by this police conduct but would, I believe, unhesitatingly endorse it".
- [251] In R. v. Bonisteel, 2008 BCCA 344, also a Mr. Big murder investigation, the police involved the target in the activities of a fictitious criminal organization over a period of eight months. In one scenario, Bonisteel was instructed to stand outside a hotel room while the police staged a beating of a woman (an undercover operator) inside. The scenario was engineered so that Bonisteel heard shouting and thumping noises coming from inside the hotel room that were consistent with the administration of a beating. The next day, Bonisteel met with the woman who was made up to appear as if she had been beaten. An abuse of process argument was dismissed (see paras. 86-94).
- [252] In R. v. O.N.E., 2000 BCSC 1200, a young person targeted with an undercover investigation witnessed one operator administer what appeared to be a "vicious beating" to a supposed "rat". The victim was left at the roadside. The purpose of the scenario was to show the target that the organization would "resort to deadly force" to deal with persons who betrayed it. Edwards J. dismissed an abuse of process argument, relying on Burns and Roberts.

- [253] In *R. v. Smith* (15 January 2003) Vancouver Registry No. CC011596, Stewart J. declined to even embark on an abuse of process voir dire following a Vukelich hearing in a case where it was accepted the evidence would establish that: (i) the target assaulted and confined a person (an undercover officer) in the expectation of that person being executed after the target was dropped off; and (ii) the target overheard gunfire he was led to believe involved the execution of a female gang member and then participated in the aftermath of the "hit" by offering to drive the executioner away from the scene. He held (at para. 14) "there is no possibility of a finding at the end of the requested voir dire that right-thinking members of the community, armed with all the relevant information would find the conduct of the police in violation of fundamental community values, or shocking to the conscience of the community "
- [254] Having considered the test for "residual category" abuse of process claims, identified the factors that might properly guide the analysis, and the treatment of abuse of process claims in similar contexts, I will now set out the factual findings upon which Mr. McDonald's abuse of process claim must be assessed.
- [255] First, it goes without saying that the offence being investigated by the police was very serious; indeed, it is the most serious offence known to law. Mr. McDonald was not a young, inexperienced or emotionally fragile target. Although he was known to abuse alcohol, the police were careful to control his ingestion of intoxicants throughout the course of the undercover operation. The "two drink rule" was only breached on a handful of occasions and, even then, there is no evidence that Mr. McDonald was under the influence of any intoxicant during a scenario. Although the investigation was relatively lengthy, it was not particularly coercive, and certainly not as coercive as the investigations mounted in *Burns* and *Hart*. Mr. McDonald had a substantial criminal history and, more importantly, a history of violence. The brutality associated with the manslaughter of Roger Wilton in England is stunning and was known to the police at the time of the investigation. In addition, he admitted to the primary that he committed other, more recent acts of violence. I reference here the Bayshore Auto incident and Mr. McDonald's admissions that he assaulted prostitutes. Mr. McDonald demonstrated no reaction to the kidnapping or the scenario that played out in the warehouse that was designed to lead him to believe a torture session was about to occur. On the evidence before me, the only conclusion I can draw is that he was utterly unaffected by this scenario. Indeed, he appeared eager to suggest alternative, more gruesome, ways in which the supposed debtor might be tortured. The police took these considerations into account in determining to proceed with the finger-severing scenario. I do not accept the argument advanced on Mr. McDonald's behalf that the officers who testified before me were engaging in ex post facto justifications for this scenario. I am satisfied that both the team commander and lead investigator apprised themselves of Mr. McDonald's reaction to the initial kidnapping scenario before determining to "up the ante". Despite the degree of simulated violence used by the police and the close temporal connection between those scenarios and Mr. McDonald's first reference to the Dawson Creek homicide, I am satisfied that Mr. McDonald was not

compelled by fear to disclose his responsibility for the shooting. Rather, in all the circumstances, I conclude that he did so because he was satisfied that the primary, and the criminal organization, represented a safe haven in which a disclosure of this kind could be made. I am also satisfied, on a threshold basis, that the use of simulated violence did not elicit an unreliable confession.

[256] I turn next to consider the nature and extent of the simulated violence the police incorporated into the kidnapping scenarios. It is disturbing. It falls toward the higher end of the spectrum of simulated violence used in cases of this kind. It is in a different category than the simulated violence used in McIntyre, Burns, Roberts and Bonisteel and must be so evaluated. It rivals the degree of simulated violence used in Smith. In another case, the degree of simulated violence used in this case might warrant an abuse of process finding. But the degree of simulated violence used by the police in this case is not the only consideration. All of the other considerations must be taken into account. Collectively, they point to a conclusion that this particular manifestation of the Mr. Big technique would not shock the conscience of the community. After carefully reflecting on this matter and considering the applicable factors in a cumulative way, I conclude that the abuse of process claim must fail.

(d) The Hearsay Argument

[257] Mr. McDonald submits that the inculpatory statements he made in the course of the undercover operation should be excluded under the principled approach to hearsay evidence. I conclude that this argument is foreclosed by authority binding on this Court. In *R. v. Terrico*, 2005 BCCA 361, and subsequently in *Bonisteel*, the Court of Appeal held that a statement made by a litigant tendered as evidence at trial by the opposing party is admissible as an admission against interest without engaging in the threshold reliability analysis contemplated by *R. v. Khelawon*, [2006] 2 S.C.R. 787, 2006 SCC 57. This position reflects the current state of the law in other provinces: see, for example, *Osmar* at paras. 52-54.

[258] Mr. McDonald submits that this line of authority has been overtaken by the Supreme Court of Canada's decision in *R. v. Mapara*, 2005 SCC 23. I do not agree. The Supreme Court of Canada has, post-*Mapara*, continued to endorse the position adopted by the Court of Appeal in *Terrico* and *Bonisteel*: see *Khelawon* (2006) at para. 65; *Couture* (2007) at para. 75; and *R. v. T. (S.G.)*, 2010 SCC 20 at paras. 20-21. For these reasons, I would not give effect to the argument advanced on Mr. McDonald's behalf.

(e) Conclusion Respecting the Admissibility of Mr. McDonald's Statements to Undercover Operators

[259] For the foregoing reasons, I dismiss Mr. McDonald's application to exclude inculpatory statements he made during the course of the Mr. Big undercover operation.

C. THE SECOND VOIR DIRE: THE ADMISSIBILITY OF MR. MCDONALD'S POST-ARREST STATEMENTS TO SGT. McCARL

1. Introduction

[260] On October 11, 2011 the Crown approved a charge of first degree murder against Mr. McDonald. On October 13, 2011 an Information was sworn charging Mr. McDonald with that offence and an arrest warrant was issued. On October 14, 2011 the primary instructed Mr. McDonald to attend an A&W parking lot on the King George Highway. When he did, he was arrested by Sgt. Drotar and Cpl. Wellington. He was informed of his right to counsel and said that he wanted to call a lawyer. Sgt. McCarl interviewed Mr. McDonald on October 14 and 15, 2011. He admitted responsibility for the shooting during the interview of October 15, 2011.

[261] Mr. McDonald seeks exclusion of the inculpatory statements he made on October 15, 2011 on a number of grounds, including:

- The police failed to discharge properly their informational obligations under s. 10(b) of the Charter by failing to clear up Mr. McDonald's confusion about his right to counsel;
- The police failed to discharge properly their implementation duties under s. 10(b) of the Charter by:
  - (a) failing to immediately facilitate access to counsel; and
  - (b) failing to provide him a further opportunity to consult with counsel when: (i) the police raised the 1983 statement and expressed concerns to him about its admissibility; and (ii) the specifics of the undercover operation were revealed to him by Sgt. McCarl during the interview on October 15, 2011;
- The inculpatory statements he made to Sgt. McCarl following his arrest were obtained in breach of his s. 7 right to silence. He submits that the decision of the police to continue questioning him despite his repeated assertions of the right to silence, and intentionally interrupting him when he tried to invoke that right, denied him a meaningful choice about whether to speak to the police or remain silent;
- The Crown has failed to prove that his custodial statements were voluntary. He makes a number of points in support of this argument, including that:
  - (a) no attempt was made in the post-arrest interviews to neutralize the effect of the inducements and simulated violence to which he was exposed in the course of the undercover operation;
  - (b) the manner in which Sgt. McCarl addressed (and then used) the 1983 statement during the interview of October 15, 2011 raises at least a doubt about the voluntariness of his statements;

- (c) Mr. McDonald repeatedly asserted his right to silence; and
- (d) the extent to which the Reid technique was employed during the interview of October 15, 2011 raises a reasonable doubt about the voluntariness of his statements.

[262] Although the constitutional and voluntariness issues were, with the agreement of counsel, addressed in the same voir dire, I am mindful of the onus and burden to be discharged by the Crown on the voluntariness issue (to demonstrate that the statement is voluntary beyond a reasonable doubt) and by the defence on the Charter issues (to establish the breach on a balance of probabilities).

[263] The Crown called four witnesses on the second voir dire: the lead investigator, Sgt. Drotar, Cpl. Wellington, and Sgt. McCarl, who interviewed Mr. McDonald on October 14 and 15, 2011. The defence called the primary. Mr. McDonald did not testify on the voir dire.

## 2. The Arrest and the Facilitation of Contact with Counsel

[264] Mr. McDonald was arrested on Friday, October 14, 2011 at approximately 2:39 p.m. by Cpl. Wellington and Sgt. Drotar. Both officers were aware that a decision had been made not to advise Mr. McDonald about the existence of an undercover operation upon his arrest. The interaction between the police and Mr. McDonald at the time of the arrest, and during the ride to the detachment, was audio recorded.

