Hart Failure: Assessing the Mr. Big Confessions Framework Five Years Later

CHRISTOPHER LUTES *

> [T]he investigation of crime and the detection of criminals is not a game to be governed by the Marquess of Queens-bury rules. The authorities, in dealing with shrewd and often sophisticated criminals, must sometimes of necessity resort to tricks or other forms of deceit and should not through the rule be hampered in their work.
>
> — Chief Justice Lamer.[1]

> With remarkable ease, the officers quickly and deeply engrained themselves in the respondent's life. By early April, less than two full months into the operation, the respondent told [the undercover officers] that they were like brothers to him and that he loved them — a sentiment he would repeat throughout the rest of the operation. Indeed, the respondent preached that loyalty to this "family" was more important to him than money.
>
> — Justice Moldaver.[2]

ABSTRACT

Five years ago, the Supreme Court of Canada (SCC) changed the law surrounding confessions gleaned from controversial "Mr. Big" Operations (MBOs) — undercover police investigations where the police pose as organized crime members who take an accused person under their wing, befriend them, give them employment, and eventually elicit a confession. In *R v Hart*,[3] the SCC ruled that these confessions were presumptively

* Christopher Lutes is a recent graduate of the University of New Brunswick, Faculty of Law. The author would like to sincerely thank Dr. Nicole O'Byrne and Alicia Yvonne for their comments and guidance on previous drafts, as well as the editors of the Manitoba Law Journal.

1 *R v Rothman*, [1981] 1 SCR 640 at 697, 121 DLR (3d) 578 [*Rothman*].

2 *R v Hart*, 2014 SCC 52 at para 137 [*Hart*].

3 *Ibid* at paras 79, 85–86.

inadmissible and subject to a two-part framework meant to safeguard against coercive police tactics and fill the "legal vacuum" where the legal protections afforded to accused persons in detention did not apply. At the first stage, the judge must weigh the prejudicial effect of the confession against its probative value on a balance of probabilities standard.[4] If the confession is more probative than prejudicial, analysis moves to the second stage to determine whether an abuse of process has occurred.[5]

In the intervening years, it has become apparent that the new framework has not had its intended effect. This article engages in an empirical analysis of post-*Hart* jurisprudence and finds that the admission rate of Mr. Big confessions has actually increased since the framework was implemented. This article's doctrinal analysis reveals that this is indicative of a deeper problem, where increased protections for accused people in detention has led to police circumventing the law and targeting the accused when they are unaware that they are under the thumb of the state.

Keywords: confession; Mr. Big; policing; undercover; abuse of process; reliability; prejudicial effect; legal vacuum

I. INTRODUCTION

Since the early 20th century, it has been a principle of the common law that confessions to the police must be given voluntarily to be admissible as evidence.[6] However, legal developments in the intervening years have resulted in that principle not applying in certain circumstances. Accused persons are given the right to speak or to remain silent, which is entrenched by section 7 of the *Canadian Charter of Rights and*

---

4 *Ibid* at paras 94–110.

5 *Ibid* at paras 111–18.

6 This principle was popularized in *Ibrahim v The King* [1914] AC 599 at 609, [1914-15] All ER Rep [*Ibrahim*], which held "[i]t has long been established... that no statement by an accused is admissible in evidence against him unless it is shewn by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority." There is support for the assertion that the principle is considerably older with Lord Sumner's later assertion that "[t]he principle is as old as Lord Hale." Lord Hale died in 1676. See *Rothman*, *supra* note 1 at 662.

Freedoms.[7] However, this right does not apply when the accused is not in police detention.[8] There is also the common law voluntary confession rule set out in *R v Oickle*,[9] which is meant to ensure the voluntariness of confessions by limiting the use of inducements, oppression, and police trickery. However, this rule only applies when the confession is given to someone that the accused subjectively believes to be a person in authority.[10] Both of these protections are based on the idea that when a person comes under the eye of the state, they become inherently vulnerable to its ability to command resources, potentially undermining the voluntariness of their confession by creating a fear of prejudice or hope of advantage.[11] Yet, the limited scope of these rights has incentivized law enforcement to engage in undercover operations where these protections do not apply.[12] This situation has been recognized as a legal vacuum — a scenario where there is no applicable law to limit state action or guide future triers of fact.[13] These vacuums are dangerous because they give rise to conditions where the police are allowed to operate with unchecked authority and because they give the judiciary no lens through which to analyze this conduct.[14]

Perhaps the most notorious kind of undercover investigation operating in this vacuum is the "Mr. Big" Operation (MBO). These operations involve the police luring someone that they believe has committed a murder into joining a fictitious criminal organization, building their trust, and giving them money to complete work that the accused believes to be criminal in nature. After a few months, the accused will be offered full membership in the organization subject to the approval of its boss, the eponymous Mr. Big. This boss will reveal knowledge that the accused is the suspect in an unsolved murder and place pressure on the accused to confess so that the organization can help make the problem go away. The accused usually confesses. The issues with MBOs are numerous and well-documented,[15]

---

7 s 7, Part I of the *Constitution Act*, 1982, being schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

8 *R v Hebert*, [1990] 2 SCR 151 at 154, [1990] 5 WWR 1 [*Hebert*].

9 2000 SCC 38 [*Oickle*].

10 *Rothman*, *supra* note 1 at 663.

11 *Ibrahim*, *supra* note 6 at 609.

12 *Hart*, *supra* note 2 at para 79.

13 *Ibid.*

14 *Ibid* at paras 78–80.

15 See e.g. 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 348 at 357; Elizabeth Sukkau & Joan Brockman, "Boys, You

from their high cost to the degree of coercion that often accompanies them. However, they also boast remarkably high conviction rates,[16] creating an incentive for police forces to use them in the face of letting someone they believe to be guilty to walk free.

The Supreme Court of Canada (SCC) weighed in on the admissibility of MBOs in *Hart*,[17] after hundreds of these operations had been conducted. The Court recognized that a legal vacuum exists, but explicitly declined to extend the right to silence or voluntary confession rule to undercover operations.[18] Instead, Justice Moldaver, writing for the majority, attempted to fill the vacuum by creating a new framework for determining the admissibility of these confessions.[19] The decision held that confessions gleaned from MBOs were now presumptively inadmissible and subject to a two-part framework to determine if this presumption could be overcome.[20] The first part involves the trier of fact balancing the probative value of the confession against its prejudicial effect.[21] If the probative value outweighs prejudice on a balance of probabilities, the analysis moves to the second part of the framework where the onus switches to the defence to argue that there has been an abuse of process.[22] The confession is excluded if either an

---

Should All Be in Hollywood: Perspectives on the Mr. Big Investigative Technique" (2015) 48:1 UBC L Rev 47; Simon Bronitt, "The Law in Undercover Policing: A Comparative Study of Entrapment and Covert Interviewing in Australia, Canada and Europe" (2004) 33:1 Comm L World Rev 35; David Milward, "Opposing Mr. Big in Principle" (2013) 46:1 UBC L Rev 81; Adriana Poloz, "Motive to Lie? A Critical Look at the 'Mr. Big' Investigative Technique" (2015) 19:2 Can Crim L Rev 231; Kassin et al, "Police-Induced Confessions: Risk Factors and Recommendations" (2010) 34:1 L & Human Behavior 3; Jason MacLean & Frances E Chapman, "Au Revoir, Monsieur Big?: Confessions, Coercion, and the Courts" (2016) 23:2 Crim Reports 1; Amar Khoday, "Scrutinizing Mr. Big: Police Trickery, the Confessions Rule and the Need to Regulate Extra-Custodial Undercover Interrogations" (2013) 60:2 Crim LQ 277; Lisa Dufraimont, "Hart and Mack: New Restraints on Mr. Big and a New Approach to Unreliable Prosecution Evidence" (2015) 71 SCLR (2d) 475; Steve Coughlan, "Threading Together Abuse of Process and Exclusion of Evidence: How it Became Possible to Rebuke Mr. Big" (2015) 71 SCLR 415; Adelina Iftene, "The 'Hart' of the (Mr.) Big Problem" (2016) 63 Crim LQ 151.

