

Importing a Canadian Creation: A Comparative Analysis of Evidentiary Rules Governing the Admissibility of Confessions to ‘Mr. Big’

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ABSTRACT

The “Mr. Big Operation” (MBO) is a noncustodial investigative technique wherein covert officers, posing as members of a fictitious criminal organization, seek to lure targeted suspects by offering fulltime membership in the organization in exchange for incriminating information. The deceptive technique is known to enhance the risk of unreliable and prejudicial evidence, two factors which have been stated by the Supreme Court of Canada as being traceable to wrongful convictions. Thus, a comprehensive and robust approach to governing the admissibility of Mr. Big confessions is essential to protect targets against the inherent risks associated with the use of the technique. This article delves into the origins of MBOs in Canada and details its importation to New Zealand and Australia. Further, through a comparative analysis of relevant case law and legislation in Canada, New Zealand and Australia, this article identifies the similarities and distinctions as well as the flaws and strengths of each nation. Proposed solutions are discussed in order to strengthen protection for Mr. Big targets and provide greater consistency in those countries where MBOs are most prevalent.

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I. INTRODUCTION

With the creation of “Mr. Big Operations” (“MBOs”),¹ law enforcement officials have increasingly employed deceptive undercover police work that seek to elicit incriminating confessions from targeted suspects. The ‘Mr. Big’ technique is a noncustodial investigative operation, wherein covert police officers, posing as members of a criminal organization, seek to lure targeted suspects by offering full time membership in the organization in exchange for incriminating information. As of 2011, the Royal Canadian Mounted Police (“RCMP”) have noted that in 75% of such operations, the person of interest is either cleared or charged; and of the cases prosecuted, over 95% result in convictions.² Given the conviction rate and potential to solve what are commonly known as ‘cold cases’ – investigations that have gone ‘cold’ due to insufficient evidence to bring the suspect(s) to trial – it is no surprise that the state-sponsored ‘Mr. Big’ technique quickly spread across Canadian provinces and overseas to countries such as Australia, New Zealand, South Africa, and some European jurisdictions.³

Commonly implemented on homicide suspects, the methodology behind most MBOs is nearly uniform from case to case.⁴ MBOs, also referred to as the ‘Crime Scenario Undercover Technique’ in New Zealand

¹ The first reported Mr. Big-like operation occurred in the 1901 case of *The King v Todd* (1901), 4 CCC 514, 13 Man R 364 [*Todd*]. Despite this initial use, it was not until the late 1980s and early 1990s that an advanced modern version of the technique resurfaced in Canadian law enforcement.

² Royal Canadian Mounted Police, “Undercover Operations – Questions and Answers” (last modified 14 December 2011), online: <bc.rcmp-grc.gc.ca/ViewPage.action?siteNodeId=23&languageId=1&contentId=6943> [perma.cc/48AE-LKU2] [Undercover Operations].

³ *Ibid.*

⁴ *R v Hart*, 2014 SCC 52 at para 108 [*Hart*].

or the ‘Scenario Technique’ in Australia,⁵ begin with undercover officers luring their suspect into a fictitious criminal organization to which the officers supposedly belong. The covert officers form a social bond with the suspect, and entice them into cooperating with the gang through powerful inducements. The undercover officers posing as organized crime figures flaunt incentives of wealth and power, and allow the suspect to partake in staged criminal activity ostensibly for the benefit of the organization. As a result, suspects often develop a strong desire to permanently join the organization and aspire to see the realization of such inducements. Values of trust, honesty and loyalty are explicitly demanded between members of the fictitious organization, and it becomes known to the suspect that solidified membership within the syndicate hinges on the sole approval of the crime boss, colloquially known as ‘Mr. Big.’ The operation culminates in an interview with the crime boss – who is typically a highly skilled and trained interrogator – wherein the suspect is encouraged to reveal information regarding certain criminal activity of his or her past in order to demonstrate trustworthiness and honesty. The interview is expertly designed to extract inculpatory statements from the target and often use fabricated evidence that leads the suspect to believe that a formal police investigation has been initiated, or reinitiated, for the purpose of convicting them.⁶ As a remedy, the crime boss offers to make the investigation disappear through the influential corrupt power of the seemingly criminal organization. However, such backing is contingent on the suspect confessing to the ‘truth’ of their part in the particular crime in question. It is made clear to the suspect that a confession will lead to permanent membership in the organization and the extinguishment of serious state allegations against them. A denial, of course, would lead to neither.

⁵ *Tofilau v R; Marks v R; Hill v R; Clarke v R*, [2007] HCA 39 at para 117 [*Tofilau*].

⁶ *Hart*, *supra* note 4; see also *R v Mack*, 2014 SCC 58 [*Mack*]; *Tofilau*, *supra* note 5; *R v Wichman*, [2015] NZSC 198 [*Wichman*]; where fabricated or misleading evidence was given by the covert officers to the MBO target in order to allow the target to believe that an official investigation had been initiated against them. A slight variation on the Mr. Big sting is seen where the covert officers tell the target that one of their connections, commonly a ‘terminally ill’ member of their organization, is willing to confess to the homicide. However, in order to make the confession credible, they ask the target to provide a detailed accounting of their participation in the homicide. For a recent example, see *R v Streiling*, 2015 BCSC 597 [*Streiling*].

Correspondingly, denials are often met with resistance from the fictitious crime boss, and confessions ultimately result in the suspect's prompt arrest.⁷

The technique has raised significant concerns in relatively recent times in Canada, Australia and New Zealand. As alluded to by Justice Moldaver in the precedent setting Canadian case of *R v Hart*, the threat of unreliable confessions present a unique danger in MBOs as suspects confess to 'Mr. Big' during interrogations in the face of powerful inducements and sometimes veiled threats.⁸ As a result of such a skilfully orchestrated and deceptive strategy, MBOs concoct a perfect recipe for heightening the danger of false confessions. Consequently, triers of fact have traditionally had difficulty accepting that an innocent person would confess to a crime they did not commit which, in turn, leads to an exponential increase in the risk of wrongful conviction.⁹

This article conducts a comparative analysis on the relevant case law and legislation in Canada, New Zealand, and Australia that has developed with respect to regulating the admissibility of confessions arising from MBOs. Although the Mr. Big technique has been deployed in a number of jurisdictions, this article focuses on those countries where the utilization of MBOs is most prevalent, and issues surrounding their use have been challenged at the highest level of court. While concentrating on three main concerns that are unique to the Mr. Big technique, namely, the potential for unreliable or false confessions, prejudicial effects on the accused, and accompanying police misconduct and/or impropriety, the laws of each selected country will be juxtaposed to examine similarities, differences, and the overall robustness of their legal framework said to be applicable to those who have made an admission during a MBO. Such examination of criminal procedures in other nations can expose flaws and benefits that may be considered as material for legal reform.¹⁰ Ultimately, through comparative methodology, the analysis of laws in each jurisdiction may lead to a more comprehensive approach to guarding against Mr. Big confessions which, if

⁷ *Hart*, *supra* note 4; *Tofilau*, *supra* note 5; *Wichman*, *supra* note 6; where denials of guilt are consistently resisted by Mr. Big during the interviews.

⁸ *Hart*, *supra* note 4 at paras 5-6.

⁹ *Ibid* at para 6.

¹⁰ Erik Luna, "A Place for Comparative Criminal Procedure" (2003-2004) 42 Brandeis LJ 277 at 284; see also Amar Khoday, "Uprooting the Cell Plant: Comparing United States and Canadian Constitutional Approaches to Surreptitious Interrogations in the Detention Context" (2009) 31:1 W New Eng L Rev 39 at 41.

found to be admissible in court, would otherwise pose a risk of wrongful conviction.

In totality, this article argues that the overall legislative and/or common law approach to the admissibility of Mr. Big confessions in each country remains inadequate to protect targets of such covert investigative techniques against the underlying threat of wrongful conviction. On the surface, Canada's new framework in *Hart* bolstered protection over what it used to be, and has heightened judicial awareness with regard to false confessions, prejudicial impact on the accused, and police misconduct stemming from MBOs. However, post-*Hart* jurisprudence demonstrates that its application in Canadian courts has been soft, resulting in a lower standard of admission than one might have expected. Nonetheless, it is argued that Australia, in particular, holds the weakest regulations for protection in comparison to Canada and New Zealand. Analogously, there are also weaknesses in New Zealand's statutory approach, but the country's policies and common law have evolved to diminish state use of violence, or threats of violence, within MBOs. New Zealand accordingly appears to have stronger regulations to protect against police impropriety within the technique, which should be taken into account for Canadian and Australian reform. In consideration of the following comparative analysis, a reinforced version of the *Hart* presumption of inadmissibility for Mr. Big confessions – with a burden placed on the Crown to prove reliability beyond a reasonable doubt rather than on a balance of probabilities – is suggested as a mechanism for each country to adopt in order to strengthen their frameworks.¹¹ It is also recommended that greater scrutiny be placed on the analysis of prejudicial effects in judicial proceedings of each country in order to fairly combat the seemingly inevitable high probative value given to Mr. Big confessions.¹² Moreover, it is proposed that a proactive and broad approach to eliminating police misconduct in MBOs should be taken in each country by excluding

¹¹ See Chris Hunt & Micah Rankin, “*R v Hart*: A New Common Law Confession Rule for Undercover Operations (2015) 14:2 OUCLJ 321 at 334 for a similar solution. Hunt & Rankin argue that the Crown should carry the burden of proving a Mr. Big confession voluntary beyond a reasonable doubt through an extension of the confessions rule. Here, it is suggested that the standard is raised within the existing *Hart* framework.

¹² For further discussion on this recommendation, see Jeremy Allen Henderson, “Don’t Go Breakin’ My Hart: The Early Evolution of the Reliability Branch of the Common Law Mr. Big Admissibility Test” (16 March 2016) [unpublished, University of Victoria Faculty of Law].

confessional evidence that is obtained as a result of an operation that used direct or indirect violence, or threats thereof.

At the outset of this article, the Canadian origins of MBOs will be briefly discussed before detailing its importation to Australia and New Zealand. The potential benefits of the technique and associated risks will subsequently be analysed. Based on the grounds of three main issues uniquely inherent to MBOs, the applicable legal framework in Canada is then examined and contrasted against approaches found in New Zealand and Australia. Lastly, a short discussion of proposed solutions for strengthening protection around the admissibility of Mr. Big confessions is outlined within the conclusion of main findings. Although solutions are drawn and proposed based on scholarly articles and cross-jurisdictional case analysis, this article mainly focuses on the results of the comparative examination between selected countries.

II. MBOs IN CANADA AND THEIR IMPORTATION TO AUSTRALIA AND NEW ZEALAND

Although the technique has raised significant concerns more recently, the admissibility of confessional evidence stemming from Mr. Big - like operations has been a contentious legal issue throughout its history. Canadian courts have expressed their discomfort with the tactics of the technique since its inception, especially the use of inducements or threats to elicit inculpatory statements.¹³ Indicia of this are found in the 1901 Manitoban case of *R v Todd*,¹⁴ which focused on the first reported investigative technique similar to that of a MBO. In that case, the court found the method of gathering evidence from the accused to be “vile” and “contemptible.”¹⁵ However, well-established common law principles allowed for the admission of the confessional statement because the inducement was not held out by a ‘person in authority,’¹⁶ and it was not made in reference to the particular charge that was subsequently laid against the defendant.¹⁷

¹³ See *Todd*, *supra* note 1, Dubuc J; *Hart*, *supra* note 4, Moldaver J.

¹⁴ *Todd*, *supra* note 1.