[265] Mr. McDonald, who was wearing layers of clothing, was handcuffed immediately upon arrest. As he was being subjected to a cursory search, Mr. McDonald advised the arresting officers he was in possession of a knife. Cpl. Wellington retrieved a knife from Mr. McDonald's right boot. Mr. McDonald was also in possession of a sizable sum of cash, which was seized.

[266] At 2:45 p.m. Sgt. Drotar read to Mr. McDonald an arrest script that had been prepared in advance. No issue is taken with the informational content of the extension of the right to counsel at the scene of the arrest. Mr. McDonald was asked and advised Sgt. Drotar that he wanted to call a lawyer. Mr. McDonald was also given a secondary warning that he was not obliged to say anything, but that anything he did say may be given in evidence. He indicated that he understood this warning.

[267] Both officers were in possession of cell phones at the scene of the arrest but neither of them offered one to Mr. McDonald to facilitate his access to counsel.

[268] At about 2:47 p.m. the officers left the arrest scene with Mr. McDonald on route to the Surrey detachment. About seven or eight minutes into that trip, Sgt. Drotar noticed that the batteries in his recording device were dead. They pulled over in a parking lot at Bear Creek Park to retrieve new batteries for the device. About two minutes of the escort back to the Surrey detachment were not recorded. Sgt. Drotar testified, and I accept, there was no conversation with Mr. McDonald during this period.

- [269] Sgt. Drotar testified that traffic was heavy and it took significantly longer than expected to get back to the detachment. They arrived at the Surrey detachment at about 3:14 p.m. but had to wait about six minutes to gain access to the cellblock area because other prisoners were being dealt with.
- [270] At 3:20 p.m. Mr. McDonald was brought into the cell block area. He was taken into a separate room where he was instructed to remove his layers of clothing. He was thoroughly searched. Sgt. Drotar explained that Mr. McDonald had a knife inside his boot and that he needed to search him for any other weapons.
- [271] After the search had been completed, Sgt. Drotar decided to proceed with the booking in procedure before facilitating Mr. McDonald's access to counsel. A number of tasks were undertaken at that time, including: compiling an inventory of Mr. McDonald's personal effects; obtaining a file number; taking Mr. McDonald's photograph; completing a prisoner form with Mr. McDonald's citizenship, address and medical information; and, counting the cash seized during the initial post-arrest search. He testified that the entire booking in process took about 23 minutes.
- [272] When asked why he completed the booking in procedure before facilitating contact with counsel, Sgt. Drotar testified that because a weapon had been found in Mr. McDonald's boot a thorough search needed to be conducted before he was lodged in cells. He also testified that he did not think the booking in procedure would take as long as it did.
- [273] At 3:31 p.m., Mr. McDonald was asked if he had his own lawyer. He said, "No, I don't". He was asked if he wanted to call legal aid or look through a phonebook and call someone else. Mr. McDonald said that he would start with legal aid and "I can always change the venue later". He was put in a private phone room at 3:43 p.m. and given copies of the information and arrest warrant, which were briefly explained to him. The arrest warrant states that Mr. McDonald has been charged with a first degree murder alleged to have been committed on September 26, 1981 at or near Dawson Creek, British Columbia.
- [274] After putting Mr. McDonald in the private phone room, Sgt. Drotar learned that Mr. McDonald could not phone legal aid directly from that room. Sgt. Drotar called the local legal aid number on Mr. McDonald's behalf but the line was busy. Sgt. Drotar then called a number in the interior for legal aid while Cpl. Wellington continued to call the local legal aid number. Cpl. Wellington called the Lower Mainland legal aid office at 3:51, 3:52, 3:53 and 3:54 p.m. but got busy signals on each attempt. At 3:56 or 3:57 p.m., Cpl. Wellington made contact with a legal aid lawyer. The lawyer confirmed with Cpl. Wellington that he was qualified to speak to an accused charged with first degree murder. He advised Cpl. Wellington that he was on the "Osmond" list, a reference to a British Columbia case dealing with the right to counsel. Cpl. Wellington transferred the call to Mr. McDonald.

- [275] At 4:05 p.m., Sgt. Drotar noticed that Mr. McDonald had hung up the phone. Mr. McDonald was removed from the phone room and confirmed with Sgt. Drotar that he received legal advice and understood it. He told Sgt. Drotar that the legal aid lawyer gave him firm advice not to speak to anybody on this matter. When he was asked if his lawyer of choice or a legal aid lawyer was coming to the detachment to speak with him in person, Mr. McDonald replied, "No, today or not, I don't believe not this weekend". He was then escorted to a cell.
- [276] The interactions between Cpl. Wellington, Sgt. Drotar and Mr. McDonald were polite and respectful. At no point after his arrest was Mr. McDonald threatened or promised anything by any person in authority to encourage him to speak about the offence under investigation.

### 3. The Statements to Sgt. McCarl

#### (a) The Interview of October 14, 2011

- [277] Sgt. McCarl (now retired) was engaged in advance by the investigative team to conduct the post-arrest interview because of his experience. Prior to this case, he had completed between 25 and 30 post-arrest interviews in cases involving Mr. Big investigations.
- [278] On October 14, 2011 at 6:46 p.m. Sgt. Drotar and Sgt. McCarl spoke with Mr. McDonald in his cell. Sgt. McCarl said he wanted to confirm with Mr. McDonald that he understood why he was in custody and asked if he was willing to come upstairs. Mr. McDonald said that he had been advised by his legal aid lawyer not to talk to anyone about what he had been charged with. Sgt. McCarl said he was not asking Mr. McDonald to talk with him about the incident but wanted to introduce himself, tell Mr. McDonald why he was in custody and "confirm that you understand your legal rights that you don't have to talk Okay?" Mr. McDonald accompanied Sgt. Drotar to the interview room. Mr. McDonald did not have his glasses at this time nor did he request them at any point during the interview of October 14, 2011.
- [279] The entirety of the interview was audio and videotaped. Mr. McDonald confirmed at the outset of the interview that he understood he had been arrested on a murder charge arising from an incident that occurred in Dawson Creek 30 years ago.
- [280] Sgt. McCarl continued the discussion by attempting to address the 1983 interview of Mr. McDonald that occurred in Redding, California. He did so at the request of investigative team members who had concerns about the admissibility of that statement. Sgt. McCarl testified he was aware that during the 1983 interview the police suggested to Mr. McDonald that perhaps it was an accidental shooting and made reference to lesser, included offences, including firearms offences. The lead investigator testified she consulted other officers about the language that should be used to ensure the 1983 interview did not taint the admissibility of any statement Mr. McDonald determined to make. She testified on the voir dire that the police knew the 1983 statement would be inadmissible. I should be clear that the 1983 statement is not before me on this voir dire and, although the Crown does not seek

a ruling as to its admissibility, neither does the Crown concede that the 1983 statement would be inadmissible.

[281] In any event, Sgt. McCarl said to Mr. McDonald he knew the police had spoken with him a number of times in the past and he wanted to make sure, in light of the passage of time, that Mr. McDonald understood "that right now, the discussion that we are gonna have today, that it's a fresh start and a new process". Mr. McDonald replied, "Yeah". Sgt. McCarl said the police may have said things in the past but things have changed over the last 30 years. He said to Mr. McDonald:

if you have spoken to any police officer with respect to this matter who has offered to you any hope, or advantage, or suggested any fear or prejudice, should you speak or refuse to speak with me at this time, it's my duty to warn you that no such offer or suggestion can be of any effect, and must not influence you or make you feel compelled to say anything to me for any reason. But anything you do say may be used in evidence.

Mr. McDonald was asked if he understood this and replied, "Yes". When asked by Sgt. McCarl what it meant to him, Mr. McDonald clarified that he had only one meeting with the RCMP in Redding, California.

[282] Investigative team members who were monitoring this interview were not satisfied that the caution Mr. McDonald was initially provided by Sgt. McCarl was sufficient to divorce what occurred in the 1983 interview from the interview that was about to commence. They interrupted the interview and asked Sgt. McCarl to deliver a more detailed caution on this issue. On returning to the interview room, Sgt. McCarl had the following exchange with Mr. McDonald:

Sgt. McCarl: One of the concerns that uh, has been identified is they want me to ensure that you understand that when you talked to the police, like we were talking before down in Redding, California and that, that you understand um, exactly so you don't have your glasses probably.

### **Thomas McDonald: I should probably put them**

Sgt. McCarl: I'll read it to you anyway. It says that I'm aware, I'm aware that you have spoken to police officers about this investigation prior to our conversation today.

Thomas McDonald: Hm, hm.

Sgt. McCarl: And I want you to feel that you are, I don't want you to feel that you are obligated to speak to me today, because you previously spoke with those police officers. Like I don't want you to feel obligated to speak with me, because you spoke to those police officers.

Thomas McDonald: Hm, hm.

Sgt. McCarl: I'm also aware that you were previously interviewed by police officers regarding these offences.

Thomas McDonald: Hm, hm.

Sgt. McCarl: Your previous statements may be inadmis, inadmissible in court, you may contact and advise a lawyer that the statements that you previously provided may be inadmissible and receive counsel. Any discussion we have today is a fresh start and a new process. You are not obliged for any reason to repeat any of the information that you provided to the police during your previous statement.

Thomas McDonald: Hm, hm.

Sgt. McCarl: You acknowledge uh, hu, like you understand. Do you?

Thomas McDonald: Ok, yes, yeah, yeah.

Sgt. McCarl: Do you? Or? Yeah. Like I said, um, before I said, any discussion we have today is like a fresh start and a new process.

[283] It would appear that the "fresh start" language used by the police is sourced in R. v. Wittwer, 2008 SCC 33. Mr. McDonald was not asked if he wanted to speak to a lawyer for a second time about this nor did he request the opportunity to do so. Sgt. McCarl testified that had this request been made, he would have stopped the interview and let Mr. McDonald make a further call to counsel.

