

Mr. Big Operations – The Big Lebow-peration – by Seminar Group Le-Ma in Introduction to Criminal Law and Procedure at Robson Hall



In this blog, we briefly outline a timeline of Mr. Big Operations (MBO) in Canada, as well as indicate their future in Canada and other jurisdictions.

Prior to the decision in *R v Hart*, the accused in an MBO was often left with a substantial burden in the attempt to rebut any evidence procured through this particular method of police trickery. The only avenue, besides the basic common law evidentiary norm, was the community shock test. However, this rule, while claiming to be objective, seems to be based on an ill-defined “community” that is undoubtedly biased by the alleged crimes and is ambiguous on what even constitutes as unconscionable behaviour. Unfortunately, fundamental protections like s.7 of the *Charter*, right to silence and the common law confession rule were held to be exempt from application because the accused was not in detention or speaking to a person in authority at the time of their confession.¹

¹ Canadian Charter of Rights and Freedoms, s 7, Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

Instead of directly replicating the common law confession rule or forcing its application (changing the person in authority requirement), the SCC decided to construct a “two-pronged test”² with a similar purpose. The test requires the court to scrutinize the circumstances of any confession, especially markers of reliability as any evidence is presumptively inadmissible, unless the Crown can establish that the probative value of the confession outweighs its prejudicial effects. This test was designed to combat the issues of reliability and prejudice that were plaguing MBOs confessions. However, proponents of MBOs saw this decision as the death of an effective technique that was relatively successful at solving cold cases for horrific crimes. It seemed like the SCC, with this new stringent standard, had essentially restricted MBOs to prohibition as any future confessions would fail to meet these elevated criteria.

Quickly after ruling on *Hart*, the SCC was faced with another MBO in *R v Mack*.³ While the focus of the analysis is on the concerns of reliability and prejudice once an MBO confession is admitted into evidence, the broad application of the *Hart* framework seems to suggest that MBOs are still a viable option for the police to secure a confession, albeit with stricter rules in place. Simply demonstrating that it is possible for the probative value to outweigh the prejudicial effects may have the effect of re-opening the floodgates of MBOs or at the very least, breathing life back into a technique that was possibly on its last legs.

Problems with Mr. Big

MBOs create an overpowering feeling of distrust and betrayal in our society. Entrapment, social and economic inducements, coercion, and manipulation are concerns the MBOs raise. In MBOs, police use their knowledge and resources to try to shed light on cold cases, where evidence was weak or nonexistent that ended up leading nowhere. However, this operation comes with a huge cost. MBOs can cost upwards of half a million dollars and span a few years, requiring a large team of officers and extensive planning. The public remains wary of these operations because of MBOs secretive nature. As such, the police are truly pushing the boundary of what the public finds acceptable. For now, the courts are standing by their decision and allowing the police to continue utilizing MBOs.

² *R v Hart*, 2014 SCC 52 [*Hart*].

³ *R v Mack*, 2014 SCC 58 [*Mack*].

The police have found a loophole - because they are acting as “non-state actors” they can circumvent the *Charter*, specifically ss. 7 & 24.⁴ This allows the police to bypass certain restrictions that normal police officers must oblige to. In an MBO scenario, the police trap the suspect using multiple methods. They pay financially dependent people to commit petty crimes, which proves to be quite lucrative and allows the suspect to get off welfare and get a taste of the “good life”. The sense of building new friendships with the criminal organization creates social inducements so they may do things that are out of the ordinary. The police officers also play psychological warfare with the suspect, saying things like: “I killed my entire family to get in with this group,” “if you lie to us there will be punishments” or pretend to be beating someone up in another room.⁵ Even with all this, the police ask the public to trust their methods, and keep supporting this program by funnelling tax payers’ money in order to catch criminals at any cost.

This questionable policing tactic has been successful in Canada. From 1990 to 2008 the police conducted around 350 MBOs, and in 75% of these operations, the person of interest is either cleared or charged. Of the cases prosecuted, an excess of 95% result in convictions.⁶ There is obvious success and the court is not shutting down the operation, so Canada will continue to use them for the benefit of the police. However, the world has mixed views on the MBO.

International Outlook

Different countries are responding on how to implement MBOs into their arsenal of tactics. Kate Puddister and Troy Riddell note that “England, The United States and Germany, essentially prohibit the use of Mr. Big-style tactics.”⁷ It is not surprising that countries will limit the use of MBOs. Not knowing if a police officer is actually a police officer has harmful effects on society, such as distrust for the system and lack of privacy in the community. On the other hand, places like Australia and New Zealand have embraced MBOs with open arms, noting how

⁴ Charter, *supra* at note 1, ss 7, 24.

⁵ Hart, *supra* note 2. See also Amar Khoday, “Visualizing Interrogative Injustice: Challenging Law Enforcement Narrative of Mr. Big Operations Through Documentary Film” (2016) 5:152 Annual Rev Interdisciplinary Justice Research.

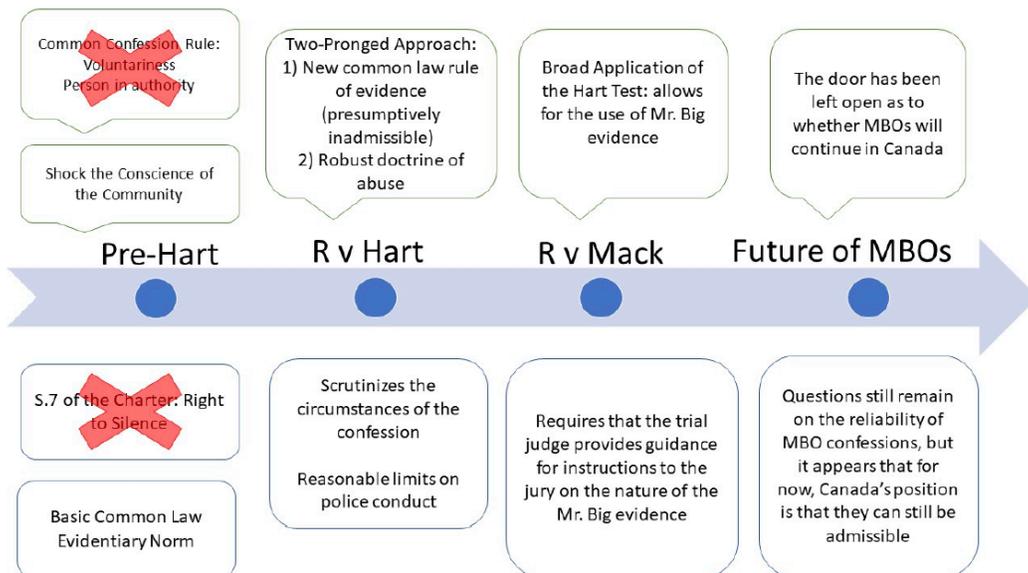
⁶ British Columbia Royal Canadian Mounted Police, “Undercover Operations – Questions and Answers” (lastmodified 14 December 2011), online: Royal Canadian Mounted Police < bc.rcmp-grc.gc.ca/ViewPage.action?siteNodeId=23&languageId=1&contentId=6943> [perma.cc/5E98-AGPA].

⁷ Kate Puddister, “‘Mr. Big’ Sting Used in Tina Fontaine Investigation Has Many Flaws”, Huffington Post (29 March 2018), online: <huffingtonpost.ca> [perma.cc/RJB2-LZBT].

it has led the police to successfully close several cold cases. The New Zealand Crown stated in an article that the Reddy case “would not have been solved if it were not for the technique”.⁸

Conclusion

Although there has been controversy and concern for public safety and welfare, Canada has an important role to play for the future of MBOs. If Canada wants to be known as a leader and advocate for the operation, they will have to tackle the major issues that stem from these kinds of operations. The Court must increase the standard of admissibility from a balance of probabilities, as laid out in *Hart*, to beyond a reasonable doubt. This standard would increase the burden and make the police take extra precautions when they are conducting and planning the operation. Overall, Canada will continue using MBOs because of its historical success.



⁸ Edward Gay, “Mr. Big” scheme used to catch killer”, RNZ (22 June 2016), online: <www.nz.co.nz/news> [<https://perma.cc/8GUV-ZPHU>].