16 Sukkau & Brockman, *supra* note 15 at 49.

17 *Supra* note 2 at paras 4, 62.

18 *Ibid* at paras 64, 79, 166, 174–75.

19 *Ibid* at paras 3, 84–90.

20 *Ibid* at paras 84–89.

21 *Ibid* at paras 85–89.

22 *Ibid* at paras 85, 113.

abuse of process is found or if the prejudicial effect outweighs the probative
value.[23]

While this decision appeared to give accused persons relief that was previously denied by the narrow application of the voluntary confession rule and the right to silence, there are issues with the decision's framework and scope that have prevented it from achieving its aim of filling the legal vacuum. Justice Moldaver's decision is unclear as to what is actually problematic about MBOs, contending in one paragraph that the framework is necessary to protect against the unique dangers that confessing to a powerful Mr. Big figure poses,[24] then implying in another paragraph that there does not need to be a Mr. Big figure for the framework to apply.[25] Furthermore, the decision explicitly refuses to extend the scope of the new framework to other kinds of undercover operations, holding that this would be a speculative endeavour,[26] even though non-Mr. Big undercover operations have been used before and since *Hart* was decided. This has resulted in great uncertainty, with some subsequent courts applying the framework against the explicit direction of the Supreme Court and others refusing to apply it by differentiating the facts based on arbitrary distinctions.[27]

Additionally, the *Hart* framework did not create adequate safeguards against the problems that tend to occur in undercover policing. Undercover investigations are premised on the use of state resources to create elaborate scenarios that are meant to lure the accused into a false reality.[28] The intention of these scenarios is not necessarily to determine the truth of what happened, but rather to elicit a confession from someone who is

---

23 *Ibid* at paras 85–89.

24 *Ibid* at paras 66–68.

25 *Ibid* at para 85.

26 *Ibid* at para 85. See footnote 5 of the decision.

27 See e.g. *R v Sharples*, 2015 ONSC 4410 [*Sharples*] and where the *Hart* framework was applied in the context of a one-on-one friendship struck between an undercover officer and the accused that involved no illegal activity, and *R v Amin*, 2019 ONSC 3059 [*Amin*], where the undercover operation involved the forging of an ostensibly legitimate business venture. Conversely, see *R v Nuttall*, 2014 BCSC 1404 where the police recruited the defendants into a fictitious terrorist enterprise bearing many similarities a MBO. Despite these similarities being recognized by Bruce J., she did not apply the *Hart* framework.

28 *Supra* note 2 at para 172.

presumptively innocent.[29] Psychological literature is clear that people are highly susceptible to the power of suggestion, meaning the creation of a fabricated reality around the accused can give rise to the concern that a confession was not entirely given of the accused's own volition.[30] The Court recognized these facts to a certain extent in *Hart* but failed to adopt a standard strict enough to prevent coerced confessions. This article will argue that the Court in *Hart* made the mistake of focusing on the symptoms of unreliable undercover confessions rather than the underlying condition of police coercion and rights avoidance.

These issues of scope and coercion have largely gone unrecognized in the academic scholarship subsequent to *Hart*. There has heretofore been no real analysis of whether *Hart* has actually changed police behaviour or made it more difficult for coerced confessions to be admitted as evidence. This article shall endeavour to rectify this gap in knowledge by determining the depth and breadth of the issues that the case has created or failed to resolve. To achieve that aim, this article engaged in an empirical analysis of the undercover confessions that have relied on *Hart* as precedent. This article analyzed every case that cited *Hart* and involved an undercover confession, resulting in a total of 42 adjudications of admissibility under the new framework. These results include decisions at the *voir dire* threshold admissibility stage, trial-level determinations of guilt, and appellate reviews. The empirical analysis reveals that despite *Hart's* assertion that it places greater strictures on police behaviour and helps prevent the admission of unreliable confessions, the admission rate of Mr. Big confessions has actually increased in the years since the framework was implemented.

Regarding other kinds of undercover operations, the analysis shows that there has been little consistency in the application of the *Hart* framework to non-MBO undercover confessions. Some cases applied it completely, some refused to apply it outright, and others used some, but not all, of the elements of the framework. This is indicative of a lack of foresight on the part of the SCC, who neglected to implement any sort of test to determine whether the facts of a non-MBO undercover confession warrant extending the framework's applicability.

---

29 *Ibid* at paras 10, 140.

30 Steven M Smith, Veronica Stinson & Marc W Perry, "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 181–82.

This article will first examine why MBOs and other undercover operations are an attractive tool for law enforcement, revealing why they continue to be used and highlighting some of their inherent dangers. It will then go into detail on the framework created by *Hart* and engage in a qualitative analysis of how the decision has affected the use of undercover operations. It will conclude that the decision fails to coherently define the framework's scope, leading to inconsistent jurisprudence in both MBOs and non-MBO undercover operations. It will also find that the decision does not adequately account for the coercion and manipulation inherent to these operations, which has the potential to decrease the voluntariness of the confessions gleaned from them. Finally, this article will engage in a doctrinal and empirical analysis of each constituent part of the *Hart* framework and show that the purported ameliorative effects of the framework have been largely illusory. These findings lead to the conclusion that something more proactive is needed to adequately protect the voluntariness of confessions and curb the use of highly coercive, and sometimes violent, police practices.

II. The Motive Behind Undercover Investigations and MBOs

A. What is a MBO?

A MBO is a kind of undercover investigation that is used when traditional investigative methods have failed.[31] MBOs are typically deployed in murder cases where police have determined that they do not have an adequate amount of evidence to find the accused guilty beyond a reasonable doubt. Law enforcement began to use these operations in the 1990s, parallel to *Charter* jurisprudence creating additional voluntariness and reliability safeguards that apply when an accused is in detention.[32] Their use has also spread to Australia and New Zealand, but they originated in Canada.[33]

MBOs can begin at any time, from when the case first goes cold to multiple years after the purported crime occurred. They begin with an officer or officers befriending the accused in a meeting that is supposed to

---

31 *Ibid* at para 1.