¹⁵ *Ibid* at 519-520.

¹⁶ *Ibid* at 527-528.

¹⁷ *Ibid* at 519-520, 523-524.

Until *Hart*, the common law confessions rule – which provided that the Crown prove beyond a reasonable doubt that an accused’s statement to a ‘person in authority’ is voluntary – continued to provide scant protection to those who made inculpatory statements to an undercover officer in Canada, especially individuals targeted by MBOs.¹⁸ It prevailed as the main starting point for judiciaries in considering the admissibility of statements made to undercover officers. This was confirmed in the 2005 case of *R v Grandinetti*, wherein the Supreme Court of Canada (“SCC”) addressed the question of whether undercover officers were to be considered ‘persons in authority’ at law.¹⁹ If the undercover officers were considered to be persons in authority, then inculpatory statements made to them would likely be inadmissible in court for two reasons. First, coercive state power, capable of controlling or influencing the investigation or prosecution of a crime, cannot be used as an inducement to elicit a confession;²⁰ second, because the use of such inducements could render the confession involuntary.²¹ The SCC ultimately held that undercover officers involved in MBOs are not persons in authority because they are not perceived by the accused to be acting on behalf of the state. Therefore, the state’s coercive power is not engaged and, due to a lack of other effective legal defences at the time, the statements were rendered admissible.²² During this era of jurisprudence in Canada, there was little to no judicial consideration as to the admissibility of Mr. Big confessions based on unreliability or probative value, unfair prejudicial effect on the accused, or police impropriety during the process of the undercover investigation.²³

MBOs developed further in the 1990s and early 2000s through the RCMP’s extensive employment of the technique in British Columbia. It is reported that nearly 180 MBOs were conducted in BC between 1997 and 2004.²⁴ Given the lack of stringent laws governing the admissibility of Mr.

¹⁸ *Hart*, *supra* note 4 at para 64.

¹⁹ *R v Grandinetti*, 2005 SCC 5 [*Grandinetti*].

²⁰ *Ibid* at paras 43-44.

²¹ *Ibid* at para 34.

²² *Ibid* at para 44.

²³ In hindsight, the SCC acknowledged in 2014 that this approach provided insufficient protection to accused persons who confess during MBOs. See *Hart*, *supra* note 4 at paras 65-67.

²⁴ Timothy E Moore, Peter Copeland & Regina A Schuller, “Deceit, Betrayal and the Search for Truth: Legal and Psychological Perspectives on the “Mr. Big” Strategy” (2009) 55:3 *Crim LQ* at 350.

Big confessions in Canada during this time,²⁵ MBOs equipped the RCMP with a useful tool for bolstering their cases against suspects without having to be overly concerned about the exclusion of evidence at trial. One such illustration is found in the case of *R v Rose*, in which the RCMP deployed a MBO in an effort to ensure conviction after the Crown suffered significant evidential setbacks.²⁶ Rose had been convicted of two murders at his first trial and on appeal, but new evidence that someone else confessed to the crimes granted him a third trial.²⁷ The operation culminated with a hotel-room interview between Rose and Mr. Big, who was portrayed to be an individual who could ‘guarantee’ the dismissal of murder charges through corrupt ties.²⁸ The covert officers strategically began by undermining Rose’s confidence in his possible acquittal.²⁹ Then, after repeated and assertive denials of guilt were met with extreme resistance and counter-pressure from the undercover officers, Rose eventually confessed in a defeated, unconvincing manner with “Well, we’ll go with I did it, okay?”³⁰ Fortunately, closer to the start of the third trial, further DNA testing was carried out and the Crown stayed their charges against Rose due to a serious lack of physical evidence linking him to the murders.³¹

As the technique gained momentum, it quickly spread across Canada. Policing authorities were persistent in its use for attempting to enhance the probability of convictions and ultimately close cases that had long been unsolved. In Manitoba, a MBO was used to convict Kyle Unger on first-

²⁵ See *Grandinetti*, *supra* note 19. MBOs do not engage the right to silence because the accused is not detained by the police at the time he or she confesses; see *R v McIntyre*, 1994 2 SCR 480, [1994] SCJ No 52 (QL) [*McIntyre*]; *R v Hebert*, 1990 2 SCR 151, [1990] SCJ No 64 (QL) [*Hebert*]. Similarly, the confessions rule is also inoperative because the accused does not subjectively know that ‘Mr. Big’ is a police officer when he or she confesses. This is further discussed below.

²⁶ Kouri T Keenan & Joan Broackman, *Mr. Big: Exposing Undercover Investigations in Canada* (Winnipeg: Fernwood Publishing, 2010) at 11.

²⁷ Gisli H Gudjonsson, *A Psychology of Interrogations and Confessions: A Handbook* (West Sussex, England: John Wiley & Sons, Ltd, 2003) at 574; The Crown’s murder theory against Rose suffered a setback after a Californian witness came forward with information that another man had confessed to the murders.

²⁸ *Ibid* at 578.

²⁹ *Ibid*.

³⁰ *Ibid* at 579.

³¹ *Ibid* at 581; see also The Fifth Estate, “Someone Got Away With Murder” (21 January 2009), online: CBC <www.cbc.ca/fifth/episodes/from-the-archives/someone-got-away-with-murder> [perma.cc/QW58-PS45].

degree murder charges that stemmed from the heinous killing of a teenage girl at a rock concert south of Winnipeg.³² Similarly, a confession elicited from a MBO in Brandon, Manitoba led to the conviction of Michael Bridges for the murder of his ex-girlfriend.³³ Fort McMurray RCMP used the technique to solve the murder of Robert Levoir, a man who had been missing for nearly one month.³⁴ Eventually, as the technique grew to become more popular within police forces, it is reported that as of 2008, MBOs had been used more than 350 times in Canada.³⁵

Police departments from other countries recognized the statistical success the RCMP was having with the technique. In Australia, the importation of MBOs crystalized in the early 2000s through the use of the technique to elicit confessions from four different murder suspects in the state of Victoria. All were considered, tried and convicted by the High Court of Australia under the decision of *Tofilau v The Queen*.³⁶ Each of the four cases involved the Victorian Police Undercover Unit implementing an operation nearly identical to that found in Canada. Since the High Court of Australia in *Tofilau* ruled the confessional evidence elicited through MBOs in all four cases admissible,³⁷ the technique has continued to be used by police units throughout the country. More recently, there have been a number of high profile convictions arising from MBO evidence including Brett Cowan, the man found guilty of murdering a 13 year old boy who had gone missing in December 1989,³⁸ and Steven Standage of Tasmania, who was sentenced to 48 years imprisonment for the homicides of Ronald Jarvis in 1992 and John Thorn in 2006.³⁹ With the *Tofilau* decision acting as the main authority for the admissibility of confessions arising from Australian

³² *R v Unger* (1993), 85 Man R (2d) 284, [1993] MJ No 363 at paras 19-24 [*Unger*]; it must also be noted that Unger was acquitted of this murder in 2009.

³³ *R v Bridges*, 2006 MBCA 118 at paras 1-6 [*Bridges*].

³⁴ *Mack*, *supra* note 6 at paras 1, 14.

³⁵ Undercover Operations, *supra* note 2; see also The Honourable Justice Susan Glazebrook, "Mr Big Operations: Innovative Investigative Technique or Threat to Justice?" (Paper delivered at the Judicial Colloquium, Hong Kong, 22-26 September 2015), online: <www.hkcfa.hk/en/documents/publications/speeches_articles/index.html> [perma.cc/JA35-N2]7]; Keenan, *supra* note 26 at 23.

³⁶ *Tofilau*, *supra* note 5 at para 1.

³⁷ The admissions to Mr. Big were found as being voluntary because they were not made to a person in authority and thus were admitted into evidence. The laws are analogous to those found in Canada pre-*Hart*.

³⁸ *R v Cowan*, [2015] QCA 87 at paras 1-2.

³⁹ *Standage v Tasmania*, [2017] TASCCA 23 at para 1 [*Standage*].

MBOs, there are no signs that the deployment of the technique is slowing down.

In New Zealand, undercover police operations that approximated the Canadian version of MBOs were initially seen in the 2007 case of *R v Cameron*, wherein a similar technique was used for the purpose of drawing a murder suspect into an association with a number of covert officers.⁴⁰ In *Cameron*, the homicide victim had been reported missing since October of 1993 and the investigation initially led to dead ends.⁴¹ Nearly 12 years later, in the course of the police operation, the primary suspect was involved in a number of simulated crimes and eventually made admissions to one of the undercover officers who acted as the boss of the organization.⁴² Following these admissions, the police arrested their suspect on a warrant for a breach of community work.⁴³ Upon detention, detectives held several interviews with the accused in which they used his previous admissions to the undercover crime boss as leverage to elicit a confession in a formal police interview.⁴⁴ Ultimately, the suspect detailed his part in the murder to the detectives at his own volition.⁴⁵

Although MBOs are not as prevalent in New Zealand as they are in Canada or Australia, the New Zealand Police Association has explicitly endorsed the technique as a method for gathering evidence.⁴⁶ As of 2016, it is reported that the technique has been deployed on only six occasions, all of which involved homicide cases;⁴⁷ five of those operations resulted in admissions from the accused. Most notably, the leading judgement from the Supreme Court of New Zealand remains *R v Wichman*, which narrowly held by a 3-2 majority that admissions elicited by a Mr. Big-style investigation are admissible in court, subject to a case-by-case analysis and legislative considerations under the *Evidence Act 2006*.⁴⁸ The most recent use of the technique is seen in the 2016 High Court of Auckland case of *R v Reddy*,

⁴⁰ *R v Cameron*, [2007] NZCA 564 at para 2 [*Cameron*].

⁴¹ *Ibid* at para 8.

⁴² *Ibid* at para 2.

⁴³ *Ibid* at para 16.

⁴⁴ *Ibid* at paras 16-24.

⁴⁵ *Ibid* at para 24.

⁴⁶ New Zealand Police Association, "Police Association Supports Undercover Technique", online: <policeassn.org.nz/newsroom/publications/media-releases/police-association-supports-undercover-technique> [perma.cc/S3LQ-B7YA].

⁴⁷ *Wichman*, *supra* note 6 at para 19.

⁴⁸ *Evidence Act 2006* (NZ), 2006/69.

wherein the police initiated a MBO that would help to elicit a confession from Reddy regarding the murder of his wife and daughter.⁴⁹ Reddy, believing that the criminal group was legitimate, led the covert officers to the previously unknown location where he buried the bodies.⁵⁰ The corroborating evidence was sufficient to support the reliability of Reddy's confession and would ultimately lead to his conviction.

Taking note of the risks associated with the technique overseas, New Zealand police forces have placed limits on how the operation is conducted so that it is a "very mild" version of what is seen in Canada or Australia.⁵¹ Indeed, evidence has shown that MBOs in New Zealand are designed on the basis that no violence or threats of violence are used.⁵² Further, police guidelines have been noted to require that no actual offences are committed during the investigation, the participation on behalf of the target must be voluntary, and interaction with the public is kept to a minimum.⁵³ However, this attempt to differentiate itself from Canadian or Australian use of the operation may be superficial given that violence, or threats of violence, used in MBOs is typically implied through the fictitious criminal organization's willingness to use violence against other disloyal members – participating undercover officers – rather than being explicitly and directly used against the target.⁵⁴ Moreover, the highest courts in both Canada and Australia have noted that no actual offences are typically conducted during MBOs because the 'crimes' are merely simulated in a manner that deceive the target into believing that they are real.⁵⁵ Although the New Zealand authorities have not adopted the technique to the extent that Canada or Australia has, they appear to be continuing their use of MBOs in a cautious fashion when circumstances are deemed to be appropriate.

