

**SUPREME COURT OF CANADA**

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| **Citation:** R. *v.* Mack, 2014 SCC 58, [2014] 3 S.C.R. 3 | **Date:** 20140926  **Docket:** 35093 |

Between:

Dax Richard Mack

Appellant

and

Her Majesty The Queen

Respondent

- and -

Attorney General of Ontario and Attorney General of British Columbia

Interveners

**Coram:** McLachlin C.J. and LeBel, Abella, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

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| **Reasons for Judgment:**  (paras. 1 to 69) | Moldaver J. (McLachlin C.J. and LeBel, Abella, Cromwell, Karakatsanis and Wagner JJ. concurring) |

r. *v.* mack, 2014 SCC 58, [2014] 3 S.C.R. 3

Dax Richard Mack Appellant

v.

Her Majesty The Queen Respondent

and

Attorney General of Ontario and

Attorney General of British Columbia Interveners

**Indexed as: R. *v.* Mack**

2014 SCC 58

File No.: 35093.

2013: December 3; 2014: September 26.

Present: McLachlin C.J. and LeBel, Abella, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

on appeal from the court of appeal for alberta

*Criminal Law — Evidence — Admissibility — Confessions — “Mr. Big” confessions — Charge to jury — Accused confessing to murdering his roommate during Mr. Big operation — Whether accused’s confessions should be excluded under s. 24(2) of Charter — If not, whether trial judge’s jury charge adequate on evidentiary concerns of Mr. Big confessions — Whether trial judge’s jury charge also adequate on reliability of Crown witness’ testimony — Canadian Charter of Rights and Freedoms, s. 24(2).*

After a murder victim was reported missing, the police received information that his roommate M had confessed to killing him and initiated an investigation. The investigation had two components: a Mr. Big operation and a wiretap authorization to intercept M’s phone calls. During the Mr. Big operation, M twice admitted to undercover police officers that he shot the victim and burned his body. That information led police to conduct a search of a firepit where they located fragments of bones and teeth later identified as belonging to the victim, and shell casings later determined to have been fired from a gun seized from M’s apartment. M was arrested and charged with first degree murder. At the time of M’s arrest, the Mr. Big operation had been in progress for four months and M had participated in 30 “scenarios” with undercover officers. He had been paid approximately $5,000 for his work, plus expenses. At trial, the Crown conceded that its wiretap authorization did not comply with the *Criminal Code* and therefore, violated s. 8 of the *Charter*. As a result of this violation, the Crown did not adduce any of M’s calls, but did adduce his two confessions to the undercover police officers during the Mr. Big operation. However, M argued that the wiretap authorization was so intertwined with the Mr. Big operation that the illegality of the authorization necessitated excluding his confessions under s. 24(2) of the *Charter*. The trial judge rejected this argument and determined that s. 24(2) was not engaged. The trial judge provided instructions to the jury in relation to the evidence arising from the Mr. Big operation. He also cautioned the jury about the testimony of the Crown’s principal witness and provided a *Vetrovec* warning in relation to his evidence. The jury found M guilty of first degree murder and his appeal from conviction was dismissed by the Court of Appeal.

*Held*: The appeal should be dismissed.

Section 24(2) of the *Charter* was not engaged because M’s confessions to the undercover officers were not obtained in a manner that infringed M’s rights. Whether evidence was obtained in a manner that infringed an accused’s rights depends on the nature of the connection between the infringement and the evidence obtained. While a causal connection is not required, the nature and extent of the connection remains an important factor for the trial judge’s consideration. In this case, M confessed to the undercover officers while the illegal wiretap was in place. Although the trial judge found a temporal connection between M’s confessions and the wiretap, its significance was undermined by a tenuous causal connection. That finding was open to the trial judge and there is no basis for interfering with it.

Neither the courts below nor the parties had the benefit of this Court’s decision in *R. v. Hart*, 2014 SCC 52, [2014] 2 S.C.R. 544, under which framework a Mr. Big confession will be excluded where its prejudicial effect outweighs its probative value, or where it is the product of an abuse of process. This poses no difficulty, however, as M’s confessions would clearly be admissible under that framework.

The probative value of M’s confessions was high because there was an abundance of evidence that was potentially confirmatory. First, M’s purported confessions to his acquaintances A and L describe the same motive for killing the victim as M’s confessions to the undercover officers. They also made reference to burning the victim’s body. Second, immediately after confessing to one of the undercover officers, M led him to the firepit in which the victim’s remains lay undiscovered. And third, shell casings fired from a gun found in M’s apartment were found in the same firepit. On the other hand, the confessions’ prejudicial effect was limited. The operation did not reveal unsavoury facts about M’s history, nor did M participate in any scenarios that involved violence.

Nor did the undercover officers engage in any improper conduct that could ground an application for abuse of process. M was not presented with overwhelming inducements. He had prospects for legitimate work that would have paid even more than the undercover officers were offering. Nor did the officers threaten M with violence if he would not confess. The most that can be said is that the officers created an air of intimidation by referring to violent acts committed by members of the organization. M, however, was not coerced into confessing.

While the *Hart* framework was intended to respond to the evidentiary concerns raised by Mr. Big confessions, it does not erase them. Rather, it falls to the trial judge to adequately instruct the jury on how to approach these confessions. The nature and extent of the instructions required will vary from case to case. However, there is some guidance — short of a prescriptive formula — that can be provided. The trial judge should tell the jury that the reliability of the accused’s confession is a question for them. The trial judge should then review with the jury the factors relevant to the confession and the evidence surrounding it. For example, the trial judge should alert the jury to the length of the operation, the number of interactions between the police and the accused, the nature of the relationship between the undercover officers and the accused, the nature and extent of the inducements offered, the presence of any threats, the conduct of the interrogation itself, and the personality of the accused. Moreover, the trial judge should discuss the fact that the confession itself may contain markers of reliability (or unreliability). Jurors should be told to consider the level of detail in the confession, whether it led to the discovery of additional evidence, whether it identified any elements of the crime that had not been made public, or whether it accurately described mundane details of the crime the accused would not likely have known had he not committed it.