[284] Mr. McDonald was very talkative and appeared to be relaxed throughout the interview. He addressed a wide variety of personal interests, was laughing on occasion and demonstrative, standing up to walk around the room stooped over to demonstrate to Sgt. McCarl how bad his back problems had been in the past. Mr. McDonald was also talkative about his activities the night of the shooting. He told Sgt. McCarl he heard about the shooting from others while he was in California and that he understood there was a "buzz" going around town that he did it. He confirmed that he did not hear anything more about it until the police came down to visit him in California. He was asked what he remembered the police telling him about the investigation in 1983 and provided some details he said the police gave him concerning the circumstances of the offence. He told Sgt. McCarl he was sucker punched in the face at the Windsor Hotel when he asked a woman to dance. He said he did not know either the woman he approached or the man who punched him but that both looked familiar. He said he was cut and bleeding from the lip. He said he called the person who punched him a "son of a bitch" but returned to his table because he did not want any trouble. He said he exchanged further words with the man who punched him, later in the parking lot at about 10:30 p.m. He said that was the last he saw of him. He gave an account of his activities after leaving the pub. He said that he knew he had to be in Fort St. John the next morning for a flight back down south. He acknowledged being pulled over by the police later that evening near Taylor. He said he thought the police asked him about the blood in his lip and thought they found a rifle in a lock box in the back of the truck. After the stop, he proceeded to his brother's residence. Mr. McDonald denied recently being in the Fort St. John or Dawson Creek areas and said that he had not been back in 30

years.

[285] When Sgt. McCarl advised Mr. McDonald he was going to shut things down for the night, the following exchange occurred:

Thomas McDonald: I'm gonna get my ass chewed for even talking to you, I know you're leading me down this path.

Sgt. McCarl: There is no path. You get to choose the path.

Thomas McDonald: Because the guy warned me

Sgt. McCarl: You play your own card.

Thomas McDonald: I'm not gonna tell you word for word what he said, but he

**Sgt. McCarl: No that's, you've, that's advice between you and the lawyer, but you know, I, I**

Thomas McDonald: Because I probably won't see him till Monday, he said that and I'll probably be arraigned on Monday and I, you know they'll appoint me an attorney at that point and take it from there.

Sgt. McCarl: Yeah. Well that's good.

[286] Mr. McDonald was returned to his cell at 8:40 p.m. The interview of October 14, 2011 lasted less than two hours. The lead investigator testified that the police were aware Mr. McDonald had an early morning and did not want the interview to be a long and drawn out affair that evening. They wanted to pin Mr. McDonald down to a version of events to set the stage for the interrogation the next day.

[287] Mr. McDonald was taken before a judicial justice of the peace after the interview terminated. The lead investigator advised the justice of the peace that the police had been investigating Mr. McDonald for two years and Mr. McDonald made admissions about his involvement in the offence. Consistent with the plan going into the first interview, she did not inform the judicial justice of the peace that Mr. McDonald had been the subject of an undercover operation. Mr. McDonald was put over to Monday and remanded in custody. After this appearance, Mr. McDonald was provided with dinner.

[288] In a debriefing session that evening, the police determined to tell Mr. McDonald about the undercover operation the following day and show him a video clip from the re-enactment.

(b) The Interview of October 15, 2011

[289] Sgt. McCarl began interviewing Mr. McDonald on October 15, 2011 at approximately 9:30 a.m. This interview was also audio and videotaped. Sgt. McCarl opened the interview by reminding Mr. McDonald that he was not obliged to say anything, but that anything he did say could be given in evidence.

[290] Mr. McDonald's demeanour was different from the beginning of the interview. His posture was defensive. He held his hands clasped together in his lap, and then locked his fingers behind his head. He told Sgt. McCarl that he was annoyed with the "misinformation" the lead investigator supplied the judicial justice of the peace the previous evening and that it was completely untrue that he shot Jones.

[291] Sgt. McCarl immediately took charge of the interview advising Mr. McDonald, "There's no doubt that you shot and killed Earl Jones". Mr. McDonald said, "Based on what?" Sgt. McCarl replied, "Based on all the evidence".

[292] He asked Mr. McDonald how he felt being punched in the bar and what he was thinking as he sat outside in his truck. The following exchange occurred:

Thomas McDonald: I'm gonna end this conversation right now that's it.

Sgt. McCarl: Well you don't want to talk about it?

Thomas McDonald: No, because, you're doing exactly what he told me you would do.

Sgt. McCarl: Hm, hm.

Thomas McDonald: And, that was the reason why he said not to talk.

Sgt. McCarl: Not to talk, ok. Well not to talk, and not to listen, or not to participate in a conversation.

Thomas McDonald: No, no I

Sgt. McCarl: Or not to talk about the incident.

Thomas McDonald: (Overlapping talking).

Sgt. McCarl: But anyway, we're still gonna, we're here. We're here and I'm gonna talk.

Thomas McDonald: Well, you can talk all you want then.

Sgt. McCarl: Yeah.

Thomas McDonald: Because I'm not going to respond.

[293] Sgt. McCarl again advised Mr. McDonald, "If you don't want to talk about it that's, that's up to you." He then started to address the police investigation. As he did, Mr. McDonald said, "I, I'm just listening, I'm not responding. Cause I've already over, overstepped, I, I " Despite saying this, Mr. McDonald continued to respond to Sgt. McCarl's attempts to confront him about the circumstances of the offence, repeatedly interjecting to get in his version of events about what happened at the bar.

[294] Sgt. McCarl again confronted Mr. McDonald with the shooting. Mr. McDonald said, "It didn't happen". When Sgt. McCarl said that it did and tried to continue, Mr. McDonald put his hands out in front of him and said, "I know I'm, I'm, please, don't, don't pressure me Because I'm not, I'm not going to (overlapping talking)". Sgt. McCarl said that he did not

want to argue with Mr. McDonald but asked what he needed to show Mr. McDonald that would convince him that he knew everything about what happened. He said that he just needed to hear it from Mr. McDonald. Mr. McDonald again began to speak about the altercation in the parking lot. Sgt. McCarl asked Mr. McDonald if he had a gun in the cab of the truck outside the bar. Mr. McDonald said, No, no, no I'm talking". When Sgt. McCarl repeated that Mr. McDonald had a gun with him in the cab, Mr. McDonald denied it and accused Sgt. McCarl of being off track and trying to get him off track. Mr. McDonald continued to respond to questions relating to items seized from the truck. Mr. McDonald again denied having a gun with him in the truck, agreeing that while he and Sgt. McCarl could banter back and forth "it's not gonna go anywhere because I'm not going to admit to something that I didn't do".

- [295] Mr. McDonald was then played a short video clip from the Dawson Creek re-enactment which contained an admission by him that he shot Jones. Sgt. McCarl agreed with a suggestion put to him in cross-examination that he relayed to McDonald information about the undercover operation at this point in the interview because it was strategically beneficial for him to do so. Mr. McDonald's first response on viewing the video was, "He looks like me". Mr. McDonald was clearly taken aback by the video and initially described it as "fabricated". Sgt. McCarl said, "This is the whole re-enactment of how you murdered him". He told Mr. McDonald, "We've got better than half a year of you telling your side of the story and what actually happened. The whole story three different times Tony, the whole story". Mr. McDonald said, "I'm still not talking".
- [296] When it was put to Mr. McDonald that he was angry after being assaulted in the bar and decided that he was not going to leave until he had a piece of Jones, Mr. McDonald replied, "I never said anything about getting a piece of anyone". He again denied knowing Jones or having a previous dispute with him.
- [297] In a calm voice, Sgt. McCarl confronted Mr. McDonald with the police theory of the case, describing Mr. McDonald's act as "selfish" and one that left a son without a father. Mr. McDonald's head was down at this point and he was rocking slightly back and forth in his chair. He was not making eye contact with Sgt. McCarl. He continued, however, to engage in conversation with Sgt. McCarl, confirming that he went to his ex-wife's residence and to a gas station looking for a headlight for the truck after the altercation in the bar. When asked if he was preying on Jones or whether he was just consumed by the passion of the events, Mr. McDonald said, "No, I'm not talking". He said, "I shouldn't have come up here with you last night, and I definitely shouldn't have come up here today". When asked if he had a better idea now what type of case the police had against him, Mr. McDonald said, "I'm gonna talk to my counsel and we'll go from there".

[298] Sgt. McCarl advised Mr. McDonald that after the arrest, the police talked to members of the Jones family who were hoping that Mr. McDonald would take responsibility for his actions. He said to Mr. McDonald, "I don't think they want to believe that you're a cold hearted serial killer I don't think you are black on the inside Tony. I just think you have a bit of a temper. And like everybody in the world we make mistakes".

[299] In a lengthy monologue, Sgt. McCarl asked if there was any reason Mr. McDonald would admit to the shooting of Jones if he did not do it. Mr. McDonald said, "I feel awkward stonewalling you, but um, I'm, I'm doing it at my own best advice". When asked to explain that, Mr. McDonald said:

I'm feeling sorry for stonewalling you but I assured the person from the Crown, Defence, that I would not talk to anyone, so I, I want to stop, that's one of the reasons that I don't want to talk to anyone. And then I feel that from coming up here last night, because it's the first thing they're gonna say, why the hell did you talk to them.

[300] Sgt. McCarl explained that it was the role and responsibility of the police to be diligent and try to interview people. He said he wanted to give Mr. McDonald "an opportunity if you choose to tell us why that event happened". He told Mr. McDonald his superiors and the courts would not look favourably upon it if "I did not give you an opportunity to talk".

