

## LITERATURE REVIEW

### Confession evidence in Canada: psychological issues and legal landscapes

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Canada's legal system recognizes that police interrogation procedures may contribute to false confessions and has provided safeguards designed to protect the rights of the accused and reduce the likelihood of these errors. Although it is difficult to determine how often false confessions occur, it is worth considering the extent to which Canadian legal protections are likely to be effective and the degree to which they address the relevant psychological issues that might increase the likelihood of a false confession. The purpose of this paper is to summarize some recent Canadian legal cases relevant to confession evidence (e.g. *R. v. L.T.H.*, 2008; *R. v. Mentuck*, 2000; *R. v. Oickle*, 2000; *R. v. Spencer*, 2007) and to analyze Canadian law and police practice in the context of the scientific evidence available and in comparison to the practice of other jurisdictions. We also discuss directions for future research, and the ways in which psychological research could inform legal process and policy in the future.

**Keywords:** confessions; false confession; legal issues in confession; international perspectives on confession

#### I. Introduction

In 1992 Kyle Unger was sentenced to life in prison for the sexual assault and murder of a 16-year-old girl in British Columbia, following his confession. Romeo Phillion spent over 30 years in prison after confessing to the 1967 murder of an Ottawa firefighter. In both of these cases, the men were ultimately determined to have falsely confessed to their crimes (CBC, 2003, 2009a); they were not cleared until March, 2009. In 1996, Darelle Exner left a Saskatchewan restaurant to make her way home, but never arrived. She was found sexually assaulted and murdered. Three men, Joel Labadie, Douglas Firemoon, and a 17-year-old youth who cannot be identified (because of protections in the Canadian Youth Criminal Justice Act) were arrested and interrogated by police for over 15 hours. The three men falsely confessed to committing the crime and spent four months in jail before the Crown ultimately dropped the charges for lack of evidence (CBC, 2003). In 1997, Simon Marshall was convicted of 15 counts of rape, based on his confession. Marshall, who was diagnosed with borderline personality disorder and an intellectual disability, convinced even his lawyer that he had committed these crimes. After being released in 2003, he was arrested again and charged with three more counts of sexual assault. He once again confessed. Fortunately, DNA analysis showed he was in fact innocent

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of the 2003 crimes. A further investigation showed he was also innocent of all of the previous crimes (CBC, 2007). In December of 2006, he was awarded \$2.3 million in compensation (CBC, 2009a). But these cases are not unique in the Canadian legal system.

These are just a few examples of false confessions in Canada; of course, there are also numerous examples of other proven false confessions, including the US and elsewhere. (e.g. Drizin & Leo, 2004; Gudjonsson, 1992, 2003; Kassin, 2005, 2008a; Kassin & Gudjonsson, 2004; Lassiter, 2004; Leo & Ofshe, 1998). The purpose of this paper is to discuss recent Canadian legal decisions in light of the scientific research bearing on psychological factors in interrogations and confessions. We provide a brief overview of factors that are known to contribute to false confessions (including police interrogation practices) and discuss the role of confession evidence in criminal proceedings. Next we present a brief history of the role of interrogations and confession evidence in Canadian courts, a summary of the current legal landscape on this issue (e.g. *R. v. L.T.H.*, 2008; *R. v. Mentuck*, 2000; *R. v. Oickle*, 2000; *R. v. Spencer*, 2007), a comparison of Canadian practice with other countries, and a discussion of the extent to which these recent decisions and police practices complement the relevant scientific research. Finally, we highlight areas where further integration of scientific evidence would be worthwhile, and discuss policy and practice implications for Canada and abroad.

## II. Police interrogations: research and policy

Criminal suspects may falsely confess for a number of reasons. There are times when suspects voluntarily confess to crimes they did not commit in the absence of any external pressure or police involvement. The Canadian cases cited above are examples of what Kassin and Wrightsman (1985) call *coerced-compliant* confessions – situations when a suspect confesses to a crime after being subjected to an extensive amount of external pressure from investigators, to avoid a specific or implied threat, or by a promise of a real or implied reward. How common are coerced-compliant false confessions? Although the precise numbers are impossible to determine, false confessions occur with some regularity, and have been documented all over the world (Kassin et al., 2009).

Much of the work done by interrogators occurs during an initial interview with the suspect. The purpose of the initial interview is simply for the officer to determine if there is evidence of guilt or deceptive behavior (Kassin, 2005). Once a suspect has been labeled as ‘deceptive’, the interrogation begins in earnest. Most Canadian investigators are trained in the principles of the Reid technique (see Inbau, Reid, Buckley, & Jayne, 2005), if not in using the technique itself (CBC, 2003), and the technique has withstood challenge in the Canadian courts (e.g. *R. v. Brinsmead*, 2006). However, although the Reid method may be an excellent tool for extracting confessions from guilty suspects (Inbau et al., 2005) there are elements of the technique that create situations that put innocent suspects at risk of confessing to a crime they did not commit (Kassin, 2005; Kassin et al., 2009).