With respect to the bad character evidence, the challenge is a more familiar one. The trial judge must instruct the jury that this sort of evidence has been admitted for the limited purpose of providing context for the confession. The jury should be instructed that it cannot rely on that evidence in determining whether the accused is guilty. Moreover, the trial judge should remind the jury that the simulated criminal activity was fabricated and encouraged by agents of the state.

In this case, the trial judge instructed the jury adequately and no error has been shown. The trial judge told the jury that it had to “carefully consider whether the themes of violence and the level of inducements may reasonably have compromised the reliability” of M’s confessions. He specifically instructed the jury that it had to “assess the environment, the themes of easy money, violence, the importance of honesty and integrity, any offers of exit points, and any threats or intimidation”. Ultimately, the trial judge left the final assessment of the reliability of M’s confessions to the jury. With respect to the bad character evidence, although the trial judge did not address it specifically, he provided the jury with a standard limiting instruction on the use that could be made of any evidence that bore on M’s character. Undoubtedly, the trial judge could have said more, but this does not mean his instructions were deficient.

Finally, the trial judge conveyed to the jury the reliability concerns with the evidence of A, the Crown’s principal witness. He reminded the jury that the defence position was that A was the killer. He told them that M’s knowledge of the murder could have come from A. He brought up A’s apparent lie to the police and cautioned the jury that it left open the question of whether they could rely on anything he said. And he told the jury that it would be dangerous to accept A’s evidence in the absence of confirmatory evidence. Nothing more was required.

**Cases Cited**

**Applied:** *R. v. Hart*, 2014 SCC 52, [2014] 2 S.C.R. 544;**referred to:** *R. v. Wittwer*, 2008 SCC 33, [2008] 2 S.C.R. 235; *R. v. Goldhart*, [1996] 2 S.C.R 463; *R. v. Côté*, 2011 SCC 46, [2011] 3 S.C.R. 215; *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353; *R. v. Bonisteel*, 2008 BCCA 344, 259 B.C.A.C. 114; *R. v. Jacquard*, [1997] 1 S.C.R. 314; *R. v. Luciano*, 2011 ONCA 89, 273 O.A.C. 273; *R. v. Daley*, 2007 SCC 53, [2007] 3 S.C.R. 523; *R. v. Terrico*, 2005 BCCA 361, 214 B.C.A.C. 135; *R. v. Fry*, 2011 BCCA 381, 311 B.C.A.C. 90; *Vetrovec v. The Queen*, [1982] 1 S.C.R. 811.

**Statutes and Regulations Cited**

*Canadian Charter of Rights and Freedoms*, ss. 8, 24(2).

*Criminal Code*, R.S.C. 1985, c. C-46, Part VI, s. 186(1)(*b*).

APPEAL from a judgment of the Alberta Court of Appeal (Côté, McFadyen and O’Brien JJ.A.), 2012 ABCA 42, 66 Alta. L.R. (5th) 377, 522 A.R. 262, 544 W.A.C. 262, 253 C.R.R. (2d) 157, [2012] A.J. No. 174 (QL), 2012 CarswellAlta 255, affirming the accused’s conviction for first degree murder. Appeal dismissed.

*Laura K. Stevens*, *Q.C.*, and *Sarah N. DeSouza*, for the appellant.

*James C. Robb*, *Q.C.*, and *David A. Labrenz*, *Q.C.*, for the respondent.

*Michael Bernstein*, for the intervener Attorney General of Ontario.

*Lesley A. Ruzicka*, for the intervener Attorney General of British Columbia.