III. BENEFITS AND CRITICISMS OF THE TECHNIQUE

The following analysis outlines the benefits and criticisms of using MBOs to elicit inculpatory statements in order to demonstrate why it is

⁴⁹ *R v Reddy*, [2016] NZHC 1294 [Reddy].

⁵⁰ *Ibid* at para 11.

⁵¹ *Wichman*, *supra* note 6 at para 509.

⁵² *Ibid* at para 89.

⁵³ *Ibid* at para 509, n 639.

⁵⁴ *Hart*, *supra* note 4 at para 59.

⁵⁵ *Ibid* at para 73; see also *Tofilau*, *supra* note 5 at paras 146, 219.

necessary to regulate the technique with a comprehensive and robust system. On balance, this section exhibits that the potential for harmful results stemming from insufficient regulation of MBOs – the most extreme form being the loss of liberty for an innocent person – simply outweigh the possible advantages derived from the operation. Given their nature, MBOs are known to enhance the risk of unreliable and/or prejudicial evidence, two factors which have been stated by the SCC as being traceable to wrongful convictions.⁵⁶ Thus, it is evident that inadequate regulation of Mr. Big confessions directly clashes with the fundamental principle of criminal law that the morally innocent should not be found guilty and punished.

The benefits of the Mr. Big technique are clear: the method can assist in solving crimes, typically of the most egregious category such as murder, that may have otherwise gone unsolved by using conventional police investigative techniques. As noted by Justice Moldaver in *Hart*, “the Mr. Big technique has proven to be an effective investigative tool. It has produced confessions and secured convictions in hundreds of cases...[t]he confessions elicited are often detailed and confirmed by other evidence. Manifestly, the technique has proved indispensable in the search for the truth.”⁵⁷ A number of MBOs have resulted in undiscovered remains of murder victims being located.⁵⁸ A significant number of these operations result in admissions to undercover officers and, ultimately, many lead to the clearance or conviction of targeted suspects.⁵⁹ While the technique creates a risk of false confessions, it has also resulted in many reliable confessions which may have never come to light.⁶⁰ It has been argued that, in consideration of protecting and upholding human rights, a state which authorizes the use of such a clever technique to investigate offences which could not otherwise be solved might be said to be showing greater respect for society than it would if it abstained from such methods.⁶¹

However, there are several criticisms of the technique that remain hotly contested. As mentioned by the highest courts in Canada and New Zealand, the main concern spotlights the ability of MBOs to produce false or

⁵⁶ *Hart*, *supra* note 4 at para 8.

⁵⁷ *Ibid* at para 4.

⁵⁸ *Mack*, *supra* note 6; *Reddy*, *supra* note 51; *Bridges*, *supra* note 33.

⁵⁹ *Wichman*, *supra* note 6 at para 19; see also *Undercover Operations*, *supra* note 2.

⁶⁰ *Mack*, *supra* note 6; *Reddy*, *supra* note 49.

⁶¹ Andrew Ashworth “Should the Police be Allowed to Use Deceptive Practices?” (1998) 114 *Law Q Rev* 108 at 134.

otherwise unreliable confessions.⁶² In the face of powerful inducements, threats, and consistent social pressure, it is not uncommon for an innocent person to admit to a crime they did not commit. The critical issue remains that once a confession is elicited, whether true or false, it provides compelling evidence that can lead judges and juries to convict with a sense of confidence.⁶³ Although it is common for the accused to retract their false confession soon after making it, case history tells us that once a confession is made, the likelihood of conviction at trial is greatly enhanced.⁶⁴ To illustrate, a 1980 English study by Baldwin and McConville, which analysed 1473 Crown Court cases, found that confessions provided the single most important evidence against a suspect; in about 30% of cases, a self-incriminating admission or confession was crucial to the prosecution's case. In comparison, forensic evidence was only important in about 5% of cases.⁶⁵

It must be noted that in the context of a MBO, the targeted person has typically been directly or indirectly accused of the crime in question, whether that be through a previous police interview or accusations from the fictitious gang members.⁶⁶ At minimum, the target typically has some form of knowledge that they are being pursued as a suspect for the particular crime. In a number of cases, this knowledge can be weighing on the accused's conscious for several months or even years before a MBO is initiated. Against this backdrop, an offer, from a seemingly authoritative and highly connected criminal boss, to make evidence or police investigations disappear in exchange for a confession becomes a significant incentive. For some MBO targets, the decision boils down to this: a confession, whether true or false, with no apparent legal repercussions in exchange for membership in a powerful organization with purportedly limitless financial upside and the elimination of serious state allegations against them. Given this offer, suspects may seize the opportunity without appreciating the full consequences of confessing.⁶⁷ The suspect's decision to confess is thus not based on their own protective interest against

⁶² Hart, *supra* note 4 at paras 68-72; Wichman, *supra* note 6 at para 20.

⁶³ Hart, *supra* note 4 at paras 5-6.

⁶⁴ Gudjonsson, *supra* note 27 at 173, 182-183.

⁶⁵ John Baldwin & Michael McConville, "Confessions in Crown Court trials" (Royal Commission on Criminal Procedure Research Study No 5 London: HMSO, 1980); see also Gudjonsson, *supra* note 27 at 132.

⁶⁶ Hart, *supra* note 4 at para 19; Reddy, *supra* note 49; Unger, *supra* note 32 at para 12.

⁶⁷ Wichman, *supra* note 6 at para 315.

penalization, but rather on an anticipation that whatever is admitted will correspondingly make legal problems go away.

Other substantial criticisms advanced in case law include that evidence elicited from MBOs is unfairly prejudicial to the defendant because it necessarily demonstrates that the accused willingly participated in simulated crimes and was eager to gain membership to a criminal organization.⁶⁸ As noted in *Hart*, this evidence “sullies the accused’s character and, in doing so, carries with it the risk of prejudice.”⁶⁹ This prejudicial effect, in combination with the risk of an unreliable or false confession, can unfairly ruin the credibility of the accused and heavily influence a judge or jury’s decision to convict.

Additionally, it has been recognized that MBOs allow police officers to circumvent a number of legal safeguards that are put in place to protect the accused against self-incrimination. As Justice William Young, for the Supreme Court of New Zealand, explains, “Mr. Big operations involve police officers interrogating a suspect unconstrained by the usual safeguards which apply when police officers, acting as such, interview suspects.”⁷⁰ As an example, the SCC has held that MBOs do not engage the right to silence under the *Canadian Charter of Rights and Freedoms* because the accused is not legally considered as “detained” by the police.⁷¹ Likewise, in his dissenting opinion in Australia’s leading case on Mr. Big confessions, Justice Kirby raised concerns that the use of such evidence undermines the common law principle of a suspect’s right to silence, and bypasses ordinary police obligations to warn a suspect before interrogation.⁷² The Canadian common law confessions rule, which ensures that statements made out of court by an accused to a person in authority are admissible only if the statements are proven to be voluntary beyond a reasonable doubt,⁷³ is also inapplicable because the covert officers involved in a MBO cannot be considered by the accused as “person[s] in authority.”⁷⁴ In a conventional custodial interrogation setting, these safeguards help to mitigate the

⁶⁸ *Hart*, *supra* note 4 at para 7; *Wichman*, *supra* note 6 at para 21.

⁶⁹ *Hart*, *supra* note 4 at para 7.

⁷⁰ *Wichman*, *supra* note 6 at para 21.

⁷¹ *McIntyre*, *supra* note 25; *Hebert*, *supra* note 25; see also *Hart*, *supra* note 4 at para 64.

⁷² *Tofilau*, *supra* note 5 at para 148.

⁷³ *Grandinetti*, *supra* note 19.

⁷⁴ *Ibid* at para 40.

disadvantaged position of the accused when he or she is up against the unique, coercive powers of the state.

Lastly, it has been argued that MBOs run the risk of becoming an abuse of process.⁷⁵ It may be improper for the police to engage in certain deceptions that influence a suspect into a confession. The Supreme Court of New Zealand's majority decision in *Wichman* referred to these concerns through a lens categorized as 'general impropriety.'⁷⁶ Such impropriety can include violence, significant intrusiveness into the suspect's life, and/or undue pressure through the use of threats or inducements. For example, some MBO targets are subject to overwhelming inducements such as significant cash rewards, close friendship, and even the illusory prospect of romantic partnership.⁷⁷ The targets are often extracted from their existing lifestyle and placed into one of apparent extravagance. The fictitious gang may also convey an image of violence, and intimate that betrayal or lies within the organization will be met with physical consequences.⁷⁸ The undercover officers engage in lies, trickery and deceit that pressure the suspect to adhere to their practices. As a result, such conduct, along with its psychological impact, has an inherent tendency to overbear the will of the target in their decision of whether or not to confess.⁷⁹ Moreover, the technique has demonstrated a trend of selecting vulnerable persons as pursuable targets.⁸⁰ This enables the police to potentially take advantage of vulnerabilities of the individual concerned such as age, background, unemployment, alienation, and/or psychological condition.⁸¹ As Justice Moldaver noted in *Hart*, significant thought must be given to such kinds of police tactics and society must consider what they are prepared to condone in pursuit of the truth.⁸²

⁷⁵ *Hart*, *supra* note 4 at para 9.

⁷⁶ *Wichman*, *supra* note 6 at para 117.

⁷⁷ Steven M Smith, Veronica Stinson & Marc W Patry, "Using the 'Mr. Big' Technique to Elicit Confessions: Successful Innovation or Dangerous Development in the Canadian Legal System?" (2009) 15:3 *Psychol Pub Pol'y & L* 168 at 171; see also *R v Cheeseman*, 2008 ABQB 282.

⁷⁸ *Hart*, *supra* note 4 at para 30.

⁷⁹ *Tofilau*, *supra* note 5 at para 148.

⁸⁰ *Ibid.*

⁸¹ *Ibid.* See also Adelina Iftene, "The Hart of the (Mr.) Big Problem" (2016) 63 *Crim LQ* 151 at 154; Keenan & Broackman, *supra* note 26 at 50-51, where out of 89 cases, 11 suspects were Aboriginal, 29 were from poor social backgrounds, and others had limited education.

⁸² *Hart*, *supra* note 4 at para 9.

IV. A SNAPSHOT OF THE CURRENT LEGAL FRAMEWORK IN CANADA, NEW ZEALAND AND AUSTRALIA

Before conducting a comparative analysis of the substantive law on the basis of three main issues uniquely applicable to MBOs, a brief discussion of the legal framework in each selected country will now be addressed. The purpose of this section is twofold: first, to establish a basic understanding of the applicable legal structures in each jurisdiction and; secondly, to provide context to each country's approach to addressing the admissibility of Mr. Big confessions and pertinent concerns associated with the technique.

The leading authority in Canada for the admissibility of confessions elicited from MBOs is found in the 2014 SCC decision of *Hart*. In *Hart*, the SCC revisited the question from *Grandinetti* of whether Mr. Big confessions should be considered as admissible evidence in court. The majority took the view that, aside from previous jurisprudence relating to the right to silence and the voluntariness of a confession,⁸³ the law necessitated a change because *Grandinetti* and other applicable jurisprudence provided insufficient protection to accused persons who confess during MBOs.⁸⁴ In their new approach, the SCC addressed their concerns regarding the danger of unreliable confessions, prejudicial effects of Mr. Big confessions on the accused, and the risk that the technique creates a fitting atmosphere for police misconduct. Accordingly, a 'new'⁸⁵ principled rule of evidence was established that where the state recruits an accused into a fictitious criminal organization of its own making and seeks to elicit a confession from him or her, any confession made by the accused to the state during the operation should be treated as presumptively inadmissible.⁸⁶ This presumption can be rebutted if the Crown can establish, on a balance of probabilities, that the probative value of the confession outweighs its prejudicial effects. Placing the burden of proof on

⁸³ *Ibid* at para 64; see also *R v Oickle*, 2000 SCC 38 at paras 47-71, for a voluntariness analysis.