First, because the decision to transition from a suspect interview to a suspect interrogation is based on a decision that the suspect is behaving suspiciously, investigators often adopt a ‘guilt-presumptive’ frame of mind, leading to confirmation biases (see Rosenthal & Jacobson, 1968). Secondly, innocent suspects tend to

elicit highly confrontational questioning styles (see Kassin, 2005; Kassin, Goldstein, & Savitsky, 2003) and can be put under more pressure than guilty suspects. Thirdly, aggressive interrogation techniques such as those prescribed by the Reid technique can lead to false confessions (Kassin, 2005; Kassin et al., 2009).

The UK's legal system takes a different approach to interrogation and confession than what is used in Canada and the USA. The UK legal system, following a series of high profile miscarriages of justice, developed the PEACE training system for investigators (see Bull & Milne, 2004; Kassin et al., 2009). In order to ensure the reliability of the confessions, officers are reminded that their goals are to be open-minded and fair, and that they are trying to obtain accurate information from suspects that can be compared to what they already know. There are also special considerations that must be made for vulnerable populations. Developed in conjunction with police officers, psychologists and lawyers, this program has been updated and refined over the years (see Bull & Milne, 2004), and has become well respected in the international legal community. Suspects must be informed and reminded of their rights, and there are limits on how long suspects can be interrogated, as well as how often they can have breaks. Suspects who are under 18 or are otherwise at risk, must have access to an 'appropriate adult' (Home Office, 2003). A key distinction between the Canadian (and US) practice and that of the UK is the use of 'mistruths' during the interrogation: UK investigators cannot pretend they have evidence they do not possess. In Australia, the common law rule is to exclude a confession unless it is deemed to be voluntary and reliable (*R. v Swaffield*, 1998; *Pavic v. R.*, 1998; Australian Evidence Act, 1995; see Skinnider, 2005). Thus, in the Australian system the burden is on the Crown to demonstrate admissibility.

### ***Recent developments in Canadian policing: the 'Mr Big' technique for eliciting confessions***

A fairly recent trend in Canada seems to be the use of the so-called 'Mr Big' technique (see Smith, Stinson, & Patry, 2009; see also Moore, Copeland, & Schuller, 2009). Generally reserved for serious cases, this type of sting operation involves the use of undercover police officers to lure the suspect into becoming involved in a supposed 'criminal organization'. Usually, undercover officers befriend the suspect and involve him or her in a series of minor crimes and pay the suspect generously for these criminal activities. Once committed to the organization, suspects are then 'interviewed' for a higher level job, but are told they need to confess to some past crime as a form of 'insurance' for the criminal gang. This confession serves as a pivotal piece of evidence against the defendant, usually resulting in a conviction.

There are numerous examples of the Mr Big technique. Most recently, the Royal Canadian Mounted Police (RCMP; the Canadian federal police force) used the Mr Big technique in the investigation of two high-profile cases. Dennis Cheeseman and Shawn Hennessey pled guilty to manslaughter in the Mayerthorpe, Alberta slayings of four RCMP officers in March of 2005; they were subsequently sentenced to 12 and 15 years in prison. The two men admitted to providing James Roszko (a man who shot and killed the four police officers before turning the gun on himself) with a shotgun and giving him a ride back to his property when they knew that Roszko was planning to kill RCMP officers. Over 50 undercover police officers were involved in the operation which included strippers, lap dances, two undercover police officers

naked in a bed together, and a trip to British Columbia to meet ‘Mr Big’. Cheeseman confessed to Mr Big’s right-hand man regarding the role that he and Hennessey played in the killings (CBC, 2009b). In a second case, Penny Boudreau confessed to killing her 12-year-old daughter in Bridgewater, Nova Scotia. She was sentenced to life in prison. Undercover police officers involved Boudreau in organized crime activities and eventually offered to help her destroy incriminating evidence. Boudreau returned to the crime scene with the undercover police agent and described in detail how she strangled her daughter and disposed of her body along the LeHave River (CBC, 2009c).

