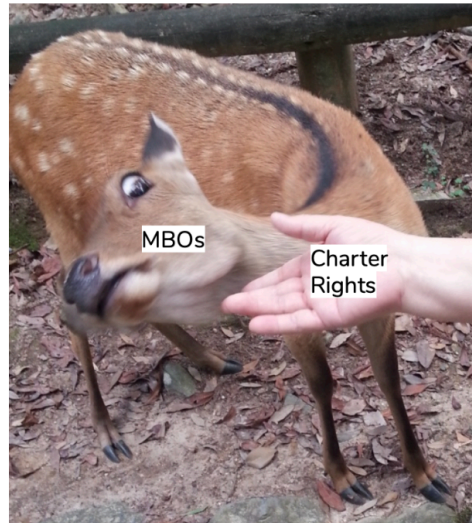


Mr. Big Operations – an Introductory Salvo – by Seminar Group Le-Ma in Introduction to Criminal Law and Procedure at Robson Hall



In lieu of the “Mr. Big” seminar that was to be presented, we have created a trilogy of blogs. The first of which will: outline the typical steps taken by the police during a Mr. Big Operation (MBO), describe the concerns Dr. Khoday had prior to recent Supreme Court of Canada (SCC) decisions regarding MBOs, and identify how MBOs avoid *Charter* concerns and how Canadians’ rights are protected from MBOs by the *Charter*.

An MBO is, by the simplest definition, an attempt by an undercover police officer to elicit a confession from a suspect. This sounds simple enough, right? Unfortunately, a plethora of potential ethical and legal issues have arisen as a result of MBOs. Before we address these issues, it is important to outline the typical steps of an MBO. An MBO begins with the police identifying a suspect of a serious crime. Undercover officers then approach the suspect and attempt to befriend them. After building a rapport, the officers start offering the suspect small jobs for rewards. The officers mention that they belong to a criminal organization, and try to get the suspect to join. In order to join the organization, the suspect must first meet the boss of the organization – “Mr. Big”. During this interaction, “Mr. Big” pressures the suspect to confess to any crimes they have committed that may jeopardize the organization. This interaction is

recorded with the goal of getting the target to confess to the crime they are suspected of committing.

Over the last three decades, MBOs have been run hundreds of times. This prompted Dr. Khoday to write "*Scrutinizing Mr. Big*".¹ In this article, Khoday's main criticism of MBOs is in regards to the community shock test (CST). A CST makes evidence inadmissible if it was obtained in such a way that shocks the community's conscience. Prior to 2014, the only realistic way to make a confession from an MBO inadmissible was to argue that it failed this test. Khoday argued that the CST was inherently flawed. He pointed out that there was no "one" community across Canada. All the test really answered was what the person administering the test considered shocking to the community, making it more of a subjective test. Khoday also pointed out that the entire process of obtaining the confession taints any jury or judge's opinion of the accused. It shows the accused is the type of person who would join a gang, then brag about committing a murder. This negative depiction of the accused is one of the main reasons almost all confessions pass the CST.

Khoday attempted to address the concerns of MBO confessions by strengthening the CST. He suggested creating objective factors that, if failed, would cause the confession to be deemed inadmissible. Khoday suggested that any confessions that stem from threats of physical violence should be excluded. He also suggested taking any inducements by the police into account making the confession potential inadmissible on a case by case basis. Finally, Khoday recommended that any confessions taken from socially vulnerable suspects should be deemed highly suspicious of their reliability. Ultimately Khoday wanted MBOs to follow similar rules of other interactions done by the police.

As expected of such clandestine police operations, MBOs often intersect with, and seemingly avoid, the *Charter* rights of the suspect. One moment the suspect is speaking with someone who they believe is a crime-boss, and the next they are arrested and have a recording of this conversation used against them as evidence at trial. At no point are they given access to legal counsel, informed of their *Charter* rights, or even aware that they are speaking to a police

¹ Amar Khoday, "Scrutinizing Mr Big: Police Trickery, the Confessions Rule and the Need to Regulate Extra-Custodial Undercover Interrogations" (2013) 60 Crim LQ 277.

officer. This is in stark contrast to typical police questioning. So how do MBOs avoid the *Charter* while typical police questioning cannot? The answer is simply that, unlike in typical police questioning, the suspect in an MBO interrogation is technically not in detention, as defined in Section 10 of the *Charter*². This means that the s. 10(b) right to counsel does not apply to the suspect. Without legal counsel informing them of their rights, and how to express them, the suspect is left vulnerable to attempts by police to elicit a confession. The right to silence encompassed in s. 7 is also avoided by the fact that the suspect is not in detention and is unaware that they are speaking to state agents, which begs the question: how can one make a free choice to either speak to the authorities or remain silent if they are not aware that the people they are speaking to are the authorities? In short, they cannot. Thus, in pre-*Hart* MBOs, the police had much greater freedom to actively elicit confessions from suspects, and could more easily avoid *Charter* law.

The decision in *R v Hart* levelled the field, allowing for greater protection under the *Charter* to suspects of MBOs.³ After this decision, confessions made during MBOs were considered presumptively inadmissible as evidence against the accused. Of particular importance in MBOs are the accused's rights to silence and against self-incrimination, encompassed within s. 7, combined with their right for a fair trial under s. 11(d)⁴⁵. For a trial to be fair, the evidence obtained by police must be permissible. If the court finds that the accused's *Charter* rights were violated during an MBO, the accused's statements, elicited as a result of these breaches, could be made inadmissible as evidence as outlined under s. 24(2) of the *Charter*⁶. As a result, police cannot actively elicit confessions from suspects without breaching their s.7 *Charter* rights and thus rendering the confession inadmissible. Conversely, statements made by suspects that are not actively elicited by police do not breach the suspect's *Charter* rights and are permissible as evidence.

² *Ibid* at 279.

³ *R v Hart*, 2014 SCC 5.

⁴ *Canadian Charter of Rights and Freedoms*, s 7, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c11 [*Charter*].

⁵ *Ibid* at s 11(b).

⁶ *Ibid* at s 24(2).

For years MBOs fell between the cracks, not being adequately protected by the common law or the *Charter*. Through the pressure of academics like Khoday, and the SCC eventually addressing at least some of these concerns in the *R v Hart* case, we are now taking a step in the right direction in protecting citizens rights.