⁸⁴ *Hart*, *supra* note 4 at para 67.

⁸⁵ Although considered new by some, it has also been argued that the rules set out in *Hart* are rather a retooled version of basic evidential common law rules. See Brendon Murphy & John Anderson, "Confessions to Mr. Big: A new rule of evidence?" (2016) 20:1 Intl J Evidence & Proof 29 at 40.

⁸⁶ *Hart*, *supra* note 4 at para 10.

the Crown, the court explains, is justified because of the central role played by the state in designing and implementing MBOs, which give rise to unreliable evidence and/or prejudicial effects.⁸⁷ The majority of the SCC also took the stance that a “more robust conception”⁸⁸ of the doctrine of abuse of process be implemented in order to deal with the problem of police misconduct, although the onus of proving an abuse of process remains on the accused.⁸⁹ In theory, this places police conduct that resembles coercion, such as certain forms of inducements or threats, under careful scrutiny to ensure that an abuse of process has not occurred during a MBO.⁹⁰

Constitutionally, the Parliament of Australia has no general power to legislate in relation to crime, thus the majority of criminal matters are left to states and territories.⁹¹ MBOs are routinely considered to be an “authorized controlled operation” under Australian legislation.⁹² It has been noted that Australian state legislatures have been moving progressively towards a unified framework so that all jurisdictions can operate within a system of laws that permit such controlled operations employed by law enforcement authorities.⁹³ In effect, legislative schemes permitting these controlled operations allow investigators to engage in criminal activity – both actual and simulated – and declare that evidence obtained in the course of the investigation is not inadmissible simply because it was gathered by way of a controlled operation.⁹⁴ For example, the *Police Powers and Responsibilities Act 2000* of Queensland provides for the legal authorization, conduct and monitoring of such controlled operations for the purpose of obtaining evidence.⁹⁵ Included in this scheme is approval for a participant in a controlled operation to engage in otherwise unlawful activities only as part of the authorized operation.⁹⁶ There are a number of legislative provisions, outlined in more detail below, within the Australian *Uniform*

⁸⁷ *Ibid* at para 91.

⁸⁸ *Ibid* at para 84.

⁸⁹ *Ibid* at paras 84-86, 113.

⁹⁰ *Ibid* at para 114.

⁹¹ *Ibid*.

⁹² Murphy, *supra* note 85 at 40.

⁹³ *Ibid*.

⁹⁴ *Law Enforcement (Controlled Operations) Act 1997* (NSW), 1997/136, s 3A(3A); see also Murphy, *supra* note 85 at 40.

⁹⁵ *Police Powers and Responsibilities Act 2000* (Qld), 2000/5, s 228(a).

⁹⁶ *Ibid*, s 228(d).

*Evidence Act*⁹⁷ that address the admissibility of confessions generally, and in the specific context of MBOs.

At common law, as seen in *Tofilau*, Australian courts have considered three main arguments against the admission of MBO-elicited confessions. The first being the common law ‘definite rule’ that evidence of a confession may not be received against an accused person if it has been obtained either by fear of prejudice or hope of advantage, exercised or held out by a person in authority.⁹⁸ Second, as per a wider conception of voluntariness, a confession will not be admissible if it is involuntary in the sense that the accused’s will or free choice to speak is overborne by any means.⁹⁹ Lastly, judges possess an overriding discretion to exclude evidence that would be unfair to use against the accused, which has been argued to apply to MBO confessions.¹⁰⁰ This discretionary power allows a judge to exclude a confession if it was found to be inappropriately or unfairly obtained by investigating authorities. In totality, six of the seven High Court justices in *Tofilau* held that confessions elicited from MBOs are admissible, as long as they were voluntarily made without compulsion.¹⁰¹ To date, there are no reported cases from the High Court of Australia that have rendered a Mr. Big confession inadmissible on the aforementioned grounds; nor have any lower court cases been found to demonstrate exclusion of MBO confessions.

New Zealand’s approach to the admissibility of MBO confessions is legislative in nature and involves a comprehensive application of several provisions from the *Evidence Act 2006*.¹⁰² As outlined by the majority in the leading case of *Wichman*, sections 8, 28, 29 and 30 of the *Evidence Act 2006* must be interpreted in a coherent way in their application to Mr. Big investigations.¹⁰³ Section 29 is meant to exclude statements influenced by police impropriety in the context of oppressive conduct by undercover officers¹⁰⁴; s. 28 addresses the exclusion of unreliable statements; s. 30 deals

⁹⁷ *Evidence Act 1995* (Cth), 1995/2 [*Evidence Act Cth*].

⁹⁸ *Tofilau*, *supra* note 5 at para 2.

⁹⁹ *Ibid* at para 6.

¹⁰⁰ *Ibid* at para 65.

¹⁰¹ New Zealand Law Society, “‘Mr Big’ Operations Receive Judicial Support” (23 June 2016), online <www.lawsociety.org.nz/news-and-communications/latest-news/news/mr-big-operations-receive-judicial-support> [perma.cc/BBS3-L33T].

¹⁰² *Evidence Act 2006* (NZ), 2006/69 [*Evidence Act NZ*].

¹⁰³ *Wichman*, *supra* note 6 at para 69.

¹⁰⁴ Oppressive behavior in s. 29 refers to any oppressive, violent, inhuman, or degrading

with impropriety on a wider scale such as evidence obtained unfairly or in contravention of the suspect's rights; and s. 8 is a provision regarding the general exclusion of evidence based on a balance of its probative value and prejudicial effect.¹⁰⁵ Discussed in more detail below, each aforementioned section includes a number of considerations that must be accounted for when determining the admissibility of a Mr. Big confession. Analogous to Australia, there have been no identified cases where MBO confessions were held to be inadmissible by virtue of applicable legislation. This must, however, be taken in conjunction with the fact that New Zealand claims to deploy the Mr. Big technique less frequently and in a less intensified fashion compared to Canada and Australia. In general, the Supreme Court of New Zealand's overall approach follows the view that statements made by a defendant are admissible against that defendant unless excluded on reliability or oppression grounds, or where the prejudicial effect of the evidence outweighs probative value.¹⁰⁶

V. A COMPARATIVE ANALYSIS ON THREE MAIN ISSUES UNIQUELY APPLICABLE TO MBOs

The following three sections will conduct a comparative analysis on the basis of three significant issues, found by the majority of the SCC in *Hart* as being uniquely associated to MBOs. These issues are imperative to address in order to approximate sufficient protection for the accused against the admission of undependable confessions. The first issue to be examined is how courts in each country have reacted to the threat of unreliable confessions arising from MBOs. Secondly, the selected countries are juxtaposed based on their approach to protecting the accused against prejudicial effects which are necessarily connected to the Mr. Big sting. Lastly, the application of laws in each jurisdiction, seemingly meant to guard against the coercive nature of MBOs including police misconduct and/or general impropriety, is analysed and contrasted.

A. The Threat of Unreliable Confessions

As noted above, the threat of producing unreliable or false confessions can be significant in Mr. Big scenarios. There are many variables that play

conduct towards the accused (s 29(5)(a)).

¹⁰⁵ *Wichman*, *supra* note 6 at para 69.

¹⁰⁶ Glazebrook, *supra* note 35 at 7.

into how an unreliable confession is created. New Zealand's Justice Glazebrook, writing as dissent in *Wichman*, identifies various risk factors, associated with MBOs that enhance the probability of false confessions. She categorized these risks into two subjects including situational and dispositional risks.¹⁰⁷ Situational risks include suspect isolation, length of interrogation, minimization techniques, and promises or threats. Dispositional risks include the target's age, social status, maturity, intellectual disabilities, and mental health issues. In a noteworthy experiment, minimization, such as downplaying or rationalizing past criminal acts of the target, has been shown to increase the rate of false confessions from 6 to 18 percent.¹⁰⁸ It is also well accepted that the potential for a false confession increases in proportion to the nature and extent of the inducements held out to the accused, or the amount of violence portrayed by the undercover gang during a MBO.¹⁰⁹ Indeed, case law tells us that the Mr. Big technique has in fact led to false confessions which, in turn, resulted in the wrongful conviction of the accused.¹¹⁰

How, then, have Canadian, New Zealand and Australian jurisdictions reacted to this issue in light of these well-known factors and risks? The SCC in *Hart* addressed this issue through their newly adopted evidentiary rule for the admissibility of confessions stemming from MBOs.¹¹¹ Underlying the onus on the Crown to prove, on a balance of probabilities, that the confession is admissible is a judicial analysis of confessional reliability. This hinges on an assessment of the probative value of the confession, balanced against any prejudicial effect that flows from the bad character evidence which is necessarily tendered in court to put the MBO confession into

¹⁰⁷ *Wichman*, *supra* note 6 at para 397.

¹⁰⁸ Melissa B Russano et al, "Investigating True and False Confessions Within a Novel Experimental Paradigm" (2005) 16:6 *Psychological Science* 481 at 485.

¹⁰⁹ *Hart*, *supra* note 4 at para 69; see also *Wichman*, *supra* note 6 at para 20.

¹¹⁰ See *Unger*, *supra* note 32 where the accused was convicted of murder in 1992, based in part on a confession obtained by the RCMP in a MBO. A new trial was ordered because DNA testing ruled out physical evidence that had initially been relied upon to link Unger to the murder scene. The trial was eventually abandoned when the Crown concluded that it would be unsafe to try Unger on the available evidence, which had solely boiled down to the MBO confession. The inference is that a miscarriage of justice occurred due to significant reliance on the Mr. Big confession from the first trial. A false confession was also obtained through a MBO in *R v Bates*, 2009 ABQB 379 wherein the accused, though properly convicted of manslaughter, overstated his involvement to 'Mr. Big' by falsely admitting to having shot a rival drug dealer.

¹¹¹ *Hart*, *supra* note 4 at para 84.

context.¹¹² Essentially, the probative value is assessed through a “cost benefit analysis,” namely, whether the value of the evidence is worth what it costs.¹¹³ First, the reliability analysis involves looking at the circumstances in which the confession was elicited. Justice Moldaver gave a non-exhaustive list of circumstances to consider such as the length of the operation, the number of interactions (or “scenarios”) between the police and the accused, the nature of the relationship between the undercover officers and the accused, the nature and extent of the inducements offered, the presence of any threats, the conduct of the interrogation itself, and the personality of the accused, including age, sophistication, and mental health.¹¹⁴ Such considerations are clearly analogous to Justice Glazebrook’s description of situational and dispositional factors mentioned above.