The judgment of the Court was delivered by

Moldaver J. —

1. Introduction
2. A jury convicted the appellant of the first degree murder of his roommate, Robert Levoir. His appeal from conviction was dismissed by the Alberta Court of Appeal. He now appeals to this Court, with leave, seeking to have his conviction overturned and a new trial ordered. This appeal was heard in conjunction with *R. v. Hart*, 2014 SCC 52, [2014] 2 S.C.R. 544.
3. The appellant advances three grounds of appeal. First, he contends that the trial judge should have excluded the confessions he made to undercover officers during a Mr. Big operation. Second, if the confessions were admissible, he argues that the trial judge did not adequately instruct the jury on the dangers associated with them. Third, he submits that the trial judge failed to properly instruct the jury on the dangers associated with the evidence of a central Crown witness, Michael Argueta.
4. For reasons that follow, I would not give effect to any of these grounds and would dismiss the appeal.
5. Background Facts
   1. The Police Investigation into the Death of Robert Levoir
6. Mr. Levoir went missing in November 2002. At the time of his disappearance, he was living with the appellant in Fort McMurray, Alberta.
7. About a month after Mr. Levoir’s disappearance, the police received a call from Jay Love, a friend of the appellant. Mr. Love told the police that the appellant had confessed to killing Mr. Levoir and burning his body. Acting on Mr. Love’s tip, the police began investigating the appellant to determine if he was responsible for Mr. Levoir’s disappearance. The investigation had two components: a Mr. Big operation, and a wiretap authorization to intercept the appellant’s phone calls.
8. The Mr. Big operation commenced in January 2004, approximately one year after the police received the call from Mr. Love. An undercover officer, whom I will refer to as Ben,[[1]](#footnote-1) was introduced to the appellant at a nightclub in Fort McMurray. The appellant was working at the club as a D.J.
9. A week after their introduction, Ben asked the appellant to help him repossess a vehicle. The appellant did so and was paid $200. During a conversation with Ben a few days later, the appellant mentioned his missing roommate. He told Ben that Mr. Levoir was a “crack head” and a “drug addict”, and accused him of stealing from his son’s piggy bank. He added that “[a]s far as he was concerned”, Mr. Levoir was “pushing up daisies”.
10. Early on in the Mr. Big operation, the appellant began to suspect that Ben was involved in criminal activity. Ben told the appellant that he worked for an organization headed up by a man named Liam who “had his fingers into a lot of things”. Throughout January and February 2004, the appellant did several more “jobs” for the organization. In early February, for example, the appellant was asked to pick up a package from a bus depot in Edmonton. When he returned to his hotel room where Ben was waiting, Ben opened the package and it contained $30,000 in cash.
11. Later in February 2004, during a conversation between the appellant and Ben, Ben mentioned that he had once been attacked by two men while working for the organization. Ben told the appellant that Liam had “looked after [the] two guys” in what Ben called the “weekend of reckoning”. Ben then asked the appellant if he had ever “beat[en]” anyone. The appellant replied that there were two occasions, once when he was in a fist fight, and another time that he could not talk about. Ben expressed his hope that the appellant would one day tell him about his “secre[t]”.
12. Ben brought up the appellant’s secret again in early March. He suggested that the person the appellant was talking about “[wasn’t] walking anymore”. The appellant nodded his head in agreement and added that “every man has a breaking point”.
13. In mid-March, the appellant drove to Vancouver at Ben’s behest to have a meeting with Liam. The appellant and Liam met at an apartment in the city. Liam brought up the appellant’s missing roommate and attempted to question him about the disappearance. The appellant asked Liam if he could “decline” to speak about the matter. Liam told the appellant that it was his choice, but that refusing to speak meant he would remain on the organization’s “third line”. The only way to advance to the “first line” was by talking about his roommate and revealing his secret. The appellant again refused, explaining that “loose lips sink ships”.
14. After the appellant’s meeting with Liam, three weeks went by before Ben and the appellant met again in person. On April 9, 2004, Ben asked the appellant if he wanted to work. The appellant said that he did, and that he would “do what it took”. Ben asked the appellant if he would be willing to sit down with Liam to talk about how his roommate had been killed. The appellant agreed to do so. Ben then asked the appellant why he killed Mr. Levoir, and the appellant responded that his former roommate had been “a liar, a thief, and a piece of shit drug dealer”. The appellant told Ben that he shot Mr. Levoir five times — four times in the chest and once in the back — with a .223 rifle. The appellant also said that there was “nothing left” of Mr. Levoir because he had burned his body.
15. The appellant initially offered to show Ben where Mr. Levoir’s body had been burned. However, he quickly backtracked, telling Ben that “everything” he had just said was “bullshit” and that he had been “lying”. Ben replied that he “really hope[d]” the appellant had been telling the truth. In response, the appellant changed his mind and took Ben out to a firepit on his father’s property. The appellant told Ben that he had taken the ashes out of the firepit and that there was “nothing left” of Mr. Levoir.
16. A few days later, the appellant was flown to Edmonton for a second meeting with Liam. That meeting took place on April 15, 2004. At the outset, the appellant described Mr. Levoir as a “crack head” and accused him of stealing from his son’s piggy bank. When Liam asked the appellant how he had killed Mr. Levoir, the appellant replied that he shot him five times with a .223 rifle — four times in the chest and once in the back. He added that there had been a “big fire” at his dad’s place, and that there was “nothing left” of Mr. Levoir.
17. The next week, on April 21, 2004, the appellant was arrested and charged with first degree murder. The police searched his father’s property, and Mr. Levoir’s remains were found in the firepit that the appellant had pointed out to Ben. Shell casings fired by a rifle found in the appellant’s apartment were also discovered in the firepit.
18. At the time of his arrest, the Mr. Big operation had been in progress for four months and the appellant had participated in 30 “scenarios” with undercover officers. He had been paid approximately $5,000 for his work with the organization, plus expenses.
    1. The Evidence of Jay Love
19. Jay Love, the man who initially brought the appellant to the attention of the police, testified as a witness for the Crown and recounted the appellant’s December 2002 confession. Mr. Love testified that he and the appellant went to a bar with another man named Michael Argueta on December 21, 2002. The appellant told Mr. Love that he was his best friend, and he asked Mr. Love if he could trust him. The appellant was intoxicated at the time. Mr. Love testified that the appellant was unhappy with Mr. Levoir because the appellant thought Mr. Levoir had stolen from his son’s piggy bank, that he was taking drugs in the house, and that he was using the appellant’s phone without permission.