The pressure on suspects to confess in a Mr Big type scenario is substantial, and the enticements are both explicit and significant. Although we found no official documents or statistics on the use of the Mr Big technique, the RCMP claims to have used the Mr Big technique in at least 350 cases across Canada, obtaining a 75% success rate and a 95% conviction rate (Gardner, 2004; see Smith et al., 2009, for a review). There is no documented evidence that investigators in the USA have used methods such as the Mr Big technique (see Smith et al., 2009, for a review). Indeed, few other jurisdictions seem to allow Mr Big type stings, although similar procedures have been used in Australia (see Moore et al., 2009).

### *Safeguards designed to protect the rights of defendants and minimize errors*

#### *The warning*

In most Western countries, criminal suspects have the right to silence and the right to have legal counsel present while being interrogated by police. In the USA, these rights are specified in what is commonly known as the Miranda warning (*Miranda v. Arizona*, 1966). In the UK, the Police and Criminal Evidence Act (PACE; Home Office, 2003) requires the suspect to be given the ‘caution’ as soon as police suspect criminal activity. Police must also inform suspects that they are entitled to legal representation and that their lawyer may be present during any interrogation, but police must provide this information only when they bring the suspect into the police station (see Slobogin, 2004 for a review).

In Russia, the Courts have decided if suspects are not provided with a caution and the opportunity to have legal counsel, then confessions (or inculpatory statements) will not be admissible (law.jrank.org, 2009). However, this exclusionary rule is rarely applied in court and Russian police appear to have become adept at convincing suspects to waive their rights. The French legal system, having a greater focus on crime control over individual rights, allows substantially greater power and discretion to investigators when conducting inquiries (Ma, 2007). French police are not required to provide warnings or cautions to suspects regarding the right to remain silent until a magistrate receives the case. At this time suspects are entitled to be informed of the charges and are entitled to legal representation. Police can detain a suspect for up to 36 hours before they see a magistrate.

Canada’s Charter of Rights and Freedoms provides the legal foundation for Canada’s caution, which varies across jurisdictions (e.g. see Eastwood & Snook, 2010). Once the suspect is under arrest, however, the warning typically takes this form: ‘You are under arrest for the charge of \_\_\_\_\_. You have the right to retain a lawyer; we will provide you with a lawyer referral service if you do not have your own

lawyer. Anything you say can be used in court as evidence' (*R. v. Hebert*, 1990). Many cautions also include a statement such as: 'You have nothing to hope from any promise or favor, and nothing to fear from any threat, whether or not you say anything' (Eastwood & Snook, 2010).

Do these warnings reduce coercion in the context of interrogations? Although it is difficult to measure coercion in this context and provide empirical data that speaks to this question, there are some indications that these warnings may be serving to inform suspects of their rights, particularly in the Canadian context. What is less clear is if suspects exercise these rights. Eastwood and Snook (2010) have demonstrated that University students in Newfoundland (half of whom were enrolled in a police recruit program) understood their right to remain silent and the right to legal counsel but had difficulty understanding that they had little to gain of 'hope from any promise or favor' or 'fear from any threat'.

Thus, although there is also some evidence that confession rates in the USA have decreased (Cassell & Hayman, 1996; Schulhofer, 1996; but by how much is unclear, see Slobogin, 2004) there are numerous cases of proven false confessions that demonstrate the ineffectiveness of warnings. Suspects believe that only guilty people need lawyers, innocent people have nothing to hide, and thus talking to investigators is perfectly reasonable (Kassin, 2008a). In addition, police officers (at least in the USA) are quite adept at convincing suspects to waive their rights or continue to speak to them anyway (see Leo, 1996; Kassin, 2005).

There are special issues which must be considered with potentially vulnerable populations. In the USA, evidence has shown that a significant portion of adults with mental disabilities, including serious psychological disorders (Cooper & Zapf, 2008) and adults with intellectual disabilities (Clare & Gudjonsson, 1991; O'Connell, Garmoe, & Goldstein, 2005) have some trouble understanding the *Miranda* warning. Until recently, Canadian police officers were simply required to ask suspects if they understood their rights; they did not have to assess suspects' actual level of understanding (*R v. Khansaiyasith*, 2008; but see *R v. L.T.H.*, 2008).

A significant proportion of adolescents also have difficulty understanding their rights, do not understand how the warning is relevant to being interrogated by police, and are more likely than adults to make decisions about waiving their rights based on immediate negative consequences (such as being able to go home; see Grisso, 1981; Redlich, Silverman, & Steiner, 2003; see Kassin et al., 2009, for a review). Thus, youth and those with mental disorders are at particular risk to waive their right to a lawyer.