After considering the circumstances, the SCC elaborated that the court should then assess the confession itself for markers of reliability. Here, judges consider the level of detail in the confession, whether it leads to the discovery of additional evidence, whether it identifies elements of the crime that are not known to the public, or whether it accurately describes the details of the crime that the accused would not likely have known had he or she not committed it.¹¹⁵ To illustrate, in application to the *Hart* case, the SCC found that the circumstances casted serious doubt on the reliability of the elicited confessions. Prior to the operation, the target was socially isolated, unemployed, and living on welfare.¹¹⁶ The operation lasted four months and consisted of 63 scenarios in which the accused became very close friends with the undercover officers – so much so that he repeatedly referred to them as his “brothers.”¹¹⁷ The accused was “financially lifted” out of his life of poverty and was induced by the prospect of an apparent \$25,000 payday that was available to him if he was allowed to participate, subject to Mr. Big’s discretion.¹¹⁸ Equally intriguing was the promise of friendship and collegiality that came with membership in the fictitious group. The accused even purported a willingness to leave his wife in exchange for membership in the organization.¹¹⁹ When the target confessed

¹¹² *Ibid* at para 85.

¹¹³ *Ibid* at para 94.

¹¹⁴ *Ibid* at para 102.

¹¹⁵ *Ibid* at para 105.

¹¹⁶ *Ibid* at para 133.

¹¹⁷ *Ibid* at paras 133, 137.

¹¹⁸ *Ibid* at para 134

¹¹⁹ *Ibid* at para 138.

to Mr. Big, his ticket to a lavish lifestyle and social acceptance was at stake. In totality, the circumstances presented the target with overwhelming incentives to confess, whether truthfully or falsely.¹²⁰ In looking at the confession itself, there were several inconsistencies between the accused's description of how the crime was committed and what was reported by the police. Moreover, Hart's story of the incident completely lacked any confirmatory evidence.¹²¹ The majority of the SCC thus concluded that the surrounding circumstances, considered alongside with internal inconsistencies and a lack of confirmatory evidence, rendered the confession to be of low probative value and, as a result, unreliable.¹²²

Concerns of unreliability in New Zealand are mainly addressed under s. 28 of the *Evidence Act 2006*. The provision establishes a low threshold wherein the defendant must raise the issue of the reliability of the statement "on the basis of an evidential foundation."¹²³ As noted by Justice William Young, writing for the majority in *Wichman*, aside from cases where no practical issue of reliability arises – such as those cases where the MBO target leads the officers to the location of undiscovered remains of a murder victim – a defendant who has made a confession in a Mr. Big interview will usually have no difficulty meeting the initial threshold of s. 28. This can be done by merely pointing out the inducing effect of the promises or threats used throughout the operation.¹²⁴ Where the threshold is satisfied, s. 28(2) states, "the judge must exclude the statement unless satisfied on the balance of probabilities that the circumstances in which the statement was made were not likely to have adversely affected its reliability."¹²⁵ Although this decision of reliability is ultimately a decision the judge must make, the onus is realistically placed on the Crown to prove reliability under s. 28 once the evidential threshold in s. 28(1)(a) has been met.¹²⁶ Thus, a parallel can be drawn between this provision and the burden of proof on the Crown to prove admissibility as established in *Hart*. The judicial exercise under s. 28(2) is factual, and s. 28(4) provides a non-exhaustive list of factors that a judge must, in each case, take into account such as any mental or physical

¹²⁰ *Ibid* at para 140.

¹²¹ *Ibid* at para 142.

¹²² *Ibid* at para 144.

¹²³ *Evidence Act NZ*, *supra* note 102, s 28(1).

¹²⁴ *Wichman*, *supra* note 6 at paras 77-78.

¹²⁵ *Evidence Act NZ*, *supra* note 102, s 28(2).

¹²⁶ *Wichman*, *supra* note 6 at para 412.

characteristics of the defendant, the nature of any questions put to the defendant and the circumstances in which they were put, and the nature of any threat, promise, or representation made to the defendant during the operation.¹²⁷

Similar to the application in *Hart*, s. 28 ensures that judges look at the external circumstances and internal consistencies of a confession before determining its reliability.¹²⁸ Although s. 28 does not explicitly tell judges to consider the reliability of the confession itself, case law has interpreted the language of the provision, specifically, the “circumstances in which the statement was made,” to require a judicial observation of what is asserted within the statement against the objective facts and the general plausibility of the statement.¹²⁹ Therefore, the reliability assessment in New Zealand is not far removed from the Canadian approach adopted in *Hart*.

On the contrary, Australian common law has addressed the issue of reliability through a focus on voluntariness. The concept is historically based on the presumption that only a voluntary confession is reliable because people generally do not act against self-interest.¹³⁰ In assessing voluntariness, courts have developed what are known as the “definite rule” and “basal voluntariness” principles. The definite rule is much like what has been rejected in Canada as authority for Mr. Big confessions – specifically, the old ‘persons in authority’ approach from *Grandinetti*. It states that a confession made in response to a threat or inducement held out by a person in authority is inadmissible.¹³¹ However, in the context of a MBO, and as demonstrated in Canadian jurisprudence,¹³² this rule is futile because a covert officer, acting as a gang member, cannot be considered to be a “person in authority.”¹³³ The rationale behind this remains that the Mr. Big target neither knows nor believes that the undercover officer has lawful authority to affect the course of the investigation or prosecution against them.¹³⁴ Therefore, the unique power of the state is not engaged as an

¹²⁷ Evidence Act NZ, *supra* note 102, s 28(4)(a)-(d).

¹²⁸ *Wichman*, *supra* note 6 at paras 92, 453-454.

¹²⁹ *Ibid* at para 84.

¹³⁰ *Tofilau*, *supra* note 5 at para 34.

¹³¹ *Ibid* at para 47.

¹³² *Todd*, *supra* note 1; see also *Grandinetti*, *supra* note 19.

¹³³ See *Tofilau*, *supra* note 5 where all statements to Mr. Big were deemed admissible under the “definite rule.”

¹³⁴ Corrupt authority to influence a police investigation also does not make an undercover officer a ‘person in authority’ because a representation to influence corrupt officials

inducing or coercive factor and is not considered as a cause for reliability issues within a confession.

The test for basal voluntariness focuses on confessions made under compulsion that would affect reliability. The key inquiry of this concept is centred on whether the defendant's free choice to speak or remain silent was overborne by "duress, intimidation, persistent importunity, or sustained or undue insistence or pressure."¹³⁵ These are valid considerations as a confession elicited from duress or significant undue pressure cannot be said to be voluntary, or reliable, because the target is likely to give responses that would preclude or avoid any threats from coming to fruition.¹³⁶ However, contrary to approaches in Canada and New Zealand, an assessment of the circumstances from which the confession emerged, such as the length of the interrogation, number of interactions, or social isolation of the accused, is not available to the accused as a method of raising reliability issues in Australian legal proceedings.

Alternatively, the judge also has an overriding discretion to exclude confessions obtained "unfairly, unlawfully or otherwise in ways contrary to public policy."¹³⁷ In application to MBOs, however, this option of exclusion has proven to be toothless. As noted by Justice Gummow and Justice Hayne in *Tofilau*, this discretion involves looking at the conduct of the police and all the circumstances of the case in question to view if it would be unfair to use the confession against the accused.¹³⁸ This has involved an inquiry into the reliability of the confession itself and the relevance of the evidence sought to be excluded.¹³⁹ In *Tofilau*, the majority swiftly discarded this argument because, in their opinion, the accused repeated the same story about the murder to the police in a formal interview following his confession to Mr. Big, and the confession was significantly relevant evidence to the crime.¹⁴⁰ However, there was no consideration of confirmatory or new evidence that corroborated the accused's account of events. Nor was there

could be made by anybody; see *Tofilau*, *supra* note 5 at para 13; *Grandinetti*, *supra* note 19.

¹³⁵ *Tofilau*, *supra* note 5 at para 60.

¹³⁶ Amar Khoday, "Scrutinizing Mr. Big: Police Trickery, the Confessions Rile and the Need to Regulate Extra-Custodial Undercover Interrogations" (2013) 60:2 Crim LQ 277 at 283.

¹³⁷ *Tofilau*, *supra* note 5 at paras 4, 166.

¹³⁸ *Ibid* at para 66.

¹³⁹ Lee Stuesser, "Mr Big' comes to Australia" (2008) 14:1 National Leg Eagle 6.

¹⁴⁰ *Ibid*.

any consideration of situational or dispositional factors such as inducements, minimization techniques, or the personality of the accused that may have impacted the reliability of the confession.

Certain sections from the *Evidence Act 1995 (Cth)* are arguably applicable to MBO confessions. However, these laws are said to only apply to a minority of jurisdictions and a minority of litigants in Australia.¹⁴¹ Indeed, these were not applicable in *Tofilau*; even if they were in force, the majority agreed that it was unlikely that the confessions would be excluded under such provisions.¹⁴² With regard to reliability, s. 85 of the *Evidence Act* establishes that an admission is not admissible unless the circumstances in which it was made were such to make it unlikely that the truth of the admission was adversely affected.¹⁴³ Similar to the approach in Canada and New Zealand, assessing the truth involves consideration of any relevant condition or characteristic of the person making the confession and the nature of any threat, promise or other inducement made.¹⁴⁴ However, the applicability of s. 85 hinges on whether the undercover officers in the MBO are characterized as “investigating officials” or persons “the defendant knew or reasonably believed to be capable of influencing the prosecution” against the accused.¹⁴⁵ It is unlikely that Australian courts will find the latter to be true given their interpretation of a “person in authority” in MBOs. As to the former, the majority in *Tofilau* found that officers “engaged in covert investigations under the orders of a superior” fell outside the scope of an “investigating official.”¹⁴⁶ Thus, the applicability of s. 85 remains dubious in the context of MBOs.

As case law and legislation demonstrates, the Australian framework to evaluate the reliability of confessions stemming from the Mr. Big technique carries with it many exceptions that are not found in Canada and New Zealand. Moreover, their continued utilization of the ‘person in authority’ rule for statements made to undercover officers relies on a common law principle that has been discarded in Canadian law as an ineffective method for protecting Mr. Big targets.¹⁴⁷ Australia’s focus on voluntariness leaves

¹⁴¹ *Tofilau*, *supra* note 5 at para 322.

¹⁴² *Ibid.*

¹⁴³ *Evidence Act Cth*, *supra* note 97, s 85(2).

¹⁴⁴ *Ibid.*, s 85(3)(a)(b).

¹⁴⁵ *Ibid.*, s 85(1)(a)(b).

¹⁴⁶ *Tofilau*, *supra* note 5 at para 342.

¹⁴⁷ *Grandinetti*, *supra* note 19 focused on the “person in authority” rule and this was deemed

the accused with little to no protection against the admission of unreliable or false confessions. Without an approach that is specifically tailored – as found in Canada and New Zealand – to analyse the surrounding circumstances, background of the accused, corroborative evidence, and the internal plausibility of the confession itself, Australian targets of MBOs are put at a higher risk of being wrongfully convicted. However, this is not to say that Canada and New Zealand’s approach is fully adequate in terms of protection against unreliability. As discussed below in the next section, the subsequent application of the presumption of inadmissibility from *Hart* has been criticized as being merely another step for Crown prosecutors to take in having the evidence admitted, rather than a true obstacle to overcome.¹⁴⁸ To that end, it appears that Canada’s soft application of the presumption of inadmissibility in *Hart* may warrant a push in the direction of stronger protection. This could be achieved by placing a stronger burden on the Crown to prove, beyond a reasonable doubt rather than on a balance of probabilities, that the Mr. Big confession is reliable. Notwithstanding any proposed changes to the existing framework, however, both Canadian and New Zealand courts have demonstrated in post-*Hart* jurisprudence that they appear to be highly sensitive to the dangers of false or unreliable confessions and other associated risks with Mr. Big evidence.¹⁴⁹ With respect, this awareness among Canadian and New Zealand courts appears to be much higher than what has been seen in Australia.