20. The appellant then told Mr. Love that “Robbie” was dead. Mr. Love asked if the appellant had “outsource[d]” the killing, and the appellant replied “no, I did it myself”. The appellant also added that he burned Mr. Levoir’s body.
    1. The Evidence of Michael Argueta
21. Michael Argueta was also called as a Crown witness. Mr. Argueta was a friend of the appellant and he too testified that the appellant had confessed to him about killing Mr. Levoir. This confession was said to have occurred at a bar in Edmonton, where the appellant told Mr. Argueta that he had “gotten rid” of Mr. Levoir.
22. Mr. Argueta and the appellant did not talk again until they were driving home to Fort McMurray the next day. Mr. Argueta testified that, during the drive, the appellant told him he shot Mr. Levoir. Mr. Argueta did not believe the appellant, and the appellant added that he burned Mr. Levoir’s body on his father’s property. Mr. Argueta also testified that the appellant had been “[v]ery agitated” by Mr. Levoir because Mr. Levoir owed the appellant money, had stolen from his son’s piggy bank, and had used his phone without permission.
23. Mr. Argueta’s credibility was a central issue at trial. Prior to testifying, he had been interviewed by the police a number of times and he had never mentioned the appellant’s second confession during the car ride home. Indeed, in a statement given to police under oath, Mr. Argueta expressly denied talking to the appellant about Mr. Levoir’s disappearance during the drive home to Fort McMurray. In his testimony, Mr. Argueta admitted knowing that drug dealers from Vancouver had put a “price on Robbie Levoir’s head” back in 2002, before he disappeared. Ultimately, the defence took the position that Mr. Argueta had killed Mr. Levoir in order to collect on this bounty.
    1. The Appellant’s Evidence
24. The appellant testified and denied killing Mr. Levoir. According to the appellant, he and Mr. Argueta had plans to go hunting on November 6, 2002. They invited Mr. Levoir to come along, and he did. The three men drove to the property owned by the appellant’s father, intending to hunt on his land.
25. The appellant testified that after the group arrived at his father’s property, Mr. Levoir and Mr. Argueta separated from him. Several minutes later, the appellant heard a series of gun shots. He returned to the road and encountered Mr. Argueta. According to the appellant, he asked “[w]here’s Robbie?”, and Mr. Argueta responded “[t]hat’s what you get for the price on his head for pissing off the big boys”. The appellant then looked over and saw Mr. Levoir’s body lying in the grass. Mr. Argueta then told the appellant to “[j]ust shut up, and don’t worry about it”, stating that he would “come back and look after it”. The appellant also claimed that Mr. Argueta told him, in a conversation at a bar approximately one month later, that he had burned the body for two days in a firepit at the same property.
26. As for his purported confession to Jay Love, the appellant claimed that Mr. Love had misheard him at the bar on December 21, 2002. He said that what Mr. Love had heard as a confession was actually an attempt on his part to tell Mr. Love that Mr. Argueta had killed the deceased. With respect to Mr. Argueta’s evidence, the appellant said it was untrue. And while he admitted to making admissions to the undercover officers, he explained that he made those statements out of a desire for money, protection, a belief that the confessions were necessary for self-preservation, and to “sound big and tough and bad like them”.
27. The appellant also called two other witnesses who testified that, on separate occasions, Mr. Argueta made statements in which he suggested he was involved in Mr. Levoir’s death.
28. The Courts Below
    1. Court of Queen’s Bench of Alberta, 2007 ABQB 182, 458 A.R. 52
29. At the appellant’s trial, the Crown conceded that the wiretap authorization it had obtained to intercept the appellant’s phone calls did not comply with the requirements of the *Criminal Code*, R.S.C. 1985, c. C-46, and had therefore been obtained in violation of s. 8 of the *Canadian Charter of Rights and Freedoms*.[[2]](#footnote-2) As a result of this violation, the Crown did not adduce any of the conversations that had been intercepted pursuant to the wiretap authorization. Nonetheless, the appellant moved to have all of the statements he made during the Mr. Big operation — none of which were recorded on the wiretaps — excluded as well. The appellant argued that the illegal wiretap was being used to design the undercover operation and that the operation would not have been conducted without it. As a result, the wiretap authorization was so intertwined with the Mr. Big operation that the illegality of the authorization necessitated excluding his statements to the undercover officers under s. 24(2) of the *Charter*.
30. The trial judge, Mr. Justice Hillier, rejected this argument. He concluded that s. 24(2) of the *Charter* was not engaged because the appellant’s incriminating statements to undercover officers had not been “obtained in a manner” that violated any of his rights under the *Charter* (para. 187). Although the appellant made his incriminating statements to the undercover officers while the illegal wiretap was in place, there was no causal connection between the existence of the illegal wiretap and the appellant’s confessions to the undercover officers (para. 184). The most that could be said was that the wiretaps were “helpful” to the undercover officers during the Mr. Big operation, because they provided the officers with assurances that their “cover” had not been “blown” (para. 175). The trial judge did not accept that the wiretaps were used to design and carry out the Mr. Big operation.
    1. Alberta Court of Appeal (Côté, McFadyen and O’Brien JJ.A.), 2012 ABCA 42, 66 Alta. L.R. (5th) 377
31. On appeal, the appellant submitted that the trial judge erred in concluding that s. 24(2) of the *Charter* was not engaged, and that his instructions to the jury in relation to the evidence arising from the Mr. Big operation and Mr. Argueta’s credibility were deficient.
32. The Court of Appeal rejected these arguments. It noted that a trial judge’s decision under s. 24(2) of the *Charter* is entitled to deference, and it could see no basis for interfering with the trial judge’s determination that the s. 8 violation and the accused’s statements to the undercover officers were not sufficiently related to trigger s. 24(2). In relation to the Mr. Big operation, the trial judge instructed the jury against engaging in propensity reasoning and pointed out the reliability concerns raised by the operation. In the Court of Appeal’s view, nothing further was required. Similarly, regarding Mr. Argueta’s testimony, the Court of Appeal observed that the trial judge had reminded the jury of the defence position that Mr. Argueta was the killer, and he had warned them of the reliability dangers associated with Mr. Argueta’s evidence. Here, too, the Court of Appeal could find no error.
33. Issues
34. The appellant raises three issues on appeal:

(a) Did the trial judge err in concluding that s. 24(2) of the *Charter* was not engaged?

(b) Did the trial judge err in his instructions to the jury on the Mr. Big confessions?

(c) Did the trial judge err in his instructions to the jury relating to Mr. Argueta’s testimony?

1. Analysis
   1. Did the Trial Judge Err in Concluding That Section 24(2) of the Charter Was Not Engaged?
2. At the outset, it bears mentioning that the appellant’s only challenge to the admissibility of the confessions he made to undercover officers during the Mr. Big operation came under s. 24(2) of the *Charter*. The appellant did not have the benefit of this Court’s decision in *Hart*, in which a two-pronged framework for assessing the admissibility of Mr. Big confessions was set out. Under the *Hart* framework, a Mr. Big confession will be excluded where its prejudicial effect outweighs its probative value, or where it is the product of an abuse of process. In this context, the confession’s probative value is a function of its reliability. Its prejudicial effect stems from the harmful character evidence that necessarily accompanies its admission (see *Hart*, at paras. 84-86).
3. Neither the courts below nor the parties before this Court have considered whether the appellant’s confessions would be admissible under the two-pronged framework set out in *Hart*. In my view, however, this poses no difficulty as these confessions would clearly be admissible under that framework.[[3]](#footnote-3)
4. To begin with, the probative value of the appellant’s confessions is high. The inducements provided by the undercover officers were modest — the appellant was paid approximately $5,000 over a four-month period, at a time when well-paying, legitimate work was readily available to him. He was not threatened by the officers. And he was told, in his first meeting with Liam, that he could decline to say anything and remain on the organization’s “third line” — an option he initially accepted.
5. Moreover, there was an abundance of evidence that was potentially confirmatory. First, the appellant’s purported confessions to Mr. Argueta and Mr. Love described the same motive for killing Mr. Levoir as his confessions to the undercover officers. They also made reference to burning Mr. Levoir’s body. Second, immediately after confessing to Ben, the appellant led him to the firepit in which Mr. Levoir’s remains lay undiscovered. And third, shell casings fired from a gun found in the appellant’s apartment were found in the same firepit. All of this made for a confession that was highly probative.
6. On the other hand, while the confessions were accompanied by bad character evidence, the prejudice was limited. The appellant was not involved in any scenarios that involved violence, nor did the operation reveal prejudicial facts about the appellant’s past history. The appellant’s involvement with the organization was primarily limited to assisting with repossessing vehicles and delivering packages. In my view, any prejudicial effect arising from the Mr. Big confessions is easily outweighed by their probative value.
7. Nor did the undercover officers engage in any improper conduct which could ground an application for abuse of process. The appellant was not presented with overwhelming inducements. He had prospects for legitimate work that would have paid even more than the undercover officers were offering. Nor did the officers threaten the appellant with violence if he would not confess. The most that can be said is that the officers created an air of intimidation by referring to violent acts committed by members of the organization. But the appellant was not coerced into confessing. This much is evidenced by the appellant’s initial refusal to speak with Ben and Liam about Mr. Levoir’s disappearance. Indeed, the undercover officers explicitly made clear to the appellant that he did not have to speak with them about Mr. Levoir, and that he could remain in his current role within the organization. None of the undercover officers’ conduct approaches abuse.
8. These comments aside, I return to the appellant’s attack on the admissibility of his confessions under s. 24(2) of the *Charter*. Under s. 24(2), evidence will be excluded where: (1) the evidence was obtained in a manner that infringed or denied any of the rights or freedoms guaranteed by the *Charter*; and (2) admitting the evidence would bring the administration of justice into disrepute (*R. v. Wittwer*, 2008 SCC 33, [2008] 2 S.C.R. 235, at para. 19).
9. Whether evidence was “obtained in a manner” that infringed an accused’s rights under the *Charter* depends on the nature of the connection between the *Charter* violation and the evidence that was ultimately obtained. The courts have adopted a purposive approach to this inquiry. Establishing a strict causal relationship between the breach and the subsequent discovery of evidence is unnecessary. Evidence will be tainted if the breach and the discovery of the impugned evidence are part of the same transaction or course of conduct. The required connection between the breach and the subsequent statement may be temporal, contextual, causal, or a combination of the three. A “remote” or “tenuous” connection between the breach and the impugned evidence will not suffice (*Wittwer*, at para. 21).
10. The strength of the connection between a piece of evidence and a *Charter* breach is a question of fact (see *R. v. Goldhart*, [1996] 2 S.C.R 463, at para. 40). A trial judge’s decision under s. 24(2) of the *Charter* is entitled to considerable deference on appeal. Such a decision will only be interfered with where the trial judge has failed to consider the proper factors or has made an unreasonable finding (*R. v. Côté*, 2011 SCC 46, [2011] 3 S.C.R. 215, at para. 44, and *R. v. Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, at para. 86).
11. The appellant submits that the trial judge erred in concluding that the statements he made to undercover officers were not “obtained in a manner” that violated his *Charter* rights. According to the appellant, the trial judge applied too stringent a test in reaching this conclusion. In particular, the trial judge mistakenly believed that a causal relationship between the breach and the acquisition of the evidence was required in order to engage s. 24(2) of the *Charter*.
12. This ground of appeal is fact-driven and I would not give effect to it. Distilled to its essence, the appellant is effectively inviting the Court to reweigh the factors the trial judge considered in deciding that s. 24(2) was not engaged. The trial judge was aware that a causal relationship between the *Charter* breach and the acquisition of the evidence was not required. He noted that “the entire relationship” between the breach and the impugned evidence had to be considered, and that causation was not the “sole touchstone” of the analysis (para. 182). The trial judge acknowledged that there was a temporal relationship between the s. 8 breach and the appellant’s statements to the undercover officers. He went on to consider the causal relationship between the wiretap authorization and the appellant’s statements to undercover officers, and found that it was “so remote as to be insignificant” (para. 185). When he considered the temporal and causal relationships together, he was of the view that the statements had not been obtained in a manner that infringed the *Charter*.
13. While it is true that the lack of a causal relationship played an important role in the trial judge’s analysis, this can only carry the appellant’s argument so far. A causal relationship is not required to support a finding that evidence was obtained in a manner that violated the *Charter*, but the nature and extent of the causal relationship remains an important factor for the trial judge’s consideration. In the trial judge’s view, the tenuous causal connection between the breach and the statements undermined the significance of the temporal relationship. That finding was open to him, and I see no basis for interfering with it.