[301] Sgt. McCarl suggested that the shooting seemed to be out of character for Mr. McDonald and asked what his intention was when the gun discharged. The following exchange then occurred:

Thomas McDonald: Again, I can't elaborate, not without my counsel. They tell you, that's why, what counsel is for so, I'm gonna wait".

Sgt. McCarl: Ok, so you do not want to talk, you're finished, the interview is should be concluded in your own mind?

Thomas McDonald: I'm sure will have more talks, but um, at, today, yeah. I don't want to carry it on any further.

Sgt. McCarl then took a break to debrief with the investigative team monitoring the interview. The interview had been ongoing for less than an hour.

[302] When Sgt. McCarl returned to the interview room he said to Mr. McDonald, "You said something that hit home with me, and it was that you felt sorry for stonewalling me". Mr. McDonald interrupted and said that he realized Sgt. McCarl was doing his job. Sgt. McCarl said, "You seem to feel bad about a decision that you've made and I want you to know that it has no effect on me " He then steered the discussion away from the shooting and Mr. McDonald fully participated in the conversation, relating (as he often did) long stories about his life and unrelated past events. In a short time, the discussion again took on more of a conversational tone and Mr. McDonald regaled Sgt. McCarl with bawdy stories, laughing as he told them.

[303] When Sgt. McCarl redirected the conversation back to the Dawson Creek shooting, this exchange occurred:

Sgt. McCarl: I'd like to try and take another kick at this uh, this Dawson Creek incident.

Thomas McDonald: No

Sgt. McCarl: And about, about mistakes and stuff like that. Can we

Thomas McDonald: No, no, no, I'm not going down that road. Um

Sgt. McCarl: Ok

Thomas McDonald: It winds me up.

Sgt. McCarl: Do you have any questions for me?

Thomas McDonald: No. I think the, video answers most of them

Thomas McDonald: No, I've done a lot of work for that guy that made that video.

Sgt. McCarl: Oh. What you think he does in his real life?

Thomas McDonald: Him and his driver. Well now I know what they do in their real life.

Sgt. McCarl: Hm, hm.

Thomas McDonald: But, I'm not, I'm not gonna mention to you, because I'd be stepping o, overstepping my, my, my boundaries, but I'm definitely gonna bring it up with the, with the uh, with my attorney.

[304] The conversation again steered away from the circumstances of the shooting for a period before Sgt. McCarl again redirected the conversation back to the investigation, asking Mr. McDonald if there was anything he thought Sgt. McCarl should know about what was going on in his life at the time of the incident. Mr. McDonald replied, "Not at this point and time". When Sgt. McCarl pressed the point, this exchange occurred:

Thomas McDonald: No, I'd uh, I really don't want to, to open this, uh, conversation up again.

Sgt. McCarl: So I just need to be firm in my own mind that, you, you absolutely do not, and will not talk about the incident?

Thomas McDonald: Not till, I'm happy with, I, I'm waiting for, two, for uh, my attorney guy gets here. Coach me through it.

Sgt. McCarl testified that there was never any suggestion made to him that Mr. McDonald's lawyer was on the way and, as far as he was concerned, no reason for Mr. McDonald to believe that he would be speaking with a lawyer in-person until Monday.

- [305] Sgt. McCarl then spelled out for Mr. McDonald that undercover officers like the primary, secondary, and the cameo operators, as well as the guy that was going to take the fall, all pretend they are doing criminal activity to befriend people under investigation in the hopes that a bond will develop that creates an environment in which the target of the investigation admits to their deepest, darkest secrets. He asked if Mr. McDonald was now beginning to understand the complexities of the investigation. Mr. McDonald replied, "Yes, I think uh, maybe too good".
- [306] When asked if alcohol was a contributing factor in the events that evening, Mr. McDonald replied, "Definitely all the way around". When asked if Jones was a bully, McDonald said, "Here I go again, I'm breaking my own rules, I'm breaking the lawyer's rules". He then admitted that he had a previous altercation with Jones up north and described it at great length. When he was finished the story, Mr. McDonald said, "Ok, that's enough said". Sgt. McCarl asked Mr. McDonald for more information about the altercation that occurred up north and Mr. McDonald obliged by providing a further lengthy exposition of what precipitated the altercation.
- [307] Mr. McDonald then addressed the incident, saying that being sucker punched by someone is the most humiliating thing that somebody can do to you. He gave another long version of events leading up to the punch in the Windsor Hotel the night of the shooting.
- [308] When he was asked by Sgt. McCarl if he went back to the Windsor Hotel when he was up in Dawson Creek with the undercover operators, Mr. McDonald paused for about five seconds before saying, "Yeah, we went there".
- [309] Mr. McDonald told Sgt. McCarl that the deceased approached him in the parking lot after the altercation, called him some names and made some derogatory comments about his ex-wife. He said that the wife of the guy who punched him was driving the vehicle. When asked when he decided to follow them, Mr. McDonald paused again for about five seconds before saying, "I don't want to pick up the story anymore I don't want to go any further on that".
- [310] When Sgt. McCarl said that it sounded as if Mr. McDonald was just getting ready to tell the part about the payback for the sucker punch, Mr. McDonald replied, "Well like you said the whole evening was a bad call". He then related to Sgt. McCarl a number of other lengthy stories unrelated to the events the night of the shooting. At the conclusion of these stories Mr. McDonald said:

Thomas McDonald: I'm, I'm at this point I'm wondering if, if uh, if the prosecuting attorney will even talk to me.

Sgt. McCarl: What you mean?

Thomas McDonald: Because I've been talking to you so much.

Sgt. McCarl: Hm. Well they're all decisions that you uh, you and your defence have to deal with. And they're decisions that you make right? You're given advice, and you make a decision what you want to do.

- [311] After Mr. McDonald went on another story-telling tangent relating to his relationship with his ex-wife, Sgt. McCarl brought the matter back to the shooting and reiterated that there was no doubt in his mind that Mr. McDonald was responsible for it. He asked Mr. McDonald why he would do this and said that he needed to hear it from Mr. McDonald's own mouth.
- [312] Mr. McDonald's admission of responsibility for the shooting began at this point in the interview at roughly the four-hour mark. He said, "Well I've asked myself a million times I guess, and I've never come up with a plausible reason". He said that when he fired the rifle he just wanted to break the window or right rear tail light of the car and was more surprised than anybody to hear that the victim was dead. He said that he did not intend to kill Jones. He said that after he discharged the rifle, the woman stopped the car on the left side of the road and got out screaming. He said he fired a second shot over the car to scare her. He said she went down into the ditch. He said that he used an old .30-30 Winchester rifle in the shooting and that he pulled it out right when he stopped at the intersection.
- [313] When Sgt. McCarl asked him what route he took after the shooting, Mr. McDonald chuckled and said, "Well you got the video, you must know". He was also laughing slightly when he said that he was so mad it would take him a long time to forgive the primary. He said that he had suspicions about the secondary operator because he overplayed his hand. He also mentioned the finger-severing incident. Sgt. McCarl said the police were very good at what they did and that what Mr. McDonald saw probably did not happen. Mr. McDonald replied, "Well the guy's finger was cut off and then, they put it in his brother's pocket for Christ sake." In cross-examination on the voir dire, Sgt. McCarl agreed that Mr. McDonald appeared not to understand at this point that the finger-severing scenario did not actually happen.
- [314] Mr. McDonald then described in detail the route he took to and from the shooting and the disposal of the firearm at the Kiskatinaw River bridge.
- [315] After relating these events to Sgt. McCarl, Mr. McDonald said, "It's a lot off my chest I've been wanting to tell that story for a long time but you know it's hard to tell anybody". Mr. McDonald then asked for some food and joked about having it with a couple of beers. He was asked to write a letter of apology to the Jones family but said "I don't want to write it today". He said he felt bad about what happened and that it never goes away because no matter how much you hash it about it comes out the same way - the guy's dead. He said his admissions would maybe give the Jones family some closure but, "It won't do much for me".
- [316] The substance of the interview ended shortly after 2:00 p.m. Mr. McDonald was not threatened nor was he offered any promises or inducements at any point during either interview conducted by Sgt. McCarl.

[317] In total, the interview of October 15, 2011 was about five hours.

[318] Mr. McDonald asserted the right to silence about 19 times in the first two hours of the interview.

[319] In cross-examination, Sgt. McCarl agreed that the interview of October 15, 2011 incorporated some aspects of the Reid technique but that his approach was not solely guided by it. He testified that he relied on his experience in conducting interviews of this kind. He agreed that he took control of the interview at the outset and confronted Mr. McDonald with his responsibility for the shooting. He interrupted Mr. McDonald's expressions of innocence. He did so because the more a suspect denies the offence, the less likely it is that they will retreat from that position. He commented on Mr. McDonald's redeeming qualities and suggested that the offence was out of character. He told Mr. McDonald that others thought highly of him. He framed for Mr. McDonald the only unanswered question - why he did it. He gave Mr. McDonald the opportunity to refute the notion that he was a cold-hearted serial killer. He offered Mr. McDonald ways of rationalizing his behaviour (the fact that all of us are capable of losing our capacity for rational thought, that other people have done similar things, and that the victim's behaviour may have been provocative). After the confession, he sought (unsuccessfully) to convince Mr. McDonald to write a letter of apology.

#### 4. The Evidence of the Primary

[320] The primary acknowledged that the Mr. Big scenarios used in this case included a number of inducements: employment; free rent in a comfortable apartment; and the prospect of the big score. He testified that he paid Mr. McDonald about \$25,000 in the course of the investigation. He agreed that the kidnapping scenarios were designed to lead Mr. McDonald to believe the debtor had been abducted and tortured. He also agreed that he portrayed himself as a man with a violent past and someone who had power to manipulate the criminal justice system.