### *Recording interrogations and confessions*

Interrogations are generally recorded (usually on video) in Canada and often in the USA. Typically, the actual confession statement is videotaped but the preceding interview and interrogation is not recorded. Importantly, how the interrogation is recorded can have an impact on perceptions of the confession itself. Arguments supporting and opposing documentation of interrogations are nicely summarized by Vrij (2003). Lassiter and his colleagues (e.g. Lassiter & Clark, 2003, as cited in Lassiter & Geers, 2004) have determined that any recordings of interrogations should focus equally on the suspect and the police officer (see Lassiter & Geers, 2004). This

will allow the viewer the best ability to understand the context in which the confession was given.

In the UK, police are required to videotape interrogations but only at the police station; there is no requirement to record interviews or interrogations that occur in other venues (e.g. police vehicles, etc.). In contrast, Dutch police are not required to videotape interrogations (nor does the suspect have the right to legal representation during the interrogation). Taking a considerably different perspective (and one that reflects a consideration of the scientific literature on this issue), New Zealand's national policy on the matter determined that the recording should focus equally on the suspect and the police officer.

### *Detecting false confessions once elicited*

The law often makes an assumption that people (including police officers, judges, and jurors) can reliably distinguish true from false confessions; this assumption was stated explicitly by the US Supreme Court in *Lego v. Twomey* (1972). Unfortunately, in the absence of disconfirming information, it is often difficult to distinguish true from false confessions. People from a variety of legally relevant professions (e.g. police, judges, psychiatrists) perform no better than at chance level when making judgments about deception (Ekman & O'Sullivan, 1991; Stinson, Smith, & Patry, 2009; see Kassin et al., 2009, for a review).

Thus, there are clear limitations to the effectiveness of safeguards designed to protect the rights of suspects, minimize errors in interrogations, and prevent wrongful convictions stemming from false confessions. Perhaps most disconcerting is the fact that false confessions can impact on other exculpatory evidence (see Kassin et al., 2009) – once a suspect confesses, investigators may ignore other leads and focus only on finding evidence that further implicates the suspect. Ambiguous evidence will be interpreted as indicative of guilt (e.g. prison informants, vague forensic evidence, partial fingerprints, motives), whereas exculpatory evidence (e.g. eyewitnesses; alibi witnesses; estimated time of death) will be ignored or discredited. Witnesses and alibis may also be affected by the false confession, changing their recollections based on the suspect's confession (e.g. believing 'if he said that it must be true'; see Kassin et al., 2009).

### **III. The Canadian legal context**

In the 1700s, legal scholars recognized the use of 'third degree' type tactics (beatings, threats, torture) could result in the elicitation of false confessions from a suspect who is desperate to escape the situation or avoid perceived threats. Ultimately, England's court determined that these types of confession were involuntary and therefore not admissible in court (*The King v. Warrickshall*, 1783). Courts excluded any statement made to an authority (e.g. police) unless the prosecution (i.e. the Crown) could prove beyond a reasonable doubt that the statement was made voluntarily (e.g. *Prosko v. The King*, 1922). Courts have typically found a statement to be involuntary if it has been obtained by 'fear of prejudice or hope of advantage' (see *R v. Oickle*, 2000) or if the police were found to use a level of trickery that 'shocked the conscience' of the Canadian public (*R. v. Rothman*, 1981). Neither *R. v. Rothman* nor any subsequent ruling has prohibited the use of police trickery (e.g. exaggerating the strength or

amount of evidence against a suspect) – it is still an allowable interrogation technique.

We focus primarily here on Supreme Court of Canada cases since 2000. Specifically, we will address *R. v. Oickle* (2000) which offers the most profound analysis of the confession rule in recent history (Ives, 2007) and which provided the basis for many subsequent cases. More recently, *R. v. Mentuck* (2000) and *R. v. Spencer* (2007) have reaffirmed the *Oickle* decision, various police tactics, and expanded *Oickle*'s applicability. Finally, we will consider *R. v. L.T.H.* (2008) which addresses issues relevant to young suspects' statements.

### **R. v. Oickle (2000)**

In *R. v. Oickle* (2000), the Supreme Court of Canada made its first comprehensive restatement of the confessions rule since the Canadian Charter of Rights and Freedoms was established in 1982. *Oickle* was a Nova Scotia arson case in which eight fires were under investigation. Police identified the defendant Oickle and brought him to a local motel for questioning. After being informed of his rights, the accused took a polygraph test and was told he had 'failed' the test. Afterwards, he was questioned for about an hour. After a short break, he was questioned again by a different officer during which time he confessed to setting one fire in his fiancée's car. He was placed under arrest and brought to the police station. Early the next morning, the accused agreed to a re-enactment of a number of the fires and he was subsequently charged and convicted of seven counts of arson.