    1. Did the Trial Judge Err in his Instructions to the Jury on the Mr. Big Confessions?
14. In *Hart*, this Court identified two evidentiary concerns with confessions that are the product of a Mr. Big operation. The first is that the confessions may be unreliable. Mr. Big operations are intended to induce confessions, and the inducements offered to a suspect may incentivize the suspect to falsely confess. Second, Mr. Big confessions are invariably accompanied by bad character evidence in which the accused has shown a willingness to commit crimes to gain entry into a criminal organization (see *Hart*, at paras. 68-77).
15. The common law rule of evidence that was set out in *Hart* was intended to respond to the evidentiary concerns raised by Mr. Big operations. However, while this rule responds to these two evidentiary concerns, it does not erase them. The focus of the rule is to determine whether a Mr. Big confession should be admitted into evidence. It does not decide the ultimate question of whether the confession is reliable, nor does it eliminate the prejudicial character evidence that accompanies its admission. Thus, even in cases where Mr. Big confessions are admitted into evidence, concerns with their reliability and prejudice will persist. It then falls to the trial judge to adequately instruct the jury on how to approach these confessions in light of these concerns.
16. The appellant agrees that reliability and prejudice are the two evidentiary concerns that must be addressed in a trial judge’s charge to the jury. With respect to reliability, the appellant submits that a “very strict” caution must be given about “danger” presented by Mr. Big confessions (A.F., at para. 95). The appellant points to the jury charge delivered in *R. v. Bonisteel*, 2008 BCCA 344, 259 B.C.A.C. 114, and argues that a similar instruction should be given in “most, if not all” cases involving Mr. Big confessions (A.F., at para. 96). In *Bonisteel*, the trial judge provided a strong caution regarding the reliability concerns raised by Mr. Big confessions. The jury was told that people sometimes “confess to [crimes] they have not committed” (para. 66 (emphasis deleted)). Moreover, the jury was told that “confessions produced by an undercover operation such as this are viewed as inherently unreliable” (*ibid.*). Without independent confirmation, the trial judge described the Mr. Big confessions as “highly suspect” (*ibid.*).
17. As for the bad character evidence that is admitted, the appellant submits that trial judges must provide a “*strong and specific*” limiting instruction that includes “specific directions” focused on the “significant efforts [the] police employed to cause and encourage” the accused’s participation in misconduct (A.F., at paras. 102-103 (emphasis in original)).
18. With those considerations in mind, the appellant submits that the trial judge’s charge in this case — which addressed the concerns with reliability and prejudice — was deficient because it did not go far enough in warning the jury about the dangers inherent in this evidence and the need to proceed with extreme caution in relying upon it to convict.
19. With respect, I disagree. The instructions given to the jury were, in my view, adequate in the circumstances. In so concluding, it bears repeating what this Court has said on numerous occasions: an accused is entitled to a jury that is properly — not perfectly — instructed (*R. v. Jacquard*, [1997] 1 S.C.R. 314, at para. 2). In reviewing the trial judge’s charge, what counts is its substance, not its adherence to or departure from prescriptive formulas (*R. v. Luciano*,2011 ONCA 89, 273 O.A.C. 273,at para. 69). The order of the charge and the words chosen by the trial judge are within his or her discretion (*R. v. Daley*,2007 SCC 53, [2007] 3 S.C.R. 523, at para. 30).
20. The functional approach to reviewing jury charges that this Court has repeatedly endorsed cuts against the appellant’s contention that trial judges must, in all Mr. Big cases, give the jury a *Bonisteel* instruction. Indeed, the British Columbia Court of Appeal has rejected such an approach, preferring instead to subject these instructions to a contextual, case-by-case review (see, e.g., *R. v. Terrico*,2005 BCCA 361, 214 B.C.A.C. 135, at paras. 42-43, and *R. v. Fry*, 2011 BCCA 381, 311 B.C.A.C. 90, at paras. 82-83 and 87).
21. I agree with the approach of the British Columbia Court of Appeal. In my view, there is no magical incantation that must be read to juries by trial judges in all Mr. Big cases. Instead, trial judges are required to provide juries with the tools they need to address the concerns about reliability and prejudice that arise from these confessions. The nature and extent of the instructions required will vary from case to case.
22. However, there is some guidance — short of a prescriptive formula — that can be provided to trial judges who must instruct juries in cases where a Mr. Big confession has been admitted into evidence.
23. With respect to the reliability concerns raised by a Mr. Big confession, the trial judge should tell the jury that the reliability of the accused’s confession is a question for them. The trial judge should then review with the jury the factors relevant to the confessions and the evidence surrounding it. As explained in *Hart*, the reliability of a Mr. Big confession is affected by the circumstances in which the confession was made and by the details contained in the confession itself. Thus, the trial judge should alert the jury to “the length of the operation, the number of interactions between the police and the accused, the nature of the relationship between the undercover officers and the accused, the nature and extent of the inducements offered, the presence of any threats, the conduct of the interrogation itself, and the personality of the accused” — all of which play a role in assessing the confession’s reliability (see *Hart*, at para. 102).
24. Moreover, the trial judge should discuss the fact that the confession itself may contain markers of reliability (or unreliability). Jurors should be told to consider the level of detail in the confession, whether it led to the discovery of additional evidence, whether it identified any elements of the crime that had not been made public, or whether it accurately described mundane details of the crime the accused would not likely have known had he not committed it (see *Hart*,at para. 105).
25. This is not to suggest that trial judges are required to provide a detailed catalogue of every piece of evidence that might bear on the reliability of the confession. The task is simply to alert the jury to the concern about the reliability of the confession, and to highlight the factors relevant to assessing it.
26. With respect to the bad character evidence that accompanies a Mr. Big confession, the challenge is a more familiar one. The trial judge must instruct the jury that this sort of evidence has been admitted for the limited purpose of providing context for the confession. The jury should be instructed that it cannot rely on that evidence in determining whether the accused is guilty. Moreover, the trial judge should remind the jury that the simulated criminal activity — even that which the accused may have eagerly participated in — was fabricated and encouraged by agents of the state.
27. In this case, the trial judge addressed the concerns about reliability and prejudice in his charge to the jury. The trial judge told the jury that it had to “carefully consider whether the themes of violence and the level of inducement may reasonably have compromised the reliability” of the appellant’s confessions. He specifically instructed the jury that it had to “assess the environment, the themes of easy money, violence, the importance of honesty and integrity, any offers of exit points, and any threats or intimidation”. Ultimately, the trial judge left the final assessment of the reliability of the appellant’s confessions to the jury:

Overall, it’s your responsibility to decide whether the statements attributed to Mr. Mack are reliable in whole or in part, bearing in mind Mr. Mack’s testimony that he was given pep talks every day . . . that he felt indebted . . . and very insecure, especially after he heard about the day of reckoning for the ice pick attack. Also that Mr. Mack felt out of his league, and whenever he started a story he felt pushed in a direction that he had done it.

When a statement may have arisen partly out of fear and partly from an inducement to easy money, it’s important to assess carefully how reliable it is, if at all. You need to assess that against all of the evidence in order to decide not only what was said, but whether what was said was truthful. [Emphasis added.]

1. With respect to the bad character evidence that was admitted along with the Mr. Big confessions, although the trial judge did not address it specifically, he provided the jury with a standard limiting instruction on the use that could be made of any evidence that bore on the accused’s character:

You’ll recall in my opening remarks I alerted you that we would likely hear evidence that does not reflect Mr. Mack in a positive light, including views and conducts which are unfavourable to him. You have now heard some evidence of that type, and I remind you not to rely upon or use that evidence to conclude that Mr. Mack is guilty or even that he is more likely to be guilty of the crime with which he is charged based on that evidence.

In Canada people are not prosecuted or judged as guilty because they have certain beliefs or values. Evidence about things Mr. Mack may have said or acts he may have committed which you find objectionable, it has been provided to you for the very limited purpose of ensuring that you know the context for the other things that are said or done that relate directly to the offence with which he is charged. Background evidence, which we sometimes refer to as the narrative, is provided to you so you understand more accurately the overall circumstances and can then better assess what and whom to believe.

So I also repeat that you’re not to decide this case based on your personal views of what you might consider to be Mr. Mack’s value system or his opinions or even whether he might have committed some other wrongful acts or offences. We are concerned with only one charge: the murder of Robert Levoir. [Emphasis added.]

1. When these instructions regarding reliability and bad character evidence are viewed through a functional lens, I am satisfied that they reveal no error. The trial judge plainly addressed the two concerns raised by the appellant’s confessions to undercover officers. He directed the jury to “assess carefully” how reliable the appellant’s confessions were, and pointed specifically to the police deception, the level of inducements, the “themes of easy money”, and the presence of any threats or intimidation. During the trial and in his final instructions, the trial judge directed the jury to disregard the prejudicial character evidence that had been admitted in reaching a verdict.
2. Undoubtedly, more could have been said by the trial judge in his discussion of the reliability of the Mr. Big confession. The trial judge, for example, could have specifically reviewed the payments received by the appellant during the operation, or the encouragements to confess that were provided by Ben and Liam. Equally, however, the trial judge could have detailed the evidence that was capable of supporting the reliability of the appellant’s confessions, including the fact that the appellant had gainful employment available to him at the time the cash inducements were offered to him, that he correctly pointed out the location of Mr. Levoir’s remains during his confession to Ben, and that shell casings fired by a rifle found in the appellant’s apartment were discovered in the firepit. The trial judge did not do so, but this does not mean his charge was deficient. A failure to say all that could have been said does not amount to a legal error:

. . . I cannot emphasize enough that the right of an accused to a properly instructed jury does not equate with the right to a perfectly instructed jury. An accused is entitled to a jury that understands how the evidence relates to the legal issues. This demands a functional approach to the instructions that were given, not an idealized approach to those instructions that might have been given.

(*Jacquard*, at para. 32, *per* Lamer C.J.)