#### 5. Issues and Analysis

##### (a) Section 10(b) and the Right to Counsel: General Principles

[321] Section 10(b) of the Charter imposes upon the police informational and implementation duties upon arrest or detention. They are obliged to inform an arrestee of the right to counsel without delay so that the arrestee can make an informed choice about whether to exercise the right to counsel and, ultimately, whether to speak to the police about the offence being investigated. Where an arrestee indicates a desire to speak with counsel, the police are obliged to implement the right to counsel by facilitating contact with counsel without delay and holding off on the investigation until a reasonable opportunity has been provided for that consultation to occur. Section 10(b) fosters the principles of adjudicative fairness by providing detainees with an opportunity to make informed choices about their legal rights at a time when they are in the control of the state and in immediate need of

legal advice: *R. v. Brydges*, [1990] 1 S.C.R. 190 at para. 13; *R. v. Bartle*, [1994] 3 S.C.R. 173 at para. 16.

- [322] In *R. v. Suberu*, 2009 SCC 33 at para. 42, the Court held that, "Subject to concerns for officer or public safety the police have a duty to inform a detainee of his or her right to retain and instruct counsel, and the duty to facilitate that right immediately upon detention".
- [323] In *R. v. Sinclair*, 2010 SCC 35 at paras. 43 and 47, the Court held that normally, the purposes animating s. 10(b) are met by a single consultation with a lawyer at the time of detention or shortly thereafter. Where, however, an objectively observable change in circumstances suggests that a further consultation with counsel is necessary to enable the detainee to make an informed choice about whether to cooperate with the police investigation or not, the implementation duties engaged by s. 10(b) do encompass facilitating a right to re-consult counsel. While the categories requiring a second consultation with counsel are not closed, they contemplate: the introduction of non-routine investigative procedures; a change in jeopardy; and, reasons to question the detainee's understanding of his s. 10(b) rights (*Sinclair* at paras. 47-52). The Court held (at para. 60) that "the common police tactic of gradually revealing (actual or fake) evidence to the detainee in order to demonstrate or exaggerate the strength of the case against him" does not automatically trigger the right to a second consultation with a lawyer.
- (i) The Alleged Failure to Address Confusion Respecting the Scope of the Right to Counsel
- [324] If the circumstances suggest that an arrestee may not understand his right to counsel, the police must go beyond a mechanical recitation of the right and take steps to facilitate that understanding: *R. v. Evans*, [1991] 1 S.C.R. 869 at para. 44.
- [325] As I understand Mr. McDonald's position on this point, he says the record demonstrates confusion on his part about the attendance of his lawyer at the detachment and that the police were obliged to resolve this confusion before proceeding with the interview.
- [326] There is no evidence in this case that Mr. McDonald was confused about the scope of his right to counsel. He indicated on arrest that he understood his right to counsel and wished to exercise it. He did so. After he spoke with legal aid counsel, Sgt. Drotar asked Mr. McDonald if his lawyer would be attending the detachment. Mr. McDonald replied, "No, today or not, I don't believe not this weekend". During the interview of October 14, 2011 Mr. McDonald informed Sgt. Drotar that he "probably won't see him [the lawyer] till Monday, he [the lawyer] said that and I'll probably be arraigned on Monday and I, you know they'll appoint me an attorney at that point and take it from there".
- [327] Although Mr. McDonald said in the course of the October 15, 2011 interview that he would wait until his lawyer was present to "coach him through it", this remark must be understood in light of the discussion that preceded it. There is no evidence that Mr. McDonald believed his lawyer was on route to the detachment or that he would have an opportunity to speak with counsel in-person before Monday. Further, there was no reason for the police to

believe Mr. McDonald misunderstood his right to counsel or was operating under some misapprehension that his lawyer would be attending at the detachment that weekend. In any event, Mr. McDonald had no right to have counsel present during the custodial interviews: Sinclair, at paras. 33-35 and 42.

(ii) The Delay in Implementing Access to Counsel

- [328] In my view, the arresting officers were justified on grounds of officer safety from delaying the facilitation of contact with counsel until such time as Mr. McDonald had been thoroughly searched at the detachment. He had a knife in his boot and was wearing layered clothing. Facilitating contact with counsel at the scene may have resulted in a breach of Mr. McDonald's right to consult with counsel in private. More importantly in this case, facilitating contact with counsel at the scene would necessarily have involved removing Mr. McDonald's handcuffs. The police had no constitutional obligation to do so in circumstances where legitimate officer safety concerns arose. Their obligation was to refrain from eliciting incriminating evidence from Mr. McDonald until he had a reasonable opportunity to consult counsel. The police complied with that obligation in this case.
- [329] Once the search of Mr. McDonald's person was over, the obligation of the police was to immediately facilitate Mr. McDonald's request to consult with counsel. They did not do so. Instead, the arresting officers decided to prioritize the completion of tasks associated with the booking in procedure over their constitutional obligation to facilitate contact with counsel. The delay in attending to their implementation duties was relatively brief. The search commenced at about 3:20 p.m. The booking in process was completed at 3:40 p.m., at which time the arresting officers began making efforts to facilitate contact with counsel. Mr. McDonald was provided with the information and arrest warrant at 3:40 p.m. and placed in the phone room to speak with counsel at 3:43 p.m. It is apparent from this chronology that (assuming the search took no more than five minutes) between 15 and 20 minutes passed while the police attended to administrative duties at the detachment before they facilitated Mr. McDonald's contact with counsel.
- [330] The delay in implementing access to counsel infringed Mr. McDonald's s. 10(b) rights. It cannot be said in these circumstances that the police discharged their obligation to facilitate contact with counsel "without delay" as that phrase has been interpreted in Suberu.
- [331] The next step is to consider whether there is a nexus between the breach and the evidence obtained - Mr. McDonald's inculpatory statements made on the afternoon of the following day. This is a threshold inquiry about whether the evidence was "obtained in a manner that infringed" Mr. McDonald's constitutional rights. It is only if the required nexus is established that a court must then turn to the evaluative component of s. 24(2) of the Charter - whether admission of the evidence so obtained could bring the administration of justice into disrepute.

- [332] It is necessary to bring a purposive and generous approach to this threshold inquiry: Wittwer at para. 21. In *R. v. Strachan*, [1988] 2 S.C.R. 980, the Court held that it is necessary to focus on the entire chain of events during which the Charter violation occurred and the evidence was obtained. The evidence will be "obtained in a manner" that infringed a Charter right if, on a review of the entire course of events, the breach and the obtaining of the evidence can be said to be part of the same transaction or course of conduct: *R. v. Plaha* (2004), 189 O.A.C. 376 at para. 45. A causal connection between the breach and the obtaining of the evidence is not required. A temporal link between the infringement and the discovery of the evidence will figure prominently in the analysis, particularly where they occur in the course of a single transaction. The presence of a temporal link is not, however, determinative. The link must not be "too remote": *Strachan* at para. 46. The connection must be more than tenuous: *R. v. Goldhart*, [1996] 2 S.C.R. 463. At the end of the day, the connection between the breach and the obtaining of the evidence may be temporal, contextual, causal or a combination of the three.
- [333] Counsel for Mr. McDonald emphasizes, in particular, the temporal link between the infringement and the obtaining of the evidence. I do not consider the temporal link to be determinative in the case at bar. Mr. McDonald was given an opportunity to consult with counsel following his arrest on October 14, 2011 at about 3:40 p.m. When he was interviewed later that evening he advised Sgt. Drotar that he had been advised not to talk to anyone and that he was going to "stick" to his advice. No incriminating admission was made that evening. It was not until the afternoon of the following day, when he was confronted with videotaped evidence of his participation in the re-enactment, that Mr. McDonald began making incriminating admissions.
- [334] There is, in my view, no causal link between the breach and the obtaining of the evidence nor is there much of a contextual link. If there is such a relationship, it is both tenuous and remote.
- [335] I would distinguish *R. v. Yoon*, 2012 BCSC 580, a case relied upon by counsel for Mr. McDonald. The facts in *Yoon* are unusual. A delay of about 8 ½ hours in facilitating contact with counsel occurred in *Yoon* as a result of "well-intentioned but profoundly ineffective" efforts by the police to provide the arrestee with a Korean speaking lawyer. In that case, Arnold-Bailey J. found that it was not possible to determine what the total effect of the long delay in affording Mr. Yoon contact with counsel was in the context of his later inculpatory statement (at para. 136). She concluded that there was a temporal and contextual connection between the s. 10(b) violation and the taking of Mr. Yoon's statement. She found that both occurred in the course of the same transaction. There are few parallels between *Yoon* and this case. The delay in facilitating contact with counsel in this case was, at most, 20 minutes. The interview on October 14, 2011 occurred after the breach, but before the evidence was obtained the following day. No incriminating statements were made on October 14, 2011. The interview of October 14, 2011 is an intervening event relevant to an assessment of the existence (and strength) of a temporal, causal and/or contextual

connection between the breach and the obtaining of the evidence. No such intervening event occurred in Yoon.

[336] Having come to the conclusion that the impugned evidence was not obtained in a manner that infringed Mr. McDonald's right to counsel, it is unnecessary for me to consider whether admission of Mr. McDonald's incriminating statements could bring the administration of justice into disrepute.

(iii) The Right to Re-consult Counsel

[337] I will deal first with Mr. McDonald's contention that the police were obliged to facilitate a further consultation with counsel after revealing to him (by showing him the video clip) that he had been the subject of an undercover operation. The law is against Mr. McDonald on this point: Sinclair at para. 60; R. v. Ashmore, 2011 BCCA 18.