The central issue on appeal was the voluntariness of the defendant's confession. The defense claimed that a number of factors raised reasonable doubts as to voluntariness, among them the fact that the police had exaggerated the reliability of the polygraph, that they had threatened to give his fiancée a polygraph, and that they had minimized the legal significance of multiple convictions. The Nova Scotia Court of Appeal overturned the conviction on the basis of the voluntariness claims made by the defense, concluding that the case facts raised reasonable doubts as to the voluntariness of the confession and that it should therefore have been excluded.

The Crown appealed the decision to the Supreme Court of Canada, which reinstated the conviction. The majority established that at common law, the voluntariness of confessions is central, and the standard for demonstrating voluntariness is beyond a reasonable doubt. A number of factors are relevant to a judge's determination of voluntariness, including police trickery, threats, or promises. But the overall determination must be made on an analysis of the totality of circumstances surrounding the confession.

Two critical elements of this analysis are the defendants' 'fear of prejudice' and 'hope of advantage': if police tactics give rise to either of these, then the voluntariness of the confession is suspect. Police deception is allowed, and only raises a reasonable doubt when the deception 'shocks the community', or when the deception is substantial enough, in the judge's analysis of the totality of the circumstances, to raise a reasonable doubt as to a confession's voluntariness. However, it is unclear how this would be determined.

Examples of improper techniques would include explicit *quid pro quo* offers of leniency such as reduced charges or lenient treatment. In the *Oickle* case, the suspect was told that he could receive psychiatric assistance after he had confessed, an

incentive which the majority viewed as a lesser inducement: '[P]olice may often offer some kind of inducement to the suspect to obtain a confession. Few suspects will spontaneously confess to a crime ... police will have to somehow convince the suspect that it is in his or her best interest to confess.' (p. 36)

The *Oickle* majority opinion included a thorough analysis of police interrogation tactics. Interrogation tactics that subtly minimize the legal and moral consequences of conviction, and subtle suggestions about the benefits of confessing, are identified as useful to police and are allowed, so long as they do not raise questions as to voluntariness. Oppression is another factor that is to be considered in the judge's analysis as to voluntariness. 'Third degree' interrogation tactics are certainly out of bounds, but police have broad discretion to induce confessions through other means. One controversial but acceptable measure often employed by police interrogators is the use of false evidence: 'I do not mean to suggest in any way that, standing alone, confronting the suspect with inadmissible or even fabricated evidence is necessarily grounds for excluding a statement.' (p. 38) Similarly, police exaggeration of the reliability of evidence, including the polygraph, does not invalidate confessions: 'Vigorous and skillful questioning, misstatements of fact by the police, and appeals to the conscience of the accused do not necessarily make a resulting statement inadmissible' (p. 19). It is interesting to note that although in *Oickle* the justices referenced a significant amount of social science evidence, including several papers on police induced false confessions, no experts were called to testify, nor did the justices decide that the tactics used by police posed a threat to elicit false confessions.

In a later case that cited *Oickle*, *R. v. Singh* (2007), the Supreme Court of Canada elaborated on the Charter right to silence, and its relationship to the common law confession rule. The defendant was arrested in connection with the death of an innocent bystander who died after a stray bullet hit him when he was standing just inside the doorway of a pub. Singh conferred with a lawyer, and during subsequent questioning repeatedly expressed his desire to remain silent. Police persisted with their interrogation, and though Singh did not confess, he made statements which later helped to conclusively identify him as the perpetrator. The trial judge concluded that the statements were made voluntarily beyond a reasonable doubt and admitted them. In a 5-4 ruling, the majority of the Court affirmed his conviction and held that repeated questioning by police, despite a suspect's repeated expression of his desire to remain silent, does not necessarily mean that any subsequent statements made by the suspect are involuntary.

### **R. v. Spencer (2007)**

In *R. v. Spencer* (2007), the Court elaborated on police offers of leniency as they relate to determinations of voluntariness. '[W]hile a *quid pro quo* is an important factor in establishing the existence of a threat or promise, it is the strength of the inducement, having regard to the particular individual and his or her circumstances, that is to be considered in the overall contextual analysis into the voluntariness of the accused's statement,' (p. 12). In *Spencer*, the defendant argued that his confession was tainted by hope for leniency for his girlfriend, who had also been arrested in relation to the charges, and also by a police promise that he could visit her after he had confessed. The Supreme Court rejected the argument and reinstated the defendant's conviction, holding that his confession was voluntary.