1. It must also be mentioned that trial counsel was provided a draft of the trial judge’s charge in advance of it being delivered to the jury, and no objection was taken to the trial judge’s handling of the Mr. Big confessions. While it is the trial judge’s job to ensure that the jury is properly instructed, trial counsel are expected to “assist the trial judge and identify what in [his or her] opinion is problematic with the judge’s instructions to the jury” (*Daley*, at para. 58). A failure to object at trial “may be indicative of the seriousness of the alleged violation” (*ibid.*). Here, although not determinative, trial counsel’s failure to object supports my conclusion that the instructions on reliability and bad character evidence were adequate in the circumstances.
2. In my view, the trial judge’s charge left the jury equipped to deal with the concerns of reliability and prejudice that emerged from the Mr. Big confessions. No error has been shown. Accordingly, I would reject this ground of appeal.
   1. Did the Trial Judge Err in his Instructions to the Jury Relating to Mr. Argueta’s Testimony?
3. In his charge, the trial judge instructed the jury to consider Mr. Argueta’s evidence in light of the defence position that it was Mr. Argueta who killed Mr. Levoir. The trial judge referred to the possibility that the appellant’s knowledge of the murder may have come from Mr. Argueta. In addition, he pointed out to the jury that even on Mr. Argueta’s own account, he had lied to the police under oath when he told them that he and the appellant had not discussed Mr. Levoir’s death on the drive back to Fort McMurray from Edmonton. The trial judge noted that Mr. Argueta had provided “no explanation” for this lie and that he appeared “quite unapologetic” about it. He cautioned the jury that Mr. Argueta’s apparent lack of concern for the seriousness of the oath “leaves open the question of whether you may rely on anything he says”.
4. Because of these concerns, the trial judge provided a *Vetrovec*[[4]](#footnote-4) warning in relation to Mr. Argueta’s evidence,instructing the jury that it would be “dangerous” for them to accept his testimony in the absence of other evidence that confirmed his account. The trial judge provided two examples of evidence that might be capable of supporting Mr. Argueta’s evidence. The first was Mr. Argueta’s testimony that the appellant was angry with Mr. Levoir because he suspected Mr. Levoir had stolen from his son’s piggy bank and had “run up telephone bills at [the appellant’s] place”. The second was that the appellant “separately testified to what he knew about the price on [Mr.] Levoir’s head”, which was “similar to what Mr. Argueta said on that matter, but was not attributed as having come to [the appellant] from Mr. Argueta”.
5. The appellant contends that these instructions were deficient. In particular, he submits that the trial judge’s instructions on the importance of Mr. Argueta’s admitted lie to the police under oath was confusing, because the appellant’s position at trial was that Mr. Argueta’sstatement to police was truthful and his testimony was a lie. Moreover, the appellant contends that the *Vetrovec* caution and the related instruction to seek out confirmatory evidence before relying on Mr. Argueta’s evidence was misplaced, because if Mr. Argueta provided information about the murder that turned out to be true, this did not bolster the Crown’s theory that the appellant was guilty of murder. Rather, it supported the defence position that Mr. Argueta, and not the appellant, had killed Mr. Levoir.
6. I would not give effect to the appellant’s submissions. In my view, the trial judge’s warning about Mr. Argueta’s admitted lie to the police was not confusing. The appellant’s submission to the contrary flows from a technical reading of the instruction. Read fairly and in context, the impugned instruction conveyed to the jury that, even on Mr. Argueta’s own account, he had lied under oath without explanation. Thus, it was questionable whether the jury could rely on anything he said. When this instruction is read in conjunction with the trial judge’s warning that it would be dangerous to rely on Mr. Argueta’s evidence in the absence of confirmatory evidence, it cannot be understood as having endorsed Mr. Argueta’s testimony over the previous version of events he gave to the police. The trial judge was merely conveying to the jury that Mr. Argueta’s evidence was highly suspect and that it would be dangerous to use it to convict in the absence of confirmatory evidence. Had he not given such an instruction, his failure to do so would most assuredly have formed a ground of appeal.
7. Second, I cannot accept the contention that the trial judge erred by instructing the jury to search for confirmatory evidence before relying on Mr. Argueta’s testimony. Admittedly, the trial judge provided an example of evidence that was not capable of confirming Mr. Argueta’s evidence. The appellant did not separately testify that he knew about the price on Mr. Levoir’s head, as stated by the trial judge in his charge. Rather, he testified that he heard about the price on Mr. Levoir’s head from Mr. Argueta. It is possible the trial judge simply misspoke, and meant to refer to the fact that both Mr. Argueta and the appellant testified that they knew the deceased was involved in the drug trade in British Columbia. No matter, the ultimate message left with the jury was clear, namely that it would be dangerous to rely on Mr. Argueta’s evidence without confirmation. Importantly, the jury was told that it was for them to decide whether there was any evidence capable of confirming his testimony. The jury would clearly have understood that in order to acquit the appellant, it did not have to believe that Mr. Argueta was the killer; rather, it had to be satisfied beyond a reasonable doubt that the appellant was the killer and that if they had a reasonable doubt, they must acquit.
8. Putting aside the appellant’s specific qualms, this ground of appeal can also be resolved with the help of common sense. The problems with Mr. Argueta’s evidence were clear and obvious. The defence position was that Mr. Argueta was the killer and that he was lying in order to frame the appellant. There was evidence he had a motive to kill Mr. Levoir. And even taking his testimony at its highest, Mr. Argueta had committed perjury.
9. At the end of the day, these were the problems the trial judge had to convey to the jury in his charge. In my view, that is exactly what he did. He reminded the jury that the defence position was that Mr. Argueta was the killer. He told them that the appellant’s knowledge of the murder could have come from Mr. Argueta. He brought up Mr. Argueta’s apparent lie to the police, and cautioned the jury that his lack of concern for the oath left open the question of whether they could rely on anything he said. And he told the jury that it would be dangerous to accept Mr. Argueta’s evidence in the absence of confirmatory evidence. Nothing more was required. Trial counsel was apparently of the same view. He made no objection to the trial judge’s instructions regarding Mr. Argueta’s testimony. In my view, given that Mr. Argueta was, apart from the appellant, the most critical witness from the perspective of the defence, trial counsel’s failure to object to the charge reinforces my conclusion that the trial judge adequately addressed the concerns raised by Mr. Argueta’s testimony.
10. Disposition
11. For these reasons, I would dismiss the appeal.

*Appeal dismissed.*

Solicitors for the appellant: Dawson Stevens Duckett & Shaigec, Edmonton.

Solicitor for the respondent: Attorney General of Alberta, Edmonton and Lethbridge.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Victoria.

1. The officer’s name is protected by a publication ban, and he is referred to as “Undercover Officer #2” in the record. [↑](#footnote-ref-1)
2. Specifically, the Crown conceded that “investigative necessity” could not be established. A Part VI authorization is only available where “other investigative procedures have been tried and have failed, other investigative procedures are unlikely to succeed or the urgency of the matter is such that it would be impractical to carry out the investigation of the offence using only other investigative procedures” (s. 186(1)(*b*)). In the Crown’s view, this requirement could not be met in the face of an ongoing Mr. Big operation. [↑](#footnote-ref-2)
3. The appellant has had ample time since the release of this Court’s decision in *Hart* to have the appeal reopened, with a view to contesting the admissibility of his confessions under the *Hart* framework. He has made no attempt to do so. [↑](#footnote-ref-3)
4. See *Vetrovec v. The Queen*, [1982] 1 S.C.R. 811. [↑](#footnote-ref-4)