[338] In Ashmore, the Court of Appeal refused to give effect to the same argument Mr. McDonald advances in this case. For the Court, Frankel J.A. said:

In playing the video clip, Inspector Pike did no more than accurately disclose evidence the police had already gathered. That the police might show Mr. Ashmore evidence, even bogus evidence, was a matter on which Mr. Ashmore had received legal advice, so it cannot be said that what occurred was unanticipated. However, even if this possibility had not been the subject of legal advice, or the record was silent as to what advice was given, the police practice of disclosing information, be it true or false, to encourage a detainee to talk does not, without more, re-trigger s. 10(b) rights. As stated in Sinclair (at para. 60):

... the cases thus far do not support the view that the common police tactic of gradually revealing (actual or fake) evidence to the detainee in order to demonstrate or exaggerate the strength of the case against him automatically triggers the right to a second consultation with a lawyer, giving rise to renewed s. 10(b) rights.

See also: McCrimmon at para. 23.

[339] Mr. McDonald also asserts that a right to re-consult counsel (and to be informed of that right) arose when the police raised at the start of the interview on October 14, 2011 concerns they entertained about the admissibility of the statement Mr. McDonald provided in California in 1983. No authority has been cited for the proposition that police concerns about the admissibility of evidence triggers the right to re-consult counsel whenever that evidence is referred to in the course of an interview. Even recognizing that the categories of cases requiring a second consultation are not closed, I do not consider this situation to fall within the sort of objectively observable change in circumstances the Supreme Court of Canada had in mind in Sinclair. I have come to this conclusion for three reasons.

- [340] First, the 1983 interview cannot be regarded as a change in circumstance that arose only during the interview. Mr. McDonald knew that he had given a statement in 1983 about the Dawson Creek shooting and knew that he had been arrested for and charged with that offence. He knew this when he spoke to counsel.
- [341] Second, extending the category of cases requiring a second consultation to situations in which the police have concerns about the admissibility of evidence they intend to use in a post-arrest interview introduces uncertainty into the process. The police must be able to ascertain, in advance, their constitutional obligations. In conducting a post-arrest interview, the police will often harbour concerns about the admissibility of evidence gathered during an investigation. They do not have the luxury of advance judicial determination of the admissibility of that evidence. The requirement that the change in circumstance be objectively identifiable properly confines the re-consultation requirement to factual changes in circumstance that are, or should be, apparent to the police.
- [342] Third, even assuming the investigators in this case knew that the 1983 statement was likely admissible, Mr. McDonald was informed by Sgt. Drotar that the 1983 statement might be inadmissible and that he had the right to contact a lawyer and receive advice about this. Mr. McDonald indicated that he understood this but never requested a further opportunity to speak with counsel about this issue.
- [343] For these reasons I dismiss Mr. McDonald's contention that his inculpatory statements were obtained in breach of his s. 10(b) rights.

(b) Voluntariness and the Right to Silence

(i) General Principles

- [344] The intersection between the common law confessions rule and the right to silence was addressed in *R. v. Hebert*, [1990] 2 S.C.R. 151 and *R. v. Singh*, [2007] 3 S.C.R. 405.
- [345] In *Hebert*, the Court interpreted the right to silence in light of existing common-law protections, such as the confessions rule. One unifying feature underlying both the constitutional right and the common law rule is the right of a detainee to choose whether or not to speak to the authorities. Police persuasion, short of denying a suspect the right to choose or depriving him of an operating mind, does not breach the right to silence (para. 73).
- [346] In *R. v. Oickle*, 2000 SCC 38, the Court undertook an expansive restatement of the confessions rule with the problem of false confessions in mind. The rule clearly includes the right of the detained person to make a meaningful choice whether or not to speak to state authorities (see paras. 24-27). Broadly speaking, a voluntary statement involves an exercise of free will by a person with an operating mind who knows there is no obligation to provide information to the authorities and yet chooses to speak, without being unfairly tricked or compelled into doing so. In determining whether the voluntariness of a confession has been established beyond a reasonable doubt, regard must be had to all of

the relevant factors, including: the making of threats or promises; oppression; the existence of an operating mind; and, police trickery that unfairly denies a detainee's right to silence. The police tricks doctrine is a distinct inquiry. While still related to voluntariness, its more specific objective is maintaining the integrity of the criminal justice system.

[347] In *Singh*, the Court held, in recognition of the considerable overlap between the confessions rule and the s. 7 right to silence, that the two tests for determining whether the detainee's right to choose whether to speak with the authorities was respected are functionally equivalent. As a result, it follows that:

where a statement has survived a thorough inquiry into voluntariness, the accused's Charter application alleging that the statement was obtained in violation of the pre-trial right to silence under s. 7 cannot succeed. Conversely, if circumstances are such that the accused can show on a balance of probabilities that the statement was obtained in violation of his or her constitutional right to remain silent, the Crown will be unable to prove voluntariness beyond a reasonable doubt (at paras. 8 and 37).

[348] In *Singh*, the accused asserted his right to silence 18 times. On each occasion the interviewing officer affirmed that Mr. Singh did not have to say anything and continued the interview, advising Mr. Singh that he had a duty to place the evidence before him. In affirming the admissibility of Mr. Singh's incriminating statements, the Court held that the right of a detainee to choose not to speak does not include the right not to be spoken to. The use of legitimate means of persuasion is permitted. Indeed, it is critical to the achievement a proper balance between individual rights and the community's interest in enabling criminal investigations to uncover the truth (at paras. 28, 45 and 47). Having said this, the Court cautioned (at para. 47) that:

the law as it stands does not permit the police to ignore the detainee's freedom to choose whether to speak or not. Under both common law and Charter rules, police persistence in continuing the interview, despite repeated assertions by the detainee that he wishes to remain silent, may well raise a strong argument that any subsequently obtained statement was not the product of a free will speak to the authorities.

Consistent with the judgment in *Singh*, Mr. McDonald's repeated assertions of the right to silence, along with Sgt. McCarl's response to those assertions, must be carefully scrutinized in the context of all of the relevant factors in determining whether Mr. McDonald's right to choose not to speak was overborne. If those circumstances give rise to a reasonable doubt about the voluntariness of his confession, I must exclude it.

(ii) Application to the Case at Bar

- [349] I will analyze the issues Mr. McDonald raises through the common law confessions rule as this approach is most favourable to him, both as a matter of onus and burden of proof. In doing so, I will consider Sgt. McCarl's incorporation of some aspects of the Reid technique into the interview. It is appropriate to consider the interviewing strategy that was employed as part of the Oickle analysis.
- [350] I make these preliminary observations. First, neither interview was excessively long. The interview on October 14, 2011 was less than two hours. The interview on October 15, 2011 was about five hours, but Mr. McDonald confessed to the shooting about four hours into the second interview. Second, there were no threats or promises made to Mr. McDonald in either interview. Although the interviewing technique included moral inducements (appealing to Mr. McDonald's sympathy for the Jones family and how the decisions he made during the interview would be perceived by others, including the undercover operators with whom Mr. McDonald had associated for the past eight months), inducements of this kind will generally not produce an involuntary confession (Oickle at para. 56). Importantly, there was no quid pro quo offer made by Sgt. McCarl at any point in the interview. Mr. McDonald's counsel does not suggest otherwise. No suggestion was made by Sgt. McCarl that a confession might result in a lesser consequence. Again, counsel for Mr. McDonald does not take a contrary position. I am satisfied that none of the relatively mild moral inducements tabled by Sgt. McCarl during the interview raise a reasonable doubt about whether Mr. McDonald's will was overborne. Second, the circumstances in which the interviews were conducted were not oppressive. Mr. McDonald was well rested for the interview on October 15, 2011 and had breakfast before the interview commenced. He was treated respectfully throughout the interview. Although Sgt. McCarl confronted Mr. McDonald with the case against him, including his videotaped confession during the re-enactment, he did not assume an aggressive or intimidating tone or posture at any point during the interview. Finally, there can be no doubt that Mr. McDonald had an operating mind at the time of the interview and there is no evidence of objectionable police trickery.
- [351] Mr. McDonald argues that four features of the interview individually or cumulatively raise a reasonable doubt about the voluntariness of the statements.
- [352] First, despite knowing about the dangers associated with the 1983 interview, Mr. McDonald says that Sgt. McCarl's efforts to establish a "fresh start" at the outset of the interview were woefully inadequate. He says that Sgt. McCarl was obliged to make clear that the police were not looking at the investigation with included offences in mind. He also submits that Sgt. McCarl referenced the 1983 statement at several points during the interview and, in doing so, incorporated into the 2011 interviews the inducement concerns that existed with respect to the 1983 statement. I do not agree with the submission. In my view, the language used by the police was adequate in this case to convey to Mr. McDonald that the 2011 interviews constituted a new beginning. To the extent that reference was made to the 1983 interview after the "fresh start" caution had been given, it was, for the most part, Mr. McDonald who inserted references to the 1983 statement into the discussion. Finally, as

noted above, there was no reference made by Sgt. McCarl to anything that Mr. McDonald could possibly construe as a quid pro quo offer.