**R. v. L.T.H. (2008)**

*R. v. L.T.H.* examined questions about the confession rule as it relates to special protections afforded to young offenders under the Youth Criminal Justice Act (YCJA, 2002). Following a chase, L.T.H., a juvenile, was apprehended by police and charged with dangerous driving causing bodily harm. He was apprised of his rights to speak with a lawyer or another adult, waived those rights and made a videotaped confession. The Nova Scotia Youth Court judge ruled that the confession was inadmissible because of issues surrounding the suspect's understanding of his rights and voluntariness of statements made after waiving those rights. A central issue in the judicial opinions in this case was the burden of proof requirements regarding confessions, as enumerated in the YCJA, section 146 (2), chapter 1. Statements are admissible if:

(a) the statement is voluntary; (b) the person to whom the statement was made has, before the statement was made, clearly explained to the young person, in language appropriate to his or her age and understanding, that (i) the young person is under no obligation to make a statement, (ii) any statement made by the young person may be used as evidence in proceedings against him or her, (iii) the young person has the right to consult counsel and a parent or other person . . . (iv) any statement made by the young person is required to be made in the presence of counsel and any other person consulted . . . unless the young person desires otherwise. (YCJA, 2002, c. 1)

The Crown appealed the not guilty verdict to the Nova Scotia Court of Appeal, which ruled the trial judge's decision to be invalid and ordered a new trial. The defendant appealed the decision to the Supreme Court of Canada. The Supreme Court of Canada held that the appeal should be allowed and the original trial judge's decision reinstated. A majority held that if the trial judge was not satisfied beyond a reasonable doubt that (1) a young person's rights were explained to him in manner appropriate to his age and cognitive capacity, and (2) that the youth understood his right to legal counsel before waiving that right, then any statement following such a tainted waiver of rights was properly excluded. Basically, the majority opinion established that every element of section 146(2) must be proven beyond a reasonable doubt. They noted however: 'Where compliance with the informational component is established beyond a reasonable doubt, the trial judge will be entitled – and indeed, expected – to infer, in the absence of evidence to the contrary, that the young person in fact understood his or her rights' (p. 10).

**R v. Mentuck (2000)**

In this case Clayton Mentuck stood accused of the murder and sexual assault of 14-year-old Amanda Cook. Cook had been last seen at Harvest Festival Fair grounds on 13 July 1996. Her body was found several days later in a field near the fairground. On the day after Cook's body was found, Mentuck, who had been staying with family nearby, and who had also attended the fair on 13 July, left town. This was apparently typical behavior, but it made police suspicious of him (*R. v. Mentuck*, 2000, p. 16) as did his comments to his cousin, wherein he indicated he would never take the blame for a crime he did not commit, not even for 'a million dollars' (*R. v. Mentuck*, 2000, p. 19). However, as there was no physical evidence to

connect Mentuck to the crime, the police developed a Mr Big type scenario to extract a confession.

Mentuck was befriended by an undercover officer (a Constable Teufel) and became involved in a number of minor criminal activities for which he was paid cash (*R. v. Mentuck*, 2000). The undercover officer told Mentuck he had to ‘come clean’ to become part of the organization. He was introduced to the leader of the gang, and he was specifically asked about the Cook murder. He was told that if he confessed to the crime, he could become part of the gang and earn large sums of money. He also told him that if he did not confess, he (Teufel) would have to leave the organization for bringing in an unreliable person. Yet he did not confess. Some days later, Teufel returned and told Mentuck that he should stop denying his guilt, because the organization knew he was guilty, and if he did not confess they would both lose their jobs. At this point, Mentuck agreed to tell the big boss that he had committed the murder. When he met with the big boss, Mentuck was told again that he would benefit from confessing.

‘... the big boss confirmed to the accused [Mentuck] that they had this individual dying of cancer and aids [sic] who was prepared to admit guilt and that they had concocted a scam whereby, following his so doing, the accused would then be provided by the organization with a lawyer and the necessary financing to sue the government for having been wrongfully charged and jailed with respect to the murder. The accused was told by the big boss that his lawyer estimated the claim to be worth a million dollars and he guaranteed the accused a minimum of \$85,000.00 or 10%, whichever was the greater, from the proceeds of the lawsuit, as well as a job in the organization.’ (p. 42).

Mentuck then confessed he committed the murder to the boss; however, his details were very sketchy, as he indicated he must have been ‘very drunk’ when he committed the crime. At trial, this was the primary evidence used against Mentuck. But, before Mentuck confessed he wrote and signed a note in which he continued to deny his guilt. This note was turned over at trial.