B. Protecting the Accused Against Prejudicial Effects

Prejudicial effect is arguably the by-product that accompanies virtually all MBO evidence that is sought to be admitted by the Crown.¹⁵⁰ Particularly, the evidence discloses to the court the accused’s willingness to join a criminal organization and participate in what he or she believes to be criminal acts. Likewise, MBO targets are generally encouraged by covert officers to speak enthusiastically about their past crimes ensuring that, when they do confess, they present themselves in the worst light possible.¹⁵¹

ineffective in *Hart*.

¹⁴⁸ Iftene, *supra* note 81 at 166. See also Lisa Dufraimont, “Hart and Mack: New Restraints on Mr. Big and a New Approach to Unreliable Prosecution Evidence” (2015) 71:18 SCLR 475; Hunt, *supra* note 11.

¹⁴⁹ Dufraimont, *supra* note 148 at 487.

¹⁵⁰ *Hart*, *supra* note 4 at para 78.

¹⁵¹ Khoday, *supra* note 136 at 282.

Admitting this kind of evidence opposes the centuries-old common law rule in Canada that prohibits the Crown from leading evidence of misconduct, engaged in by the accused, which is unrelated to the charges before the court.¹⁵² Justice Moldaver, writing for the majority in *Hart*, elaborated on two kinds of prejudice that stem from such evidence. The first is “moral prejudice” whereby the overall character of the accused is diminished in the eyes of the jury and, as a result, they base their decision of guilt off of the accused’s irrelevant background, or the belief that the accused is deserving of punishment.¹⁵³ There is also “reasoning prejudice,” which may distract the jury’s attention away from the particular charge(s) in question, towards the totality of the accused’s criminal acts or misconduct during the MBO.¹⁵⁴

To safeguard against such prejudice, the Canadian approach is one that is specifically tailored for, and connected to the aforementioned assessment of reliability in Mr. Big confessions. As established above, the Crown carries the burden of overcoming the *prima facie* presumption of inadmissibility by proving that the probative value of the MBO confession outweighs any prejudicial effect that accompanies its admission into evidence. In assessing the prejudicial effects, judges must be cognizant of the dangers posed by admitting evidence that unnecessarily tarnishes the accused’s character, or that distracts the jury away from the charges in question.¹⁵⁵ In the context of a MBO, an example of this would be admitting evidence that demonstrates the accused’s willingness to participate in simulated acts of violence, or that shows the accused boasting about their alleged criminal past. Jury distraction can be found in how long the Crown spends detailing the MBO in court, or any underlying controversy as to whether a particular event or conversation occurred during the operation – assuming it was not recorded.¹⁵⁶ *Hart* illustrates that judges must be aware that the exclusion of evidence, that is unessential to the relevant narrative, may be necessary to mitigate prejudice against the accused and to promote a fair trial.¹⁵⁷ However, given the nature of MBOs, the Crown’s need to submit such prejudicial evidence is quite inevitable. Moreover, because the operation is uniformly conducted, the prejudicial concerns that originate from MBOs

¹⁵² See *Hart*, *supra* note 4 at para 73 citing *R v Handy*, 2002 SCC 56 at para 32.

¹⁵³ *Hart*, *supra* note 4 at para 74.

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid* at para 106.

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid* at paras 107-109.

are likely to be similar from case to case. Therefore, Canadian courts have acknowledged that judges will typically expend more of their analytical energy in assessing the probative value and reliability of a confession when balancing against prejudicial effects.¹⁵⁸ Consequently, it has been argued that this soft approach to prejudicial analysis contributes to the lower standard of admission seen in post-*Hart* cases, given that a Mr. Big confession, without obvious reliability issues, is typically seen as highly probative in the eyes of Canadian judges.¹⁵⁹

In New Zealand, s. 8 of the *Evidence Act 2006* takes into account prejudicial effects on the accused. Similar, but not identical, to the reasoning in *Hart*, s. 8 is a general exclusion provision whereby the judge must exclude evidence if its probative value is outweighed by the risk that the evidence will have an unfairly prejudicial effect on the proceeding, or will needlessly prolong the proceeding.¹⁶⁰ However, the main distinction from *Hart* remains that there is no presumption of inadmissibility that the state must overcome by proving that the probative value outweighs any prejudicial effect. Rather, the judge must only take into account the right of the defendant to offer an effective defence when balancing the two concepts.¹⁶¹ This appears to be a legislative codification of a basic common law evidentiary rule which applied to MBOs in Canada pre-*Hart*, but had minimal impact on the exclusion of confessions.¹⁶²

Akin to Canadian law, measuring prejudicial effect in New Zealand focuses on the Crown's tendency to submit evidence that showcases the accused's involvement in criminal activity.¹⁶³ It has been noted that if the value of the Mr. Big confession is limited – likely because it lacks confirmatory evidence or is incomplete – the prejudicial effect on the defendant may outweigh the probative value of the evidence.¹⁶⁴ However, case law in New Zealand demonstrates that it is far from common for the

¹⁵⁸ *Ibid* at para 108.

¹⁵⁹ See Henderson, *supra* note 12 at 2. See also Streiling, *supra* note 6; *R v Magoon*, 2016 ABCA 412 as examples where prejudicial effects are minimally considered by the court.

¹⁶⁰ *Evidence Act NZ*, *supra* note 102, s 8(1)(a)(b).

¹⁶¹ *Ibid*, s 8(2).

¹⁶² *Hart*, *supra* note 4 at paras 64-65. The case of *R v Creek*, 1998 CanLII 3209 (BCSC), [1998] BCJ No 3189 (QL) was the only case found in Canadian jurisprudence where the judge's overriding discretion was used to exclude a confession because its prejudicial effects outweighed its probative value.

¹⁶³ *Wichman*, *supra* note 6 at para 94.

¹⁶⁴ *Ibid* at para 95.

courts to exclude evidence under s. 8 because confessions are often viewed as carrying substantial probative value and are fundamental to the Crown's case.¹⁶⁵ Again, a parallel can be drawn between s. 8 and pre-*Hart* jurisprudence whereby an overriding judicial discretion to exclude confessional evidence that is more prejudicial than probative proved to be futile.¹⁶⁶ Thus, in the context of a MBO confession, s. 8 is likely not as protective for the defendant as one may anticipate based on its language.

In addition, New Zealand's legislation around prejudicial effects not only reflects similarities with *Hart* principles, but its application also appears to be just as narrow as in Canada. For example, in the leading case of *Wichman*, the majority held that the prejudicial effects were not sufficient to warrant exclusion mainly because the simulated crime scenarios that the accused had participated in had no relevance to the crime of which he was suspected of committing.¹⁶⁷ Therefore, the court found that, with appropriate jury directions not to misuse the evidence, there was no logical basis for the jury to regard the accused's willingness to engage in criminal activity as having any significant bearing on guilt.¹⁶⁸ Yet, this seems to be the exact type of character evidence that is to be considered for exclusion on the basis of moral or reasoning prejudice in *Hart* where the simulated crimes that the accused participated in consisted of transporting stolen property, smuggling alcohol, and breaking into a car, all of which were far removed from *Hart*'s charge of first-degree murder. Nonetheless, the prejudicial impact from said simulated crimes on *Hart* was deemed to be significant and exclusion was ultimately granted.¹⁶⁹ Of course, the probative value of the evidence must be taken into account, but the prejudicial effect of these unrelated crimes were not simply brushed off by the court because they were irrelevant to the charge in question.

In Australia, judicial discretionary power to exclude or limit evidence that is found to be unfairly prejudicial to the accused exists both at common law and within legislation.¹⁷⁰ Similar to Canada and New Zealand, this

¹⁶⁵ *Ibid* at para 96.

¹⁶⁶ *Hart*, *supra* note 4 at para 65.

¹⁶⁷ *Wichman*, *supra* note 6 at para 96; it must be noted that the crime the accused was suspected of committing was assaulting a child.

¹⁶⁸ *Ibid* at paras 96, 532.

¹⁶⁹ *Hart*, *supra* note 4 at para 145. Albeit, the probative value of the confession had been deemed low.

¹⁷⁰ See *R v Swaffield*, [1998] HCA 1 at paras 29, 54, 62 [*Swaffield*]; see also *Tofilau*, *supra* note 5 at para 3; *Evidence Act Cth*, *supra* note 97, ss 90, 135-137.

discretion is based on whether the probative value of the evidence is outweighed by the danger of unfair prejudice to the defendant.¹⁷¹ For those jurisdictions that are subject to the uniform evidence legislation, s. 90, and ss. 135 to 137 of the *Uniform Evidence Act 1995 (Cth)* all provide the court with powers to exclude or limit evidence that is unfairly prejudicial to a party. Akin to Canada, while considering prejudicial factors that may be unfair,¹⁷² Australian judges must be cognizant of evidence that may appeal to a trier of facts sympathies, sense of horror, instinct to punish, or other motives that may lead one to make a decision on the basis of improper reasoning.¹⁷³ Once such evidence is considered to be at risk of being unfairly prejudicial to the defendant, the effect of appropriate judicial directions to the jury must then be taken into account.¹⁷⁴ With intention of neutralizing the unfair prejudicial evidence, courts must consider whether, upon receiving instructions, an “average jury” would “be reasonably capable, as an intellectual exercise” of leaving the prejudicial background of the Mr. Big scenarios out of account for the purpose of maintaining a fair trial.¹⁷⁵ If the unfair prejudice can be overcome by giving instructions to the jury, then it is unlikely to outweigh any probative value that a Mr. Big confession can provide for the Crown’s case (assuming that there are no serious reliability issues within the confession). For this reason, the judicial discretionary power in Australia is similar to Canada and New Zealand in that it likely provides superficial protection for suspects who confess to Mr Big.

In a recent Australian Mr. Big case, for example, the trial judge held that the evidence presented a danger of unfair prejudice towards the accused. The Mr. Big scenarios showed that the accused had been a criminal for most of his adult life, that he successfully grew and trafficked cannabis, and that he possessed, and was ‘very familiar’ with various types of firearms,

¹⁷¹ *Evidence Act Cth*, *supra* note 97, ss 90, 137.

¹⁷² A noteworthy distinction is made in Australian case law – which also applies in Canada and New Zealand – between evidence that is considered “prejudicial”, and evidence that is “unfairly prejudicial”. As stated by Justice Crawford in *Neill-Fraser v Tasmania*, [2012] TASCRA 2 at para 184, “all evidence that may tend to convict an accused person is prejudicial, but that does not mean that it is unfairly prejudicial. What is meant by unfair prejudice is that the jury may use the evidence to make a decision on an improper, perhaps emotional basis.”

¹⁷³ See *Standage*, *supra* note 39 at para 6, citing *Neill-Fraser*, *supra* note 172 at para 128.

¹⁷⁴ *Standage*, *supra* note 39 at para 6.

¹⁷⁵ *Ibid* at para 6.

including guns alleged to be the murder weapons in the particular case.¹⁷⁶ It also demonstrated the accused's voluntary participation in serious organized crime such as illegal prostitution, money laundering, police corruption, trafficking in ecstasy and hashish, illicit diamond sales, and armoured truck robbery.¹⁷⁷ However, the judge found that the evidence could be "compartmentalised" and a reasonable jury, upon being given appropriate instructions, would be reasonably capable of 'editing out' the prejudicial background of the accused.¹⁷⁸ The probative value of the Mr. Big confession thus easily outweighed any unfair prejudicial effects on the accused.