- [353] Second, Mr. McDonald submits that the inducements, threats and deception that characterized the undercover operation were incorporated by Sgt. McCarl into the post-arrest interview when he made reference to the undercover operation and the operatives he had come to know. Sgt. McCarl told Mr. McDonald the undercover officers would want to know how things went during the interview to confirm their favourable assessment of his personality. In my view, it cannot reasonably be contended that the atmosphere of the undercover operation was operative when the incriminating statements were made to Sgt. McCarl. It must be remembered that Mr. McDonald had been shown the video clip of the re-enactment when this effort to convince him to speak through moral persuasion was made. Although Mr. McDonald may not have fully appreciated when he made his incriminating statements the extent to which he had been taken in by the elaborate artifice created by the police, he was aware after he was shown the video clip that his "associates" in the criminal organization were undercover officers and that he had been thoroughly ensnared by the investigative technique employed in this case.
- [354] Third, and most significantly in my mind, Mr. McDonald argues that police persistence in the face of his repeated assertions of the right to counsel gives rise to a reasonable doubt about whether he was effectively deprived of the ability to choose whether or not to speak with the authorities. I have reflected on this submission mindful of the comments of the Court in *Singh*. The number of times an accused asserts his right to silence is part of the assessment of all the circumstances, but is not in itself determinative. As the Court made clear in *Singh*, "the ultimate question is whether the accused exercised free will by choosing to make a statement" (at para. 53).
- [355] Looking at the totality of the circumstances, I am satisfied beyond a reasonable doubt that the voluntariness of the statements in issue has been established. Sgt. McCarl repeatedly reminded Mr. McDonald that it was his choice and his decision about whether or not to speak to the police. It is evident from the words Mr. McDonald used during both interviews, including what he said shortly before the confession was made, that he was mindful throughout that he had no obligation to speak to the police. For example, when Mr. McDonald spoke to Sgt. McCarl about his activities the night of the offence during the interview of October 14, 2011, he told Sgt. McCarl he knew he was being led down a path and was "gonna get my ass chewed for even talking to you". Mr. McDonald was reminded that he got to choose the path. He was repeatedly reminded during the interview of October 15, 2011 that it was his decision whether to speak with the police. Despite acknowledging at least twice in the course of the interview that he had "overstepped" the boundaries of the advice he had received not to talk to the police, Mr. McDonald continued to answer questions relating to the offence and refute some of the statements about the offence made by Sgt. McCarl. Shortly before beginning his confession to the shooting, Mr. McDonald said, " here I go again, I'm breaking my own rules, I'm breaking the lawyer's rules". As he

continued to respond to some questions about the offence, Mr. McDonald wondered aloud if the lawyer who advised him not to speak with the police would even speak with him because, by talking so much he had not followed that person's advice. Sgt. McCarl again reminded him that the decision whether to talk was one that Mr. McDonald had to make. Mr. McDonald was aware throughout the interview of October 15, 2011 that the decision whether or not to speak with the police was his and his alone. When he realized the strength of the case against him, Mr. McDonald made a choice not to heed the advice of his lawyer but to confess. Mr. McDonald's will to confess is supported by his lighthearted demeanour after the confession and his acknowledgment to Sgt. McCarl that he had been wanting to tell that story for a long time and that it was a lot off his chest.

- [356] While Mr. McDonald's repeated assertions of the right to silence are important considerations, I am obliged to look at the totality of the circumstances that inform the voluntariness inquiry. Having done so, I am satisfied beyond a reasonable doubt that Mr. McDonald chose voluntarily to confess, not because he concluded further assertions of the right to counsel would be futile or because his will was overborne, but because he determined, in an exercise of free will, that the weight of the evidence did not leave him with any reasonable option other than to confirm what the police already appeared to know.
- [357] Finally, and with respect to the alleged incorporation of components of the Reid technique into the interview of October 15, 2011, nothing Sgt. McCarl did in the course of that interview raises a reasonable doubt about the voluntariness of Mr. McDonald's statements.
- [358] Mr. McDonald was immediately confronted with a statement that the police were sure he was responsible for the shooting of Jones. Sgt. McCarl never backed away from that position in the course of the interview. Although direct positive confrontation is the usual first step in the Reid technique, it is hardly surprising it would be employed in this case where the police were in possession of four confessions, two of which had been videotaped, when Mr. McDonald was arrested. Neither is it surprising Sgt. McCarl would tell Mr. McDonald that he "knew everything" shortly before showing him the video clip from the re-enactment. The police did know a great deal about the offence at the time of the interview. Indeed, much of it had come from Mr. McDonald's own mouth. There was nothing unfair about the police setting out for Mr. McDonald the strength of the case he was facing, nor am I left with any doubt about whether this approach deprived him of the right to choose whether or not to speak with the authorities. I am satisfied beyond a reasonable doubt that it did not.
- [359] The interview was not aggressively conducted nor was it coercive. Mr. McDonald was not prevented from asserting his right to silence. Indeed, his right to do so was repeatedly affirmed by Sgt. McCarl.

- [360] Although the interview incorporated some moral persuasion and minimization techniques, they were relatively mild and did not result in inducements as that term has been defined in *Oickle*. On the issue of minimization techniques, Sgt. McCarl suggested to Mr. McDonald that many people take justice into their own hands, and that the assault perpetrated on him in the bar by Mr. Jones likely provoked him. At the same time, he put it to Mr. McDonald that he was not going to walk away without "getting a piece" of Jones and that he murdered Jones in what amounted to a selfish act by deliberately firing the rifle at his vehicle. Importantly, Sgt. McCarl never suggested that the conduct of Jones in the bar, or Mr. McDonald's alcohol consumption, or any other factor would minimize the legal consequences of his actions. It was never suggested to Mr. McDonald that there was some morally or legally acceptable reason for him to shoot Jones. There was no *quid pro quo* offer tabled by Sgt. McCarl during the interview of October 15, 2011. Put simply, there is nothing in this interview that could possibly lead Mr. McDonald to believe he had to trade an admission to achieve an end to the interrogation or to avoid prosecution on the full offence charged. Finally, the interview did not involve the use of tricks or deceit.
- [361] I wish to emphasize that I have considered the points advanced by counsel for Mr. McDonald on the voluntariness issue in a cumulative way. Having done so, I am satisfied beyond a reasonable doubt that his post-arrest statements to Sgt. McCarl are voluntary.
- [362] Mr. McDonald's statements to Sgt. McCarl are admissible. I would also admit these statements on the first *voir dire* as being relevant to the reliability prong of the *White* analysis.

#### D. THE THIRD VOIR DIRE: THE ADMISSIBILITY OF MR. McDONALD'S STATEMENTS TO CST. ZWICKER IN THE DAWSON CREEK LOCKUP

##### 1. Factual Background

- [363] On the weekend of September 14 and 15, 2013 Mr. McDonald was held in the Dawson Creek lockup pending completion of the first two *voir dire*s.
- [364] The prison log reflects that Mr. McDonald was put in a cell at 4:11 p.m. on Friday, September 13, 2013 at the conclusion of the court proceedings that day. He stayed in that cell until Sunday, September 16, 2013 at 4:19 a.m., when he was escorted to and from the cell for a shower and shave.
- [365] Cst. Zwicker, an RCMP officer since 2009, was the Acting Corporal in charge of the detachment on the evening of September 15, 2013 and morning of September 16, 2013. He was in uniform wearing soft body armor with his duty belt and firearm. He escorted Mr. McDonald to and from the shower room and supervised Mr. McDonald while he shaved in his cell after showering. He testified that as Mr. McDonald was shaving in his cell, Mr. McDonald made to him an inculpatory statement concerning the Dawson Creek shooting. The interaction between Cst. Zwicker and Mr. McDonald in the cell and in the hallway outside his cell was videotaped but not audio recorded. The voluntariness of the statement

Mr. McDonald made to Cst. Zwicker while shaving in his cell is at issue in these proceedings.

- [366] Counsel for the Crown argues that the statement was spontaneous, not obtained through inducements or police trickery and that it was the product of an operating mind. While Crown counsel acknowledges the relative harshness of the conditions in the Dawson Creek lockup, he submits that the statement was not the product of oppressive circumstances giving rise to the risk of a stress-compliant confession. He submits that Mr. McDonald chose (unwisely) to speak with Cst. Zwicker. He submits that the voluntariness of the statement has been proved beyond a reasonable doubt.
- [367] Counsel for Mr. McDonald submits that the statement was not spontaneous, the gap in the record does not permit assessment of the context in which the statement was made or its voluntariness, and the statement was the product of an oppressive environment, and that it has not been shown by the Crown to have been voluntarily given.
- [368] Cst. Zwicker was the only witness to give evidence on this voir dire. He testified (and the video confirms) that prisoner cells in the Dawson Creek lockup are about 8' x 8'. There is a toilet and basin in the cell as well as a sleeping bench. From the video, Mr. McDonald appeared to have a pad to sleep on and a blanket, but prisoners are not permitted pillows and Mr. McDonald did not have one. There are no windows in any of the cells. Prisoners can request that the lights in their cell be dimmed but they are never turned off. There are no clocks or radios in the cells. Prison guards can open a window to look inside the cell, but prisoners cannot open this window from inside the cell. There is a flap at the bottom of the cell door for food tray delivery. There is no exercise yard at the Dawson Creek lockup. At no time during the weekend in issue was Mr. McDonald taken outside for fresh air. A camera monitors the individual cells 24 hours a day. There is no privacy screen shielding the toilet area. There is no programming for prisoners in the Dawson Creek lockup. Prisoners can request magazines and books to read in their cells. Cst. Zwicker agreed that there is little for prisoners to do in the lockup but read, sleep and exercise in the limited space available to them.
- [369] Cst. Zwicker testified that prisoners eat three times a day and are provided, by the jail guards, with any prescription medication they require. The prison log reflects the times at which Mr. McDonald was given breakfast, lunch and dinner and supplied with his medication. It also records his requests to have reading material delivered to his cell and to have the lights in his cell dimmed. Cst. Zwicker was unable to say whether and, if so, to what extent, the delivery of meals, medication and reading material involved in-person contact between Mr. McDonald and the jail guards. He testified that jail guards are instructed to have minimal contact with prisoners and use the cell door flaps at meal times.
- [370] The prison log also reflects that Mr. McDonald made his first request for a shower and shave on Saturday, September 15, 2013 at 10:40 a.m. He repeated this request at 11:08 p.m.