Although Mentuck was ultimately found not guilty of the murder and the trial judge recognized the inducement that elicited his confession, the Court did not disallow the Mr Big procedure. Functionally, the decision reaffirmed the procedure as acceptable: ‘I fully recognize that when the police are attempting to solve crimes and, in particular, to obtain admissions from people they honestly believe to be suspect, that they may be required to resort to tactics which some may describe as unfair or dirty.’ (p. 47). Determining whether a police procedure is acceptable includes an assessment of whether the police trickery ‘shocked the conscience’ of the Canadian public (*R. v. Rothman*, 1981). Evidently, in the eyes of Canadian courts, the Mr Big technique does not rise to that level.

### **‘Persons in authority’**

Some Canadian cases have addressed the requirement that, for a confession to be admissible, it must be made to a ‘person in authority.’ In *R. v. Rothman* (1981), Canada’s Supreme Court held that although an undercover police officer tricked the accused into making a confession, the confession was deemed admissible because the accused did not know that he was disclosing information to a person in authority. In 2005, Canada’s Supreme Court defined further the notion of a ‘person in authority’ as such: ‘The accused must have believed two things: one that the person to whom he

confessed was an agent of the state capable of influencing the investigation or prosecution, and two, that it would be beneficial for him to confess or prejudicial for him not to do so. Belief must be reasonable (*Grandinetti v. R.*, 2005). In *Grandinetti*, the accused did not believe that the undercover agent was acting for the state, although he did believe that the agent could influence the outcome of the investigation. Finally, in *R. v. Hodgson* (1998). The accused confessed only after a man held a knife to his throat. The Court ruled that the confession was voluntary (and thus admissible) because the person holding the knife was not part of the prosecution and was not a person in authority. The Court recognized the unfairness of the situation, but it left it up to Parliament to address the legal aspects.

#### **IV. Policy and research implications**

A review of the state of knowledge regarding the psychology of interrogations and confessions, along with a bird's eye view of legal, policy, and practice issues, leads us to the following observations and recommendations to create a situation which maximizes the likelihood that confessions obtained can be considered valid and reliable.

##### ***Record the interrogation***

Experts have long made the case that recording the entire interrogation so that the focus is shared between the police officer and suspect is of paramount importance (e.g. Lassiter & Geers, 2004; Lassiter, Geers, Munhall, Handley, & Beers, 2001; Kassin et al., 2009). Indeed, Lassiter and his colleagues (e.g. Lassiter & Geers, 2004) have argued that filming the interrogator at all times would give judges and jurors the best opportunity to understand the interrogation from the suspects' point of view. In any event, it is clear that careful recording (preferably on video) would do much to clarify the interrogation situation to judges and juries and to protect law enforcement agencies from fabricated allegations of coercive or inappropriate interrogation procedures.

As has been summarized elsewhere (see Vrij, 2003) there are many benefits to recording, but there are also some risks which must be taken into account. One risk that is unique to the Canadian context is how confessions are recorded in Mr Big type stings. Typically, only the confession, elicited after months of undercover operations, is filmed. A significant concern is that there is little opportunity for judges or juries to see the context in which the confession was made, with significant pressure on the suspect, and often very explicit rewards and punishments hanging in the balance. On the other hand, a Mr Big type scenario embroils suspects in a criminal gang – there is no question the suspect believes they are behaving illegally. Filming this and showing it to triers of fact could be prejudicial against the suspect. Clearly, this is an issue which deserves additional consideration (see Smith et al., 2009; Moore et al., 2009, for reviews).

##### ***Limit the duration of interrogations***

Isolation increases people's motivations for belongingness, social support, and connection with trusted others (Baumeister & Leary, 1995); it also increases anxiety and incentives to escape the situation. Proven false confessions emerged after an

average of 16 hours (Drizin & Leo, 2004), whereas most interrogations lead to confessions within one–two hours (Kassin, 2008a). Clearly, limiting the duration of interrogations and the scheduling of breaks is a reasonable place to start discussions on how policy and practice could be revised, although much research still needs to be done in this area (see Kassin & Gudjonsson, 2004). The UK and Russia both limit interrogations and require breaks.

### ***Limit police deception or trickery***

The decision-making process during interrogations involves, in part, a cost–benefit analysis of capitulating to the pressure to confess against prolonging (or potentially prolonging) the unpleasant and distressing interrogation. Police introduction of genuine evidence against the defendant should help the suspect make an informed decision as to how to proceed and should increase the diagnosticity of the confession (Kassin & Gudjonsson, 2004). Police introduction of false information serves only to facilitate a desired outcome – a confession (Horselenberg et al., 2006; Kassin & Kiechel, 1996).

### ***Using the Mr Big Technique***

The Mr Big technique is highly troublesome (see Smith et al., 2009). Canadian courts have deemed this type of sting operation to be legal and the ensuing confessions to be voluntary. However, courts have made this determination with little (or arguably no) consideration of the considerable body of research on the psychological factors impinging upon interrogations and confessions. Attempts to introduce expert witnesses have not been particularly successful. No expert witnesses have been allowed to testify in Mr Big type cases (see Moore et al., 2009; see also Gudjonsson, 2003). Moreover, Canadian courts have deemed that the Mr Big technique for eliciting confessions does not ‘shock the conscience’ of Canadians.

### ***Vulnerable or high-risk populations***

There are a number of factors that put people at risk (psychological disorders, youth, suggestibility, anxiety), which must be assessed and considered carefully before interviewing or interrogating people. As the *R. v. L.T.H.* (2008) decision highlights, police need to be as sure as possible that the suspects they deal with understand their rights. However, police officers cannot read minds, nor can they easily access medical history. Thus, how do they assess whether an adult has a mental disorder, or whether a youth understands his or her rights (or whether a youth has a mental disorder that may affect his or her understanding of the caution)? Clearly, simply inviting the juvenile to repeat the warning/caution is not an adequate test of comprehension (*R v L.T.H.*, 2008). It behooves scientists to develop valid and reliable tools for the purpose of assessing comprehension of legal warnings and cautions. At the very least, potential complicating factors should be considered when identifying high-risk individuals; any subsequent statements provided should be examined carefully. Police should also document a high-risk person’s comprehension of their rights, once assessed (Drizin & Colgan, 2004). Presence of a parent or lawyer during interrogations should

also be implemented (Drizin & Colgan, 2004; Vrij, 2003). However, we appreciate that many might raise resource-related, practical, philosophical, and legal limitations of such a suggestion.

### *Expert testimony*

One obvious approach would be to allow expert testimony on confession during admissibility hearings. However, although the requirements for expert testimony are similar under Canadian and US law (i.e. the witness is an expert, the testimony would substantially assist the court, and to 'perceive, know or understand the matter' requires 'special knowledge, skills, experience or training'; CRC, c1049 c81) judges in Canada seem reluctant to allow expert testimony on confession issues. In two cases where expert testimony on false confessions was sought (i.e. *R. v. Osmar*, 2007; *R. v. Bonisteel*, 2008) the expert testimony was excluded because it was judged to be of insufficient assistance to the jury. Fundamentally, courts are ruling that circumstances surrounding confessions are common knowledge issues that do not require 'special knowledge' to understand. Similar logic has been used frequently to exclude expert testimony on false confession in the USA as well (see Soree, 2005, for a review).

It seems clear that the factors leading to false confession are not as generally understood as the courts might believe. Indeed, as highlighted in *Oickle*, where social science research was cited but no experts were called, the potentially coercive nature of interrogation practices are not well understood by the courts. Nonetheless, when experts present their briefs to the court, they should be careful to present their arguments in such a way as to convey the substance of the relevant social science research. Kassir (2008b) has proposed a pyramidal structure for such presentations, focusing first on basic social science research on compliance and obedience, then the research on false confessions, and finally on specific cases. Considering psychological researchers have been successful in communicating their results and influencing legal decision in the past (e.g. Manitoba, 2002; Wells et al., 2000), we suggest that a coordinated and careful approach could result in revisions of the confession rule in Canada.

### **V. Conclusions**

*Oickle* is seen as a major restatement of the confession rule in Canada. In its decision, the Supreme Court of Canada affirmed the Court's position that police interrogation procedures involving minimization and false evidence might be unpalatable but do not threaten voluntariness nor rise to the level of 'shocking' the community. Subsequent decisions narrow the criteria for inadmissibility and sanction the use of undercover operations designed to elicit suspect confessions (such as the 'Mr Big' sting). Although *Oickle* both cited and discussed psychological research on the topic in the decision, there are clearly issues that remain to be addressed concerning confession.

Canadian confession law and practice shares many similarities with models commonly used in the USA. Yet one noteworthy aspect of Canadian policy is that confessions are recorded as a matter of course. In Canadian jurisdictions, this is a matter of police policy and is not mandated by federal law. Recording confessions

is becoming more common in the USA and elsewhere around the world, and Canadian policy serves as an excellent benchmark for other nations. However, Canadian investigations, as with the USA, are commonly laced with deception (e.g. lying about the existence of evidence, exaggeration of the strength of evidence). Although police agencies and courts argue that such practices are a justifiable means to an end, North American law enforcement may have much to learn from developments in countries such as the UK, where deception is no longer used, yet police seem to remain effective at eliciting confessions from guilty suspects. Canada's unique use of the Mr Big technique is troubling for many reasons. We recommend a careful empirical look at this method, and urge extreme caution to any other police agencies considering adapting similar deceptive non-custodial interrogations.

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