32 Bronitt, *supra* note 15 at 36; Iftene, *supra* note 15 at 151.

33 John Anderson & Brendon Murphy, "Confessions to Mr. Big: A New Rule of Evidence?" (2016) 20:1 Intl J Evidence & Proof 29 at 40–41.

appear spontaneous to allay suspicion. This is known as "the bump".[34] This initial meeting may or may not involve an element of criminality. For instance, in *R v Shaw*,[35] the undercover officer posed as a detainee in a jail lockup with the accused. Other cases have a more innocuous initial meeting, like in *R v Caissie*[36] where the accused won a fictitious contest to see an NHL game and the undercover officers posed as co-winners.[37]

The accused meets with the undercover officers on multiple occasions, with each occasion being referred to as a "scenario" in police parlance.[38] After a certain level of trust has been established, the officer will slowly reveal that they are a member of a criminal organization. They recruit the accused into completing a series of low-level tasks for their organization, offering "a pathway to financial rewards and close friendships."[39] This charade continues for a few months as the accused gets promoted through the ranks of the fictitious organization, receives increasing cash payouts for completing work, and sometimes gets treated to a lavish lifestyle involving fine dining, trips to strip clubs, and stays in expensive hotels.[40] They are also sometimes exposed to the lengths that the organization is willing to go to achieve its aims, including the use of fake kidnappings and mock executions.[41]

After the accused has sufficiently climbed the ladder, the undercover officer will ask them if they are interested in becoming a full-fledged member of the organization. However, induction comes with a catch. Membership is subject to the approval of the head of the organization, the eponymous "Mr. Big," who is portrayed by another undercover officer. In the meeting with Mr. Big, the accused is told that their membership application has hit a snag — the organization has a corrupt police officer on their payroll, and they were able to discover that the police are investigating the accused for an unsolved murder. However, the organization has a solution: Mr. Big has a relative who is dying of a terminal disease and is

---

34 See e.g. *R v Moir*, 2016 BCSC 1720 at para 253; *R v RK*, 2016 BCSC 552 at para 40.

35 2017 NLTD(G) 87 at para 8 [*Shaw*].

36 2018 SKQB 279 [*Caissie*].

37 *Ibid* at paras 107, 109.

38 See e.g. *Hart*, *supra* note 2 at para 133.

39 *Ibid* at para 1.

40 See e.g. *Caissie*, *supra* note 36 at para 328; *R v Ledesma*, 2017 ABCA 131 at para 37 [*Ledesma*].

41 See e.g. *R v M(M)*, 2015 ABQB 692 at paras 30–34 [*M(M)*]; *R v Randle*, 2016 BCCA 125 at para 4 [*Randle*].

willing to confess to the crime. All that the accused must do is provide as much detail as possible about how and why they committed the crime. An alternative method involves the accused being goaded into confessing to the crime as an illustration of their criminal fortitude. This method, however, has been viewed with more scrutiny by the courts. Either way, if the accused confesses, the veil soon drops and they are arrested, tried, and likely found guilty.[42]

MBOs are just one subset of a wider range of undercover operations that are available for the police to use. The outline given above is quite specific and not all operations that are labelled as MBOs by the courts unfold in that way. For instance, some MBOs involve the accused confessing even before the Mr. Big character enters the operation.[43] Others involve ostensibly legitimate operations — for instance, opening a hookah bar together[44] — and the subject of crime is brought up through conversation. The forms that these investigative techniques can take are infinite. This will be addressed later in the paper to illustrate that the framework created by the Supreme Court in *Hart* is only meant to apply to one specific type of operation, creating issues when it is extended to non-MBO undercover operations with facts not contemplated by the framework.

B. Why are MBOs Used?

The continued use of MBOs and undercover investigations is the result of multiple intersecting factors. First, they typically occur as a sort of "Hail Mary" attempt when typical methods of investigation have been exhausted or there is not enough evidence to bring charges against the accused. Often, the accused was detained in the conventional manner and questioned by police but did not confess. In these cases, the police are faced with the option of either letting someone that they believe to be guilty to walk free or resorting to methods that fall outside of the traditional police investigation paradigm. The police usually believe that the accused is factually guilty[45] and thus consider launching an MBO as the best way to ensure that justice is served.

This is in part because many of the confessions elicited through MBOs are bolstered by evidence that would seemingly not be known to a person

---

42 *Hart*, *supra*, note 2 at paras 56–62.

43 See e.g. *R v Lee*, 2018 ONSC 308; *R v Potter*, 2019 NLSC 8 [*Potter*].

44 *Amin*, *supra* note 27 at para 7.

45 Despite the fact that the accused is legally innocent until proven otherwise.

who did not commit the crime. This includes so-called "holdback evidence" — evidence that the police do not disclose to the public with the idea that a suspect who conveys knowledge of its existence must have been involved in the crime. The probative value of this kind of evidence is often overstated, as holdback evidence can be transmitted to the accused via prior interactions with the police. This can create the erroneous perception that the accused has implicated themselves by corroborating the existence of the evidence.[46] There is also proof that this kind of evidence is accepted by courts, despite inconsistencies between it and the accused's confession.[47] Nevertheless, this kind of evidence has the patina of reliability and its presence in prior MBO confessions creates a justification for future MBO use, absent any judicial scrutiny.

This justification is bolstered by the apparently overwhelming legal success of MBOs. In a set of self-reported statistics, the RCMP has held that MBOs have a confession rate of 75% and a conviction rate of 95%.[48] Academic studies conducted prior to *Hart* contend that the conviction rate is lower than that, but not by much. One study of 81 MBO confessions yielded an 88% conviction rate[49] and another study of 153 MBO cases found a 91.5% conviction rate.[50] With these numbers, it is easy to see why these kinds of investigations are so favoured by law enforcement, especially considering the alternative of not pursuing the suspect.

Finally, there is the contention that police engage in undercover operations because it allows them to circumvent established *Charter* rights and common law doctrine that are meant to protect people accused of a crime.[51] Until *Hart*, undercover confessions took place in a legal vacuum where two such protections — the section 7 *Charter* right to silence and the voluntary confession rule — did not apply. This created a set of circumstances where the police were subject to fewer restrictions when they

---

46 Kent Roach, "Wrongful Convictions in Canada" (2012) 80:4 U Cin L Rev 1465 at 1507.

47 See e.g. *Caissie*, *supra* note 36 at paras 402–03; *R v Kelly*, 2017 ONCA 621 at paras 41–43 [*Kelly*]; *R v Johnston*, 2016 BCCA 3 at para 68 [*Johnston*].

48 Poloz, *supra* note 15 at 237.

49 Sukkau & Brockman, *supra* note 15 at 49.

50 *Ibid*.

51 See e.g. Iftene, *supra* note 15 at 168, where the author argues that in employing MBOs "the state is virtually taking control of one's life, takes advantage of his greed or addictions, and uses them to obtain indirectly what it is forbidden by law to obtain directly." See also Khoday, *supra* note 15 at 278.

covertly investigated a suspect than when the suspect was in custody.[52] This lack of restrictions reified the appropriateness of these techniques and created a police culture that legitimized the use of highly intrusive undercover operations.[53] By not filling the legal vacuum, courts neglected to recognize the underlying issue with these kinds of investigations; the fact that they give the state the opportunity to take control of a person's life and exploit their weaknesses in environments that are free from any external scrutiny.[54] The inapplicability of the voluntary confession rule and the right to silence warrants further analysis in order to illuminate the arbitrary nature of their inapplicability to MBOs.

The voluntary confession rule is used with the understanding that inculpatory statements made by an accused may be rendered involuntarily due to the presence of threats or inducements made to "persons in authority".[55] Pre-*Hart* attempts to exclude undercover confessions on these grounds are numerous, but all of them have failed. This is because *Rothman*[56] limited the scope of who could be considered a person in authority. The case imparted a subjective test on the person in authority requirement, meaning that, for voluntariness to be an issue, the accused must have believed that the person they were speaking to was a person in authority.[57] This means that undercover officers are not subject to the rule, precluding its application. This was explicitly confirmed by the Supreme Court in *R v Grandinetti*.[58] For MBOs, the unavailability of the rule is significant because it protects accused persons from several of the factors inherent to those operations that could overbear the accused's will.

Formulated by Justice Iacobucci for the majority in *Oickle*, the rule holds that some kinds of threats and promises made to the accused are capable of rendering a confession involuntary.[59] While the Court appears to be most concerned with the kinds of threats or promises that could be made by persons in authority and believed by the accused — for instance, the threat of increased penal punishment or the promise of a lenient sentence — the decision contemplates other kinds of inducements that

---

52 Bronitt, *supra* note 15 at 36.
53 Poloz, *supra* note 15 at 236.
54 Iftene, *supra* note 15 at 168.
55 *Oickle*, *supra* note 9 at para 24.
56 *Supra* note 1.
57 *Ibid* at 641.
58 2005 SCC 5 [*Grandinetti*].
59 *Oickle*, *supra* note 9 at paras 47–57.

would also fall afoul of this rule.[60] Some of the inducements contemplated are omnipresent in MBOs and would likely have a severe negative impact on the voluntariness of the confession if the rule was extended. For example, most Mr. Big confessions come in the wake a promise of full-fledged membership in the organization, which in turn comes with a promise of financial reward.[61] This kind of *quid pro quo* arrangement is exactly what is warned of in *Oickle*[62] and it would likely contravene the rule given the assertion in that case that inducements can be very subtle and nuanced, yet still render a confession involuntary.[63]

Even more relevant to MBOs is that the confession rule also prohibits the use of police trickery that would shock the conscience of the community.[64] This prong of the rule is more focused on preserving the integrity of the justice system than voluntariness. Justice Iacobucci cites two examples of what might rise to this standard, holding that "a police officer pretending to be a chaplain or a legal aid lawyer, or injecting truth serum into a diabetic under the pretense that it was insulin" would shock the conscience of the community.[65] The former example is especially relevant in the context of MBOs where police officers assume false identities to deceive the accused for months at a time, intending to elicit a confession. While the standard for a judicial finding of community shock is incredibly high[66] and the test's origins do not offer guidance as to what would and would not shock the community,[67] it is clear that the ambit of the voluntary confession rule applies to authorities disguising themselves to elicit a

---

60 *Ibid* at paras 48–57.

61 See e.g. *Caissie*, *supra* note 36 at para 353; *R v Buckley*, 2018 NSSC 1 at para 76 [*Buckley*]; *R v Wruck*, 2016 ABQB 370 at paras 31, 33 [*Wruck*].

62 *Supra* note 9 at para 57. Justice Iacobucci holds that "[t]he most important consideration in all cases is to look for a *quid pro quo* offer by interrogators, regardless of whether it comes in the form of a threat or a promise."

63 *Ibid* at paras 53–54.

64 *Ibid* at paras 65–66.

65 *Ibid* at para 66.

66 Khoday, *supra* note 15 at 281.

67 The test was formulated in *Rothman*, *supra* note 1 and refined in *R v Collins*, [1987] 1 SCR 265, 15 WCB (2d) 387 [*Collins*] before becoming situated within the voluntary confession rule. None of those cases speculate about what would shock the community's conscience beyond Chief Justice Lamer in *Rothman*, *supra* note 1 at 697 that "generally speaking, pretending to be a hard drug addict to break a drug ring would not shock the community". There is no elaboration regarding what qualities of imitating a chaplain or lawyer would shock the community or what part of pretending to be a drug addict would not.

confession in some circumstances, but not others. This highlights the arbitrary nature of the person in authority requirement and reifies the fact that MBOs were conducted in a legal vacuum prior to *Hart*.

The section 7 right to silence is not subject to the person in authority requirement, but it also does not apply to MBOs. The right is meant to protect the accused from self-incriminating, but it does not apply in situations where the accused is not in detention.[68] The failure to extend this right to undercover investigations contravenes the underlying reason behind the right for two reasons. First, the purpose of the right is to "prevent the use of state power to subvert the right of an accused to choose whether or not to speak to authorities."[69] This concern still exists regardless of whether the accused is knowingly in the custody of the police. In fact, the concern is arguably greater when undercover officers are involved because it suggests that the officers are attempting to obtain indirectly what they could not obtain directly.[70] This is supported by the emergence of the MBO in the 1990s occurring simultaneously with the bolstering of procedural rights for accused persons. The second reason is that the use of police subterfuge to trick the accused into waiving their right to silence would be legally considered a violation of their right to silence if the accused was in detention.[71] The only functional difference between these kinds of cases and undercover investigations is that the accused does not subjectively believe themselves to be detained in the latter scenario, which is not supposed to be relevant to a right to silence analysis.[72]

III. *R v Hart*

A. The *Hart* Framework

Despite the myriad convictions that have been attained by using MBOs, legal scholars and practitioners have raised concerns about their continued deployment. These concerns culminated in *Hart*,[73] which was the first time

---

68 *Hebert*, *supra* note 8 at 154.

69 Bronitt, *supra* note 15 at 67.

70 Iftene, *supra* note 15 at 195. This is especially true in the context of MBOs where the accused is often unsuccessfully questioned by the police before the operation is deployed.

71 *Hebert*, *supra* note 8 at 154. This can occur when an officer poses as a cellmate when the accused is in custody.

72 *Ibid* at 155–56, 164, 167–68.

73 *Supra* note 2.

that the Supreme Court ruled on the general admissibility of Mr. Big confessions. The case involved Nelson Hart, a Newfoundlander who was accused of drowning his two infant daughters.[74] Unable to find sufficient evidence to convict him, the police formulated a MBO that drew him into a fictional world of crime where he was given everything he did not have in his actual life: financial security, social acceptance, and friendship.[75] Over the span of a four-month operation, he was paid over $15,000 for his work.[76] He confessed only after the Mr. Big figure repeatedly prodded him and suggested that he was lying about the claim that his daughters' deaths were an accident.[77]

At the Supreme Court, Justice Moldaver found that Mr. Big confessions give rise to a triad of concerns: 1) the potential that the confession will be unreliable due to the threats and inducements present in MBOs[78] 2) the concern that triers of fact will hold prejudice against the accused for their willingness to participate in crimes they believed to be real[79] and 3) the "risk that the police will resort to unacceptable tactics in their pursuit of a confession."[80] In response, the Court held that Mr. Big confessions were now presumptively inadmissible and subject to a *voir dire* where a two-prong test would be applied.[81] The first prong engages in a balancing of probative value against prejudicial effect.[82] The presumptive inadmissibility means that the Crown bears the burden of showing that the former outweighs the latter.[83] The probative value of a confession is assessed in terms of its overall reliability, which is determined by how closely its contents align with objective, ascertainable facts.[84] *Hart* sets out a two-step process for determining the reliability of the accused's confession, including factors such as the length of the operation, the circumstances of the confession, and the presence of threats or inducements.[85] The second part of the reliability analysis looks to evidence that might confirm the veracity of the

---

74 *Ibid* at para 16.
75 *Ibid* at paras 22–28, 68.
76 *Ibid* at para 38. The operation as a whole cost $413,268.
77 *Ibid* at paras 34–35.
78 *Ibid* at paras 68–78.
79 *Ibid* at paras 73–77.
80 *Ibid* at para 78.
81 *Ibid* at paras 85, 89.
82 *Ibid* at para 108.
83 *Ibid* at paras 89, 108.
84 *Ibid* at paras 99–100.
85 *Ibid* at para 102.

confession itself, like the presence of factual details not already known by the public or whether any additional evidence is discovered.[86]

After the probative value is analyzed, the inquiry moves to determining the degree to which the MBO has prejudiced the accused.[87] Under the *Hart* framework, prejudice is limited to a concern for bad character evidence being admitted.[88] This stems from the fact that during the operation, the accused commits acts that he or she believes to be criminal.[89] Based on these acts, there is a risk that the trier of fact will engage in reasoning prejudice, which is the belief that because the accused was willing to participate in criminal acts, they are also guilty of the crime with which they are charged.[90] The court is also concerned with moral prejudice, which is the risk that the trier of fact will believe that the accused should be punished for the bad acts that they committed as part of the operation, regardless of their guilt in the crime for which they have been arrested.[91]

Once probative value and prejudicial effect are determined, the trier of fact must weigh them against each other. If the prejudicial effect outweighs the probative value, the analysis stops there, and the confession is excluded. However, if the probative value prevails, the analysis moves to the next prong. Justice Moldaver acknowledged that comparing these factors will never be an exact science.[92] To this point, he recognized that probative value and prejudicial effect are fundamentally concerned with different aspects of the law. Probative value is an evidentiary concept that concerns the degree to which something can be factually proven, whereas prejudicial effect is fundamentally concerned with the fairness of the trial.[93] This has the potential to invite trial judges to place more emphasis on the factor they believe to be more important, especially when this kind of analysis is highly discretionary and typically afforded great deference by appellate courts.[94]

The second prong of the test involves analyzing whether there was police misconduct in the operation that led to an abuse of process.[95] The

---

86 *Ibid* at para 105.
87 *Ibid* at para 85.
88 *Ibid*.
89 *Ibid* at para 73.
90 *Ibid* at paras 74, 106.
91 *Ibid*.
92 *Ibid* at para 109.
93 *Ibid*.
94 *Ibid* at para 110.
95 *Ibid* at para 86.

burden of proof is on the accused to show that there was state conduct that society would find unacceptable and which threatens the integrity of the justice system.[96] Working in the accused's favour is the fact that *Hart* built off of the then-recent case of *R v Babos*.[97] *Babos* fortified the residual category of the abuse of process doctrine pertaining to state conduct that risks undermining the integrity of the judicial process.[98] The Court in *Hart* purported to recognize this more robust understanding of the doctrine,[99] holding that the presence of coercion on the part of the police in obtaining the confession would likely amount to an abuse of process.[100] However, Justice Moldaver, in *Hart*, also recognized that the doctrine has provided little protection in the context of MBOs.[101] This is still the case. Since *Hart* was decided, only one Mr. Big confession has been excluded because of an abuse of process.[102] The only cases where it seems to be relevant is when the undercover officers use actual or simulated violence during the operation.[103] If the police conduct is determined to be an abuse of process, then the confession is excluded and it is up to the state to determine whether they want to proceed.

Before addressing the problems inherent to the framework, it is important to note that the decision has created much uncertainty regarding undercover police investigations that do not fit the specific definition of MBOs. *Hart* definitively closed the door on the use of certain types of defences or grounds for excluding confessions derived from undercover stings, either by situating them within the confines of the *Hart* test or by explicitly ruling that they are not applicable to undercover confessions at all.[104] These grounds include invoking the *Charter* section 7 right to silence,[105] the voluntary confession rule, the abuse of process doctrine by itself, the hearsay rule, and the judicial gatekeeper discretionary analysis.[106]

---

96 *Ibid* at paras 89, 113.

97 2014 SCC 16 [*Babos*]. The majority decision in this case was also penned by Justice Moldaver.

98 *Ibid* at para 31.

99 *Supra* note 2 at para 84.

100 *Ibid* at para 115.

101 *Ibid* at para 114.

102 *R c Laflamme*, 2015 QCCA 1517 [*Laflamme*].

103 *Ibid* at para 56; *Supra* note 2 at para 116.

104 *Supra* note 2 at paras 64–65.

105 *Charter*, *supra* note 7, s 7. Though the right to silence is not actually part of the *Charter* text, it has subsequently been read in as a principle of fundamental justice.

106 Moore, Copeland & Schuller, *supra* note 15 at 357–76.

In the absence of any coherent guidance on what cases do and do not necessitate the application of the *Hart* framework, it is unclear whether these remedies are still available to non-Mr. Big undercover operations or whether they too have been subsumed by *Hart*.

B. Categorization Problems

One notable impact that *Hart* has had on the general admissibility of undercover confessions was that it unintentionally created a morass of categorization and application problems. These problems are apparent in the *Hart* decision itself, which boasts numerous internal contradictions regarding whether the framework should apply solely to MBOs or other kinds of undercover investigations as well. These contradictions become fully cognizable in the subsequent jurisprudence, which tends to make this determination based on meaningless distinctions that fail to consider the reasons why the framework exists in the first place.

In *Hart*, the most direct analysis of the new framework's scope comes from a footnote:

> This rule targets Mr. Big operations in their present form. A change in the way the police use undercover operations to elicit confessions may escape the scope of this rule. However, it is not for this Court to anticipate potential developments in policing. To do so would be speculative. Time will tell whether, in a future case, the principles that underlie this rule warrant extending its application to another context.[107]

This is problematic for three reasons. First, it erroneously implies that MBOs are the only kind of undercover operation that the police use, and that the use of non-Mr. Big undercover operations is 'speculative' and best left for future courts to adjudicate. Second, it sends a signal to future judges that other kinds of undercover operations are not subject to the rule. This has the potential to misguide judges, making them look at the surface-level facts of whether there was a fictitious criminal organization with a "Mr. Big" involved rather than the principles that decrease the reliability and voluntariness of confessions. Finally, it leaves an opportunity for police officers to slightly alter the design of their operations to avoid the scrutiny of the framework. This does little to address the legal vacuum that the *Hart* framework was supposed to fill.

These problems are compounded by the fact that Justice Moldaver contradicts the above assertion several times throughout his decision. He

---

[107] *Hart*, *supra* note 2 at para 85. See footnote 5.

holds that the framework should apply when "the state recruits an accused into a fictitious criminal organization of its own making and seeks to elicit a confession from him."[108] This categorization is a broader understanding of a typical MBO and widens the scope of the framework's application beyond MBOs "in their present form".[109] Under this conception, there is no Mr. Big required for the framework to apply. This contradicts the decision's later assertion that the framework is necessary because confessions to a Mr. Big figure present unique dangers.[110] However, this assertion is once again contradicted by the fact that Justice Moldaver uses the framework to exclude all of the three confessions that Hart made, which included a confession to undercover officers who were not playing the Mr. Big role.[111] This raises the question of whether the framework is appropriate in circumstances when the only confession is to a non-Mr. Big undercover officer or when there is no Mr. Big at all.

Despite the Court's noncommittal stance, subsequent judges have frequently applied the *Hart* framework to undercover operations where they believe it is warranted, from low-level one-on-one relationships with undercover officers[112] to operations that are very similar to MBOs but different enough to fall outside of *Hart*'s scope.[113] This is perhaps a reflection of the fact that undercover operations take many different forms and applying the framework to non-MBO undercover confessions is a suitable alternative to not analyzing their admissibility at all. Nevertheless, the test has been extended despite the absence of legislation or appellate court guidance on their applicability outside of Justice Moldaver's footnote. Due to the tentative way that the doctrine was extended, no constituent test was developed to determine whether an undercover operation is factually similar enough to a MBO to warrant the application of the *Hart* test.[114]

The test has been applied to undercover operations that are quite far from *Hart* in terms of the level of deception involved. Emblematic of this is *Sharples*[115] where the police believed that the accused had murdered his girlfriend. Sharples made prejudicial statements in the course of a

---

108 *Ibid* at para 10.
109 *Ibid* at para 5.
110 *Ibid* at paras 66–67.
111 *Ibid* at paras 13, 24, 29, 147.
112 *Supra* note 27.
113 *R v Ader*, 2017 ONSC 4584 at paras 56–63 [*Ader*].
114 *Hart*, *supra* note 2 at para 219.
115 *Supra* note 27.

friendship with an undercover officer.[116] The two met on numerous occasions and the officer confided that he was having issues with a fictional girlfriend to get Sharples to offer relevant information about the death.[117] Sharples suggested multiple detailed ways that the officer could "get rid of" his girlfriend but he did not actually confess.[118] Despite this lack of a confession and the absence of anything resembling a MBO, Justice Henderson applied the *Hart* test on a *voir dire* and declined to admit these statements.[119] He held that the statements had little probative value because they were unreliable.[120] Specifically, Sharples' girlfriend did not die in any of the ways that he mentioned and the statements were inconsistent with the relevant forensic evidence.[121] On the other hand, the statements he made were highly prejudicial, considering the gruesome detail he went into.[122] Excluding the statements on the first prong of the *Hart* test, Henderson did not analyze the second prong.[123]

Representative of the other end of the spectrum was *R v Zvolensky*[124] where the undercover operation was based on elaborate deception but was not classified as a MBO. Zvolensky and his two co-accused were suspects in the murder of one of the co-accused's wife.[125] An undercover officer befriended all three of the suspects and concocted a plan to buy a travel canoe company together.[126] The undercover officer offered to pay the up-front costs and drew up a detailed business plans to further the ruse.[127] Over the span of their communications, the officer claimed to be having trouble with his wife, which escalated to a point where one of the co-accused offered the services of all three to kill the fictional wife.[128] After the accused made this offer, the undercover officer asked how they could be trusted.[129] One

---

116 *Ibid* at paras 8–14, 18.
117 *Ibid* at paras 8–14, 20.
118 *Ibid* at paras 20–30.
119 *Ibid* at paras 38–63.
120 *Ibid*.
121 *Ibid* at paras 44–53.
122 *Ibid* at paras 55–57.
123 *Ibid* at para 63.
124 2017 ONCA 273 [*Zvolensky*].
125 *Ibid* at para 1.
126 *Ibid* at paras 37–41.
127 *Ibid* at paras 40–41.
128 *Ibid* at paras 37–65.
129 *Ibid* at para 16.

of the co-accused answered by offering details of the murder which implicated all three of them.[130]

After the statements were admitted at trial, Justice Pardu on appeal chose to affirm their initial admission, applying the *Hart* framework despite acknowledging that the investigation was nothing like a MBO.[131] She ruled that the reliability of the confession was high because it resulted in evidence of the murder being discovered.[132] She also affirmed the trial judge's decision to edit out the parts of the evidence that were prejudicial to the accused and did not have an impact on the confession.[133] Justice Pardu ruled that there was no abuse of process, but did not give any reasons as to why.[134]

In the post-*Hart* case *Kelly*,[135] the Ontario Court of Appeal provided a principled way of determining whether *Hart* is applicable. The Court in *Kelly* held that when the three danger factors from *Hart* (unreliable confessions, prejudice to the accused, and police misconduct) could be at play in an undercover investigation leading to a confession, the *Hart* test should be applied.[136] Since the case is relatively recent, it is difficult to determine the extent to which it will become embedded in the jurisprudence. But the model it proposes is valuable because it reflects a principled method of analyzing whether an undercover operation should be subject to the *Hart* framework, rather than one based on mere factual similarity. In the absence of Supreme Court guidance on these edge cases, judges have recognized that confessions attained through undercover investigations are inherently problematic and are thus likely to apply a framework that recognizes this fact, even if it was not explicitly designed to be extended in this manner.

C. Psychological Consequences of Undercover Operations

The *Hart* framework also largely fails to address the psychological implications of being the target of an undercover police investigation. While the Supreme Court cites the leading scholarly article on false confessions,[137]

---

130 *Ibid* at paras 51–65.
131 *Ibid* at paras 74–93.
132 *Ibid* at para 86.
133 *Ibid* at paras 97–98.
134 *Ibid* at para 78.
135 *Supra* note 47.
136 *Ibid* at paras 35–36.
137 Kassin et al, *supra* note 15.

it does not go into any detail on the actual findings or meta-analysis of the report. The report reveals that the human psyche can be incredibly malleable in the face of psychological tactics used by officers in eliciting a confession.[138] Situations involving deception are by definition manipulative and have the ability to falsely alter people's perceptions, beliefs, and behaviours.[139] Kassin et al. contend that humans are inherently social beings who are "highly vulnerable to influence from change agents who seek their compliance."[140]

This is compounded in circumstances where the accused is particularly young or suffers from a mental disorder.[141] These factors show that the Supreme Court's concerns about the voluntariness of confessions in *Oickle*[142] are still relevant even when the accused does not have a subjective belief that they are speaking to a person in authority. Mr. Big figures and other members of the fictional criminal organization are not considered persons in authority in the way the jurisprudence has developed,[143] but they are often still perceived as authority figures to the accused. Despite the inability to hold out state-sanctioned threats or inducements that would render a confession involuntary, they are still legally able to implicitly threaten the accused, as well as offer inducements,[144] which can include

---

138 *Ibid* at 12.

139 *Ibid* at 17: "Over the years, across a range of sub-disciplines, basic research has revealed that misinformation renders people vulnerable to manipulation. To cite but a few highly recognized classics in the field, experiments have shown that presentations of false information--via confederates, witnesses, counterfeit test results, bogus norms, false physiological feedback, and the like--can substantially alter subjects' visual judgments (Asch, 1956; Sherif, 1936), beliefs (Anderson, Lepper, & Ross, 1980), perceptions of other people (Tajfel, Billig, Bundy, & Flament, 1971), behaviors toward other people (Rosenthal & Jacobson, 1968), emotional states (Schachter & Singer, 1962), physical attraction (Valins, 1966), self-assessments (Crocker, Voelkl, Testa, & Major, 1991), memories for observed and experienced events (Loftus, 2005), and even certain medical outcomes, as seen in studies of the placebo effect (Brown, 1998; Price, Finniss, & Benedetti, 2008)."

140 *Ibid* at 15.

141 *Ibid* at 19.

142 *Supra* note 9.

143 *R v Hodgson*, [1998] 2 SCR 449 at para 16, 163 DLR (4th) 577. A person in authority is "anyone formally engaged in the arrest, detention, examination or prosecution of the accused".

144 *Oickle*, *supra* note 9 at paras 48–57.

promises of money and social status.[145] This has the potential to undermine a confession's voluntariness and convince the accused to act against their own interest in a situation where they are unaware of their legal jeopardy.

Another factor relevant to the psychological state of the accused is the circumstances surrounding the crime they are accused of committing. Many of the targets of undercover investigations were first arrested and subsequently released. The social stigma that surrounds being a murder suspect has the potential to render an accused both socially and economically vulnerable.[146] The perception of criminality can limit a person's options for legitimate employment and increase the likelihood that they will join the fictitious criminal enterprise that the police create.[147] This "alienation of the suspects from the real world and their submergence into a fictive, rotten one"[148] can have a negative effect on the accused's psyche, especially considering that one necessary purpose of these investigations is to create a relationship of dependence between the accused and the undercover officers.[149]

IV. Doctrinal and Empirical Analyses

This article will now consider each of the elements of the *Hart* framework and examine them through the lens of their ability to account for the inherent rights tensions in both MBOs and undercover operations more generally.

A. Methodology

The intention of this research was to determine how the *Hart* framework has affected the admissibility of not just Mr. Big confessions, but confessions to undercover officers more generally. To achieve this aim, this article restricted the cases analyzed to those that have specifically cited *Hart*. The online case reporter that revealed the greatest number of cases citing *Hart* was Westlaw Next Canada, which listed 196 total cases. From there, the number was narrowed down further by manually analyzing each of the

---

145 See e.g. *Shaw*, *supra* note 35 at para 41; *Caissie*, supra note 36 at paras 353–55; *Wruck*, *supra* note 61 at para 18.

146 Khoday, *supra* note 15 at 284–85.

147 *Ibid.*

148 Iftene, *supra* note 15 at 157.

149 *Ibid.*

cases to determine whether they assessed the admissibility of a confession to an undercover officer. Most of them did not.

Any proceedings that were not undercover confession *voir dires*, trial decisions, or appellate decisions were discarded. Proceedings like bail applications, sentencing reasons, and disclosure applications were all excluded. Furthermore, cases were excluded from the final analysis where the confession was made to someone that the accused believed to be an officer or if the accused was knowingly in detention. Those circumstances are beyond the scope of this article. After excluding everything that was not relevant, 42 decisions remained. These decisions were sub-divided by subject matter, separating MBO confessions from non-MBO undercover confessions.[150] There were 30 total MBOs analyzed and nine non-Mr. Big confessions. Each of these decisions were analyzed and the following variables were tracked:

- Whether the presumption of inadmissibility was applied;
- Whether the probative value outweighed the prejudicial effect;
- Whether an abuse of process was found; and
- Whether the confession was excluded as evidence.

There are two primary limitations to this methodology, both of which stem from restricting the cases examined to those that cite *Hart*. The first is that there may be cases involving an undercover confession that did not cite *Hart*. This is potentially problematic since *Hart* explicitly limits its framework to MBOs.[151] However, courts have repeatedly applied the framework to non-MBO undercover confessions, meaning that the scope of this article is able to show the effect that *Hart* has had on those undercover confessions. The second limitation is that there was no empirical analysis of the admissibility of undercover confessions prior to *Hart*. This somewhat limits the ability to make conclusions about whether *Hart* has increased or decreased the rate at which undercover confessions are admitted. However, the fact that Justice Moldaver recognized that these operations "are conducted in a legal vacuum"[152] implies that many of them were admitted

---

150 The categorization problems mentioned in the above section make it somewhat difficult to determine what exactly the Supreme Court intended to be counted as an MBO. In the analysis, any operation where the accused confessed to a member of a fictitious criminal organization was counted.

151 *Hart*, *supra* note 2 at paras 84–85.

152 *Ibid* at para 79.

without scrutiny. Furthermore, there is scholarship that has tracked the prior admission of Mr. Big confessions, serving as a valid means of comparison. This article will now proceed to analyze the four elements of the *Hart* framework through both a doctrinal and an empirical lens.

B. Presumption of Inadmissibility

While the presumption of inadmissibility appears to be a strong safeguard against the spectre of coerced or unreliable confessions, in practice it is directly undermined by multiple factors. The first is that the entire purpose of a Mr. Big *voir dire* is to determine the threshold rather than the ultimate reliability of the confession.[153] This tends to result in judges overlooking potential issues with the confession's reliability based on the idea that the problems can be examined more completely at trial where they will go to weight rather than admissibility.[154] The second factor concerns cases where the trier of fact was a jury rather than a judge. Concurrent to *Hart*, the Supreme Court released *R v Mack*,[155] the leading authority on jury charges in the context of MBOs. While the decision engaged in a full *Hart* analysis,[156] notably absent is any holding that Mr. Big confessions are *prima facie* inadmissible.[157] This raises questions about whether the presumption still applies when the trier of fact is a jury.

Third, the presumption of inadmissibility is typically only discussed in the *voir dire* judge's recitation of the framework and does not tend to guide the overall analysis in any apparent way. It is difficult to tell what an appropriate application of the presumption would look like due to the Court's vagueness in *Hart*. Perhaps, as a result, most decisions that discuss the presumptive inadmissibility do so only on a cursory basis. It is also possible that the presumption is meant to be more prospective than curative, evidenced by Justice Moldaver holding that "[c]onfronted by the reality that the Crown will ultimately bear the burden of justifying reception of a Mr. Big confession, the state will be strongly encouraged to tread carefully in how it conducts these operations."[158] While this provides more

---

153 *Ibid* at paras 89, 98.

154 See e.g. *Johnston*, *supra* note 47 at para 64; *R v West*, 2015 BCCA 379 at para 84 [*West*]; *Wruck*, *supra* note 61 at paras 41–44; *R v Allgood*, 2015 SKCA 88 at para 64; *R v Yakimchuk*, 2017 ABCA 101 at para 76 [*Yakimchuk*].

155 2014 SCC 58 [*Mack*].

156 *Ibid* at paras 31–42.

157 Iftene, *supra* note 15 at 165.

158 *Hart*, *supra* note 2 at para 92.

of a safeguard against confessions obtained through coercion than what existed previously, it appears that the sole effect of the presumption is procedural; the only change that it imposes is requiring a *voir dire* to have the confession included rather than excluded.

Empirically, the presumption is generally followed in MBO cases. In the 32 Mr. Big cases examined, 28 of them specifically mention the presumption of inadmissibility. Three of the cases that do not mention it are appellate decisions and the failure to note the presumption is defensible in context.[159] The fourth case that does not apply the presumption, *Potter*,[160] gets it completely wrong and applies a presumption of admissibility.[161] However, despite fundamentally misinterpreting what is arguably the key safeguard created by the *Hart* framework, Justice Handrigan's analysis otherwise looks exactly like any other Mr. Big *voir dire*.[162] In all of these cases, there is little description of the presumption and what it means beyond a recitation of the framework. In the absence of guidance from the SCC on how the presumption is supposed to inform the analysis of probative value versus prejudicial effect or abuse of process, the result is an admissibility rule that does very little to alter admissibility, even at a threshold level.

The data also indicates that the presumption is inconsistently applied to non-Mr. Big undercover confessions. While some cases were willing to extend the entirety of the *Hart* framework to non-Mr. Big confessions,[163] others only applied a quasi-analysis of *Hart*, choosing to use some factors from the framework and ignoring others. For instance, *Ader*[164] involved a confession to an undercover officer who was posing as a literary agent offering the accused a book deal. The Court concluded that the operation was a variant of an MBO[165] and embarked on an application of the *Hart* factors without applying the presumption of inadmissibility.[166] The doctrinal concerns noted above may mean that this issue is moot in terms

---

159 See *Johnston*, *supra* note 47; *West*, *supra* note 154; *Mack*, *supra* note 155.

160 *Supra* note 43.

161 *Ibid* at para 116.

162 *Ibid* at paras 116–237. It is also possible that Justice Handrigan made a typographical error in writing his judgement. However, there is a correction of another typo at the bottom of the decision, indicating that there was at least some retroactive scrutiny.

163 See *Amin*, *supra* note 27; *Kelly*, *supra* note 47; *Zvolensky*, *supra* note 124.

164 *Supra* note 113.

165 *Ibid* at para 56.

166 *Ibid* at paras 57–62. See also *Randle*, *supra* note 41. That case eschews the first stage of the *Hart* framework altogether and begins by analyzing abuse of process.

of its practical effect on the admissibility of these confessions. However, the inconsistency is worth noting as an illustration of courts' equivocation regarding *Hart*'s inapplicability to non-MBO undercover confessions. Namely, they recognize the usefulness of the framework yet often apply it in a piecemeal fashion, dulling its impact.

C. Probative Value Versus Prejudicial Effect

Under this part of the framework the Crown must demonstrate on a balance of probabilities that the probative value of the confession outweighs the prejudicial effect of its circumstances. As a guiding case, *Hart* is strongly weighted towards finding that the probative value of a confession exceeds its prejudicial effect. This can be seen on the surface of the decision very clearly, where Justice Moldaver devotes 11 paragraphs to reliability analysis and only two to prejudice.[167] This is borne out in subsequent decisions like *Ledesma*[168] and *Johnston*,[169] which neglect to engage in a prejudice analysis altogether. Both cases resulted in the confession ultimately being included. Beyond that observation, it is worth noting that the decision outlines a very clear framework for determining reliability, setting out two different tiers of analysis with nearly a dozen different non-exhaustive factors offered for consideration.[170]

That is not to say that the reliability framework is exhaustive. It fails to mention multiple relevant factors that can affect the confession's ultimate reliability and might help the accused in some circumstances. For instance, procedural reliability, a measure of reliability that draws its strength from its ability to test an admission for its objective truth and accuracy,[171] goes unmentioned in the list of factors to consider.[172] This has resulted in procedural failures by the police, like multiple confessions not being audio recorded,[173] not affecting the threshold reliability analysis. Another factor that goes unmentioned in *Hart* is whether the accused has a motive to lie, which is relevant in cases where the accused is induced to confess to heinous

---

167 *Hart*, *supra* note 2 at paras 94–107.

168 *Supra* note 40.

169 *Supra* note 47.

170 For those factors see *Hart*, *supra* note 2 at paras 100–05.

171 *R v Bradshaw*, 2017 SCC 35 at paras 27–28.

172 Strangely, Justice Moldaver notes the reliability concerns of unrecorded confessions at para 93 but fails to include this as a factor in the reliability framework that begins in the next paragraph.

173 See e.g. *Caissie*, *supra* note 36 at para 213.

crimes as a way of proving their mettle within the fictional criminal organization.[174] To his credit, Justice Moldaver holds that the factors are not meant to be exhaustive.[175] But no judge since *Hart* has endeavoured to expand that list.

Prejudice, on the other hand, is limited to an assessment of moral prejudice and reasoning prejudice.[176] This conception is in line with the jurisprudential evolution of bad character evidence. However, the analysis fails to consider that in MBOs, the state is intentionally creating bad character evidence that the accused will have to answer for at trial. Thousands of hours and hundreds of thousands of dollars in police resources can be spent creating "layers of deception"[177] in an attempt to achieve this aim. This suggests that the state should be held to a higher standard based on their explicit role in inducing a confession that is often inextricable from its surrounding bad character evidence. The presumption of inadmissibility created by *Hart* does not meet this suggested higher standard because bad character evidence is already presumptively inadmissible.[178] Arguably, something more is required.

Furthermore, courts can attempt to mitigate the negative effects of moral and reasoning prejudice through jury instructions, but it is impossible to completely prevent juries from engaging in it. This is problematic because it creates the potential for juries to give the evidence more weight than it deserves and fails to give the accused the benefit of any reasonable doubt.[179] The Great Britain Law Commission succinctly questioned the efficacy of jury instructions as a curative measure, holding that "there are two possible

---

174 The reliability test calls for examining inducements and threats to the accused which can affect motive, but not necessarily. The motive to lie may come from the nature of the social relationship that the undercover officers have cultivated with the accused as in *Amin*, *supra* note 27.

175 *Hart*, *supra* note 2 at paras 102, 104.

176 Moral prejudice and reasoning prejudice have been the only types of prejudice recognized at common law in Canada for bad character evidence. The doctrine came from Andrew Palmer, "The Scope of the Similar Fact Rule" (1994) 16:1 Adel L Rev 161 at 169. It was based on Australian case law and was subsequently adopted in *Criminal Law: Evidence in Criminal Proceedings: Previous Misconduct of a Defendant: Consultation Paper*, (London: Great Britain Law Commission, 1996) at para 7.2 [*Previous Misconduct*]. It was then adopted by the Supreme Court of Canada in *R v Handy*, 2002 SCC 56 at paras 31–32 [*Handy*].

177 *Hart*, *supra* note 2 at paras 93, 165, 193.

178 *Handy*, *supra* note 176 at paras 53, 66.

179 *Previous Misconduct*, *supra* note 176 at para 7.13.

pitfalls: the jury may not understand the direction; and even if it is understood, the jury may not obey it."[180] This is doubly true in light of the recognized phenomenon that confessions are given quite a bit of weight by juries and that they often find it difficult to believe that a person would confess to a crime that they did not commit.[181]

The prejudicial effect analysis is also severely flawed to the extent that it only accounts for the bad character evidence against the accused that arises from their willingness to engage in an enterprise that they believe to be criminal. In undercover cases where a fake criminal organization is not part of the operation, the prejudicial effect