- [371] Cst. Zwicker testified that he was informed by Laverne Carter, a jail guard, that Mr. McDonald had requested a shower. Cst. Zwicker and Ms. Carter went to Mr. McDonald's cell. Ms. Carter opened the cell door. That was the extent of her involvement in this matter. She did not speak with Mr. McDonald or hear anything he subsequently said to Cst. Zwicker.
- [372] Cst. Zwicker knew at the time that Mr. McDonald was charged with an historical murder and had been the subject of a Mr. Big investigation. He knew the murder involved a shooting and either the trial or voir dres were underway. He also testified that he knew the case involved something about a finger because he heard about this in the foyer of the courthouse while he was there on other matters and this case was proceeding.
- [373] Cst. Zwicker escorted Mr. McDonald to a private shower room on Sunday, September 16, 2013 at 4:19 a.m. Cst. Zwicker testified that prisoners take showers at this time in the morning largely as a result of operational requirements. It is a quiet time in terms of police calls and the detachment is fully staffed. In the morning, the call volume begins to pick up and there is not enough time to tend to showers for prisoners.
- [374] After the shower, Cst. Zwicker gave Mr. McDonald a shaving kit and escorted him back to his cell. He told Mr. McDonald that the shave would have to be supervised because of incidents with other prisoners and razors. Mr. McDonald said in response that, "a few ruin it for the rest of us". As they were walking back to Mr. McDonald's cell, Cst. Zwicker also asked when he was coming back to Dawson Creek. At some point during their interaction, Mr. McDonald mentioned how tiring it was to be in cells. As he was shaving at the basin in the cell, Mr. McDonald asked Cst. Zwicker, who was standing at the cell door, if he had anything to do with the police in the south. Cst. Zwicker said, "No". Mr. McDonald said that the Canadian system of voir dres is better and that police officers in the south are corrupt. He told Cst. Zwicker that members of the Mr. Big investigation took \$30,000 from his account. He also said they executed a person at the Vancouver International Airport with a taser. Cst. Zwicker testified that he just listened. Mr. McDonald was not Chartered or warned. Cst. Zwicker agreed in cross-examination that, in retrospect, it was an error on his part not to warn Mr. McDonald that anything he said could be given in evidence.
- [375] Mr. McDonald then said to Cst. Zwicker, "I don't know where all the witnesses are coming from. There were only three people there when he died - his drunk wife, the guy who died and me".
- [376] Mr. McDonald also told Cst. Zwicker that he was offered a deal to manslaughter. Cst. Zwicker asked if Mr. McDonald had been offered a particular sentence. Mr. McDonald replied, "No".

- [377] The entire conversation lasted just under 12 minutes. The conversation began in the hall as Mr. McDonald was being returned to his cell after showering, but 90 per cent of the conversation occurred while Mr. McDonald was shaving in his cell and Cst. Zwicker was standing at the cell door. Mr. McDonald's back was to the video camera throughout the exchange that occurred back in the cell.
- [378] Cst. Zwicker testified that he did not threaten Mr. McDonald nor did he offer him any inducements. He never suggested to Mr. McDonald that being permitted to shower and shave was in any way related to speaking with him about the offence. In addition, Mr. McDonald sought no favour from Cst. Zwicker in return for speaking with him.
- [379] Cst. Zwicker testified that he made an initial brief note of Mr. McDonald's remarks shortly after the encounter. He sent a text message to the Crown about the conversation. The Crown instructed him to report this occurrence to the team commander. Cst. Zwicker made more detailed notes about 36 hours later when he was directed to do so by a superior officer.
- [380] Cst. Zwicker testified in cross-examination that he did not know at the time that Mr. McDonald was talking about the offence. Although the point was not clarified, I take it Cst. Zwicker's evidence on this point was that he did not realize at the time that Mr. McDonald's comment about there only being "three people there when he died" was a reference to the offence.

## 2. Factual Findings

- [381] I make the following factual findings in relation to this issue.
- [382] First, Mr. McDonald knew that Cst. Zwicker was a police officer. Cst. Zwicker was in full RCMP uniform when the interaction with Mr. McDonald occurred.
- [383] Second, Mr. McDonald knew that he did not have to speak about the circumstances of the offence with Cst. Zwicker.
- [384] Third, despite the absence of a further warning at the time of this interaction, Mr. McDonald knew that any statement he made relating to the offence could be given against him in evidence.
- [385] Fourth, it was Mr. McDonald who engaged Cst. Zwicker in discussion about the offence. The case at bar is, in this respect, quite unlike *R. v. Carey* (2001), 154 C.C.C. (3d) 334 (Ont. S.C.J.), a case upon which Mr. McDonald places considerable reliance. In *Carey*, the transporting police officer to whom the prisoner made a potentially incriminating statement initiated discussion about the offence and "orchestrated" the subsequent conversation. In doing so, he was found to have deliberately elicited the statement through trickery. In this case, Cst. Zwicker simply listened to Mr. McDonald who, for reasons known only to him, chose to make a highly incriminating statement. The remarks Cst. Zwicker made that preceded the incriminating admission were innocuous and certainly not

orchestrated for the purpose of eliciting from Mr. McDonald incriminating evidence.

- [386] I accept that Mr. McDonald's statements to Cst. Zwicker are not as "spontaneous" as the statements made in *R. v. Wilson*, 2001 BCCA 391. In my view, the circumstances in the case at bar are more like the facts in *R. v. Van Haarlem*, 64 C.C.C. (3d) 543 (B.C.C.A.), aff'd [1992] 1 S.C.R. 982. In *Van Haarlem*, the police officer to whom an incriminating statement was made approached the out-of-custody accused in a bar at the conclusion of the preliminary inquiry and struck up a conversation with him. The police officer did not, however, persuade the accused to talk about his case. Rather, the accused chose to volunteer an incriminating statement. The Court held there was no violation of the right to silence. At the end of the day, I recognize that cases like *Van Haarlem* and *White* can only provide general guidance. The highly contextual nature of the confessions rule is such that each case must be assessed in light of its unique factual matrix.
- [387] Fifth, Mr. McDonald's admission that he was present at the scene emerged unprompted by anything Cst. Zwicker said or did.
- [388] Sixth, Cst. Zwicker made no threats to Mr. McDonald nor did he offer him any inducements to speak about the offence. I recognize the need to closely examine potential inducements in context. The context in which Mr. McDonald made this incriminating statement includes the fact that he was being held over the weekend in a police cell with virtually no amenities. Even examining the statement from this broader perspective, I am satisfied there is no relationship between Mr. McDonald being taken for a shave and shower and his decision to speak to Cst. Zwicker about the offence.
- [389] Finally, Laverne Carter's involvement in this incident was simply to unlock Mr. McDonald's cell door. She had no relevant conversation with Mr. McDonald herself and did not overhear any part of the conversation between Mr. McDonald and Cst. Zwicker.

### 3. Issues and Analysis

- [390] Relying on *R. v. Holmes* (2002), 169 C.C.C. (3d) 344 (Ont. C.A.), Mr. McDonald asserts that in the evidence put before me on the voir dire is insufficient to enable an understanding of all of the relevant circumstances surrounding the statement in issue - an inquiry mandated by the confessions rule. I cannot accede to this argument. There was no evidence in *Holmes* about what occurred in the 16 hours that passed between the arrest and the interview that led to the taking of the statement. I am satisfied that the record before me (evidence respecting the prison log, Cst. Zwicker's testimony and videotaped interaction) permits full consideration of the circumstances in which the statement was made. I therefore reject the submission made on Mr. McDonald's behalf that there is a gap in the record that frustrates a contextual assessment of the circumstances in which the statement in issue was made.
- [391] Mr. McDonald argues that his statement was also made in circumstances of oppression and that this raises a reasonable doubt about the voluntariness of his statement. I do not wish to minimize the starkness of the conditions that characterize police lockups, including the

one in the Dawson Creek RCMP detachment. Mr. McDonald was kept in conditions akin to solitary confinement from Friday afternoon until Monday morning. He stayed in his cell for the whole of that time. Having said that, police custody is inherently oppressive. It might fairly be said that local police lockups are particularly so but, for the purposes of the confession rule, something more is required. The circumstances must be so oppressive that the detainee's will and strength to make an independent choice to speak or remain silent is overborne. Although the circumstances of Mr. McDonald's confinement over the weekend in question were unpleasant, they cannot properly be characterized as oppressive. Mr. McDonald had his own cell. He was regularly fed and supplied with his medication. He could ask for reading materials and have the lights in his cell dimmed. The admittedly harsh conditions upon which Mr. McDonald relies do not give rise to a reasonable doubt in my mind about the voluntariness of his statements.

[392] Counsel for Mr. McDonald submits that the confessions rule extends to protect a broader conception of voluntariness that also focuses on the protection of the accused's rights and fairness in the criminal process. I agree. As Iacobucci J. observed in Oickle, both the operating mind and the police tricks doctrines address not so much the reliability of the statements but fundamental issues of fairness (at para. 69). The voluntariness inquiry engages a complex of values and requires a highly contextualized approach. Giving due regard to the custodial context in which the statement was made, the harshness of the conditions to which Mr. McDonald was exposed over the weekend and the fact that he was not warned before making the statement, I am satisfied beyond a reasonable doubt that the statement he made to Cst. Zwicker was voluntary.

[393] For the foregoing reasons, Mr. McDonald's statements to Cst. Zwicker are admissible. I would also admit these statements on the first voir dire as being relevant to the reliability prong of the White analysis.

"FITCH J."

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Prepared on 27 October 2026 · Esheria