With the exception of slight variations, all three jurisdictions hold similar frameworks to address the risk of unfair prejudice in MBO confessions. Taken at face value, the Canadian, New Zealand, and Australian common law rules and legislation appear to provide adequate protection for the accused. In particular, Canada, through the presumption of inadmissibility from the *Hart* framework, appears to hold an extra barrier for the Crown to overcome prejudicial impact. However, in practice, such protection may be fruitless, as probative value seems to outweigh prejudicial effect more often than not in a Mr. Big setting.¹⁷⁹ At other times, prejudicial effect from MBO evidence is given little to no consideration. For instance, only one of the four cases in *Tofilau* were analysed on the grounds of prejudicial effects.¹⁸⁰ When it is considered, however, it is clear that the exclusion of a confession, on the basis of prejudicial effect, will likely only occur when probative value is clearly trivial, or the prejudice towards the accused is significant and relevant. Otherwise, case law demonstrates that

¹⁷⁶ *Ibid* at para 142.

¹⁷⁷ *Ibid* at para 143.

¹⁷⁸ *Ibid* at para 158.

¹⁷⁹ See *Wichman*, *supra* note 6 at para 96; *Cameron*, *supra* note 40; *Reddy*, *supra* note 49; *Standage*, *supra* note 39. See also post-*Hart* cases such as *Streiling*, *supra* note 6, *R v Johnston*, 2016 BCCA 3 [Johnston], *R v West*, 2015 BCCA 379 [West], *R v Allgood*, 2015 SKCA 88 [Allgood], *R v Caissie*, 2019 SKQB 3; *R v Klaus*, 2018 ABQB 6; *R v Mildemberger*, 2015 SKQB 27; *R v Magoon*, 2016 ABCA 412; *R v MM*, 2015 ABQB 692; *R v Tingle*, 2015 SKQB 184; *R v Balbar*, 2014 BCSC 2285; *R v Keene*, 2014 ONSC 7190; *R v Hales*, 2014 SKQB 411. In *Tofilau*, *supra* note 5, there appeared to be no consideration of prejudicial effects stemming from the MBO evidence.

¹⁸⁰ See *Tofilau*, *supra* note 5 at para 406 for a discussion on *Clarke*. This is also assuming there is no police impropriety or abuse of process found to otherwise render the confession inadmissible.

where prejudicial effects are not severe, the judge will choose to edit and admit the confession through appropriate jury instructions.¹⁸¹ This trend has been demonstrated in Canada by post-*Hart* jurisprudence as evidence from MBOs is admitted in the majority of cases.¹⁸² The *Hart* framework has thus been criticized as being ineffective in its subsequent applications¹⁸³ due to its exclusionary rules being only well suited to capture only the most unreliable or prejudicial evidence.¹⁸⁴

C. Police Misconduct and General Impropriety

Lastly, the issue of police misconduct or general impropriety remains an important concern surrounding MBOs. Due to its inherent coercive nature, MBOs contain the risk that police will engage in tactics that are unacceptable to society. As alluded to in *Hart*, police misconduct can involve undercover officers cultivating an aura of violence through threats or portrayed acts of violence that approximate coercion.¹⁸⁵ Using such conduct for the purpose of eliciting a confession can become abusive; and as a result, the reliability and voluntary nature of a confession are likely undermined. Similarly, ‘general impropriety,’ a term used in New Zealand and Australia, can include police acts such as the lies which are a necessary part of the Mr. Big technique, the commission of simulated crimes and the recruitment of the suspect into such activities, and the intense pressure to confess placed upon the target¹⁸⁶; all of which have the potential to threaten the credibility of a confession. Notwithstanding the reliability and/or probative value of a confession, the SCC has simply held that the courts cannot condone state misconduct that coerces the target of a MBO into confessing.¹⁸⁷

Canadian courts have addressed the issue of police misconduct through the doctrine of abuse of process – a doctrine intended to protect individuals against abusive state conduct that society would find unacceptable, and

¹⁸¹ *Mack*, *supra* note 6; *Standage*, *supra* note 39; *Wichman*, *supra* note 6. It must be noted that when a jury is not present, there is a greater chance that the prejudicial effects will be mitigated through the experience of the judge, sitting alone.

¹⁸² See the non-exhaustive list of post-*Hart* cases, *supra* note 179 where admission was granted at each trial.

¹⁸³ *Henderson*, *supra* note 12.

¹⁸⁴ *Dufraimont*, *supra* note 148 at 490.

¹⁸⁵ *Hart*, *supra* note 4 at para 78, 115.

¹⁸⁶ *Wichman*, *supra* note 6 at para 117.

¹⁸⁷ *Hart*, *supra* note 4 at para 10.

which threatens the integrity of the justice system.¹⁸⁸ This approach gives the court wide remedial discretion to exclude evidence, or issue a stay of proceedings, where an abuse of process has occurred, regardless of whether the evidence is reliable.¹⁸⁹ Although the onus of establishing an abuse of process remains on the accused, *Hart* has made it clear that trial judges must bear in mind that MBOs can become abusive, and that each case must be carefully scrutinized to evaluate how the police conducted themselves throughout the operation.¹⁹⁰ For example, the SCC held that an operation where the police use violence or threats to overcome the will of the accused and coerce a confession will almost certainly amount to an abuse of process.¹⁹¹ Exploitation of particular vulnerabilities of the suspect can also prove to be improper police conduct worthy of excluding evidence. In *Hart*, other, less obvious, factors were considered by the SCC as potentially resulting in an abuse of process. In that case, the accused was prone to having seizures, and had previously had his driving licence suspended to protect against the risk that a seizure would cause him to have a vehicular accident.¹⁹² However, during the MBO, the officers allowed him to drive long distances on populated roads, ultimately putting the general public and the target in danger, in order to make ‘deliveries’ for the organization.¹⁹³ Without having to ultimately conclude on the issue of abuse of process (because exclusion of the particular evidence was already established), Justice Moldaver held that such police conduct raised significant issues, and “might well amount to an abuse of process.”¹⁹⁴ However, aside from exceptional cases,¹⁹⁵ it appears that Canadian courts have taken a soft approach to applying the abuse of process doctrine following *Hart*. In *R v Allgood*, the Saskatchewan Court of Appeal acknowledged that a ‘typical’ MBO alone does not amount to an abuse of process. Rather, something more is required; the police must overcome the will of the accused and

¹⁸⁸ *Ibid* at paras 79, 113.

¹⁸⁹ *Ibid* at 113. As a post-*Hart* example, see the case of *Laflamme v R*, 2015 QCCA 1517 [*Laflamme*].

¹⁹⁰ *Hart*, *supra* note 4 at para 114.

¹⁹¹ *Ibid* at para 115.

¹⁹² *Ibid* at para 21.

¹⁹³ *Ibid* at para 148.

¹⁹⁴ *Ibid* at para 149.

¹⁹⁵ *Laflamme*, *supra* note 189; see also *R v SM*, 2015 ONCJ 537 where an abuse of process was also found, although the operation conducted by the police was not a typical MBO.

coerce a confession.¹⁹⁶ Prior to initiating the MBO in *Allgood*, the target was unemployed and frequented a pawnshop.¹⁹⁷ During the operation, the target was introduced to a lifestyle of expensive restaurants and hotels, told that he would receive \$25,000 if approved by the boss to participate in an upcoming job, and handled upwards of \$50,000 for the organization.¹⁹⁸ The accused was also exposed to considerable violence such as a kidnapping and staged murder of another undercover officer, as well as an assault on a woman and her daughter.¹⁹⁹ Yet, the court found that “there was no indication that there was violence, threats of violence, or taking advantage of Mr. Allgood’s vulnerabilities on the part of the police.”²⁰⁰ No abuse of process was found as a result. Likewise, in the post-*Hart* cases of *R v Johnston*, *R v West*, and *R v Perreault*, the courts held that no abuse of process arose because the violence and/or threats of violence were not directly aimed at the MBO target or anyone close to the target, but rather directed at individuals outside of the organization.²⁰¹ Another example is found in *R v Streiling*, wherein the British Columbia Supreme Court held that the police allowing the Mr. Big suspect to quit his job and interrupt gainful employment, which would have negative consequences for future employability was of “grave concern” and went “too far” in their view.²⁰² The judge also ruled that the covert officer allowing the target to take the wheel of his vehicle from the passenger’s seat so that the officer could text while driving put innocent civilians at risk, and was an action that could not be condoned.²⁰³ However, none of the police conduct rose to the apparent high level of abuse of process. As post-*Hart* jurisprudence demonstrates, the issue remains that many MBOs continue to create an undertone of violence that is either directly or indirectly aimed at the target, ultimately leaving it up to the target’s imagination as to what consequences may arise if they cross or upset any members of the fictitious organization. Indeed, vulnerabilities are still being preyed upon by police, and courts seldom reject

¹⁹⁶ *Allgood*, *supra* note 179 at para 67.

¹⁹⁷ *Ibid* at para 11.

¹⁹⁸ *Ibid* at paras 11, 17.

¹⁹⁹ *Ibid* at paras 14-15.

²⁰⁰ *Ibid* at para 67.

²⁰¹ For a summary regarding abuse of process in all three cases, see *Johnston*, *supra* note 179 at paras 50-60.

²⁰² *Streiling*, *supra* note 6 at para 148.

²⁰³ *Ibid* at para 149.

evidence based on this under an abuse of process.²⁰⁴ Perhaps the more robust conception of the abuse of process doctrine has not outgrown its reputation as a ‘paper tiger’ that it once carried in pre-*Hart* jurisprudence.²⁰⁵

In New Zealand, a combination of s. 29 and s. 30 of the *Evidence Act 2006* address the issue of evidence obtained through police impropriety.²⁰⁶ Given the broad language of these sections, they are likely to be applicable to MBO confessions in a similar manner to what is seen in Canada. Under s. 29(2), a judge must exclude a statement unless satisfied beyond a reasonable doubt that the statement was not influenced by oppression. To trigger this section, the onus is on the defendant to raise, on the basis of an evidential foundation, the issue of whether a statement was influenced by oppression; however, the judge alone may also raise this issue in their analysis and inform the prosecution of the grounds for raising the issue.²⁰⁷ For the purpose of applying this section, s. 29(4) outlines a non-exhaustive list of factors for judicial consideration, such as any pertinent mental or psychological condition of the defendant when the statement was made; the nature of any questions put to the defendant and the manner and circumstances in which they were put; and the nature of any threat, promise or representation made to the defendant.²⁰⁸ It must also be noted that this provision defines “oppression” as “oppressive, violent, inhuman, or degrading conduct towards, or treatment of, the defendant or another person; or a threat of conduct or treatment of that kind.”²⁰⁹

Likewise, s. 30 provides judicial discretion to exclude evidence that has been improperly obtained.²¹⁰ Such impropriety may exist if the police conduct is overbearing or the suspect is put under pressure to confess by reason of threats or inducements.²¹¹ Furthermore, s. 30(5)(c) establishes a broad discretion that evidence is improperly obtained if it is obtained

²⁰⁴ See non-exhaustive list of post-*Hart* cases, *supra* note 179, all of which found no abuse of process. However, it must be noted that some of these cases involve Mr. Big evidence of high probative value that strongly justifies its admission.

²⁰⁵ See *Hart*, *supra* note 4 at para 79 where the SCC refers to the ineffective abuse of process doctrine pre-*Hart* as a “paper tiger”.

²⁰⁶ *Evidence Act NZ*, *supra* note 102, ss 29, 30.

²⁰⁷ *Ibid*, s 29(1)(a)(b).

²⁰⁸ *Ibid*, s 29(4).

²⁰⁹ *Ibid*, s 29(5).

²¹⁰ *Ibid*, s 30.

²¹¹ *Wichman*, *supra* note 6 at para 122.

“unfairly.”²¹² This fairness analysis, however, has been narrowly interpreted as only requiring an assessment of police conduct short of oppression that has not already led to exclusion under s. 28.²¹³ If the judge finds that the evidence was improperly obtained, they must then determine whether the exclusion of the evidence is proportionate to the impropriety by means of a balancing exercise.²¹⁴ Again, a list of factors is set out in s. 30(3) to guide the balancing exercise. These include, but are not limited to, considerations such as the nature of the impropriety, or whether there were any other, less intrusive, investigatory techniques that could have been used. However, it was found by the Supreme Court of New Zealand that some constraints within the s. 30 analysis do not apply to covert officers acting within Mr. Big scenarios. For example, in addressing the question of why pressure that would otherwise be deemed as improper in a formal police interview could be applied during a Mr. Big interview, the court held that such constraints do not apply to undercover officers because they are not exercising the coercive power of the state.²¹⁵ Thus, similar to Australia’s “person in authority” exception, circumvention of certain constraints through the employment of a MBO may permit for police conduct that may otherwise be improper;²¹⁶ and s. 30 may not be fully available for the defence as a result.

Moreover, in regards to general impropriety, the majority in *Wichman* hinted at the prospect of applying the Canadian “abuse of process” approach from *Hart* to determining whether MBO statements should be excluded.²¹⁷ In that case, the same factors from *Hart* were considered – including whether the operation involved violence or threats of violence, or exploitation of particular vulnerabilities of the defendant – but it was determined that the impugned operation in question held none of the same characteristics as found in *Hart*, and thus admission of the evidence was favoured.²¹⁸

²¹² *Ibid*, s 30(5)(c).

²¹³ *Wichman*, *supra* note 6 at para 70; Section 28 is discussed above under the unreliability assessment for New Zealand.

²¹⁴ *Evidence Act NZ*, *supra* note 102, s 30(2).

²¹⁵ *Wichman*, *supra* note 6 at para 124.

²¹⁶ *Ibid* at para 124.

²¹⁷ *Ibid* at para 125.

²¹⁸ *Ibid*.

At common law, it has been said that Australian courts have had discretionary powers to exclude unlawfully or improperly obtained evidence on the basis of public policy grounds since at least the 1970s.²¹⁹ Under this discretionary authority is the general power to exclude a confession that is obtained by improper police conduct that would make it unacceptable to admit the statement.²²⁰ The High Court of Australia has noted that the main inquiry is whether, having regard to the conduct of the police and all the circumstances of the case, it would be unfair to use the statement against the accused.²²¹ For applicable Australian jurisdictions, the *Uniform Evidence Act 1995* has crystallized a similar form of this discretion into statute under what is now s. 138. The section provides that evidence obtained improperly or in consequence of an impropriety is not to be admitted unless, on balance, the desirability of admitting the evidence outweighs the undesirability of admission based on the way it was obtained.²²² Akin to s. 30 in New Zealand's Evidence legislation, there are similar considerations listed within the provision including the gravity of the impropriety, whether the impropriety was contrary to a legal right of a person, and the difficulty of obtaining the same evidence without impropriety.²²³

Likewise, s. 84, which can exclude admissions influenced by violence and certain other conduct, is also relevant in the context of an MBO confession. Nearly identical to s. 29 of New Zealand's Evidence Act, s. 84 excludes evidence of an admission that was influenced by "violent, oppressive, inhuman or degrading conduct...or a threat of conduct of that kind."²²⁴ The source of such conduct is not restricted to an "investigating official" or "person in authority," thus there is scope for broad application and, in particular, to MBOs wherein the identities of the undercover officers are unknown to the accused.²²⁵ However, a difficult challenge that has been notably attached to this section remains that the accused has the burden of identifying the "oppressive" nature of the conduct, and more importantly, whether it has impacted their voluntariness in making a

²¹⁹ Murphy, *supra* note 85 at 40; *Bunning v Cross* (1978), 141 CLR 54; *Cleland v R*, [1982] HCA 67; *Swaffield*, *supra* note 172.

²²⁰ *Tofilau*, *supra* note 5 at para 3.

²²¹ *Ibid* at para 66.

²²² *Evidence Act Cth*, *supra* note 97, s 138.

²²³ *Ibid*.

²²⁴ *Ibid*, s 84(1).

²²⁵ Murphy, *supra* note 85 at 43.

confession during the MBO.²²⁶ Aside from proving an impact on voluntariness, this approach is comparable to the Canadian approach in *Hart*, where the onus is on the accused to establish an abuse of process.

Alternatively, the aforementioned Australian common law rule of basal voluntariness may render a confession inadmissible on the grounds of improper police conduct. If the covert officers engage in conduct that rises to the level of “duress, intimidation, persistent importunity, or sustained or undue insistence or pressure,” then it could be argued that, through compulsion, the accused’s free choice of whether to speak or remain silent was overborne.²²⁷ However, *Tofilau* establishes a high threshold to meet by placing the onus on the accused to identify why he or she had no choice to speak or stay silent.²²⁸ A cleverly planned MBO is likely to circumvent this rule – and also hinder any success of protection under s. 84 of the *Uniform Evidence Act 1995* – by making it known to the suspect that they are ‘free to go’ at any time, or that they ‘do not have to speak’ during the interview with Mr. Big. In this regard, the suspect will likely be found as voluntarily choosing to confess as there is no considerable level of coercion from the undercover officers.

Under the context of MBOs, the Australian approach to police misconduct and/or general impropriety contains several exceptions that make its application more constricted than comparable laws in Canada and New Zealand. With Australia’s underlying focus on voluntariness, the defendant carries a heavier burden not only to identify which conduct amounts to ‘violence, oppression, inhuman or degrading,’ but also to prove and explain why such conduct impacted their voluntariness to confess to Mr. Big. Although there are also exceptions to police impropriety found in New Zealand’s legislation due to the disengagement of coercive state power, New Zealand’s Parliament has demonstrated that they are willing to take a liberal approach by not only allowing judges to raise issues of impropriety, but also considering and applying Canada’s abuse of process doctrine from *Hart*. It must also be kept in mind that this approach is in combination with a general consensus among police departments to implement MBOs on a ‘very mild’ basis. As such, New Zealand may have some of the better tools

²²⁶ *Ibid* at 44. It has also been held that “Oppressive conduct” is not limited to physical violence or explicit threats, but could extend to “mental and psychological pressure”; see also *Higgins v The Queen*, [2007] NSWCCA 56 at 26.

²²⁷ *Tofilau*, *supra* note 5 at para 60.

²²⁸ *Ibid* at para 64.

and safeguards in place to protect against police impropriety during a MBO, if it arises at all. Analogously, the Canadian method of dealing with police misconduct and impropriety on paper is wide in ambit. Without establishing a bright line rule to distinguish what is and what is not improper, Canadian courts have acknowledged their obligation to carefully scrutinize each Mr. Big case on its own circumstances and to bear in mind that these operations have a tendency to become abuse in numerous ways.²²⁹ However, as seen in post-*Hart* cases, the application of the abuse of process doctrine remains questionable, as lower courts have admitted Mr. Big confessions even where police conduct approximates what was intimated in *Hart* as amounting to an abuse of process.²³⁰

VI. CONCLUSION AND PROPOSED SOLUTIONS

The foregoing comparative analysis demonstrates that each country carries flaws within its framework, and/or application thereof, which result in insufficient protection for those who confess during a MBO. Australia, in particular, holds the weakest protection compared to Canadian and New Zealand regulations. With an underlying focus on voluntariness, Australian laws follow a similar version of an out-dated and rejected approach found in pre-*Hart* Canadian jurisprudence, which ultimately allows for numerous exceptions to safeguards that are put in place to protect against the admission of unreliable confessions. Such exceptions are not found in Canada or New Zealand due to developments in common law or legislative measures. In regard to reliability concerns, an approach specifically tailored for MBOs in Australia, which avoids consideration of the ‘person in authority’ threshold and rather focuses on situational and dispositional factors, as well as the plausibility of the Mr. Big confession itself, is therefore necessary, at minimum, to approximate stronger safeguards. To enhance reliability protections in all discussed jurisdictions, it is recommended that each country adopt a heightened version of the existing *Hart* framework, one which places the burden on the Crown to prove beyond a reasonable doubt, instead of on a balance of probabilities, that the Mr. Big confession is reliable.²³¹ This would raise the threshold of admissibility in line with the

²²⁹ *Hart*, *supra* note 4 at para 118.

²³⁰ *Ibid* at paras 115-118; see also *Streiling*, *supra* note 6 at paras 148-150.

²³¹ See *Hunt*, *supra* note 11 where the elimination of the ‘persons in authority’ threshold is proposed in order to extend Canada’s confession rule to those who confess to an

Canadian common law confessions rule – without having to remove the ‘persons in authority’ threshold – and provide for greater protection against the admission of false confessions.

As for prejudicial impact on the accused, all three countries appear to be lacking in effective application of existing laws meant to protect against the admission of prejudicially unfair evidence. The highest courts in Canada and New Zealand have, at least, acknowledged a heightened obligation on judges to be cognizant of the innate prejudicial effects that necessarily accompany Mr. Big evidence. However, as recent cases show, the standard of analysing prejudicial effect is often trivial, non-existent, or overshadowed by thorough consideration of probative value found within a Mr. Big confession. Consequently, any prejudicial effect of Mr. Big evidence is typically outweighed by probative value, or edited-out for the trier(s) of fact as irrelevant, and the confession is admitted as a result. It is suggested that greater scrutiny be placed on the analysis of prejudicial effects in judicial proceedings of each country, allowing for a full and comprehensive review of potential prejudice in each case. Such individualized engagement will address the variability of the accused, their background, and surrounding circumstances in each operation, which would create an actual, rather than just illusory, obstacle for the Crown to overcome before admitting Mr. Big evidence.²³²

Under the context of police misconduct or general impropriety during MBOs, the ‘more robust’ Canadian doctrine of abuse of process from *Hart* is a step forward in theory, yet its application remains weak. Likewise, Australian laws appear to make protection from police impropriety even more restricted and burdensome for Mr. Big targets due to its underlying focus on voluntariness. As policing authorities have continued to shape MBOs into an effective investigatory tool, methods are already at play to eliminate conduct that manifests impropriety or an abuse of process in the eyes of the court, thus rendering the current application of laws futile. Therefore, a proactive and broad approach, as seen in New Zealand, is suggested for each country to enhance protection against police impropriety during MBOs. Such an approach should eliminate the accused’s burden of

undercover officer. Although this solution may be able to enhance protection for Mr. Big targets, it has also been argued that eliminating the ‘persons in authority’ threshold could create unintended consequences as those who confess, even to legitimate crime bosses, will always have a voluntariness argument; see Steusser, *supra* note 139.

²³² See Henderson, *supra* note 12 for greater analysis on this proposed solution.

proving the actual police impropriety and its effect on voluntariness, and allow judges to scrutinize police misconduct and raise issues of their own. It should also provide for judicial examination and stronger application of Canada's abuse of process doctrine, on a case-by-case basis, as a method of considering less obvious police misconduct that society (and courts) may not wish to condone. Moreover, it is recommended that each country exclude confessional evidence that is obtained as a result of a MBO which created an aura of violence, or threats thereof – whether directly or indirectly aimed at the accused. Consequently, this would result in a 'very mild' form of the investigative technique, as found in New Zealand, and further shield against unreliable confessions, prejudice, and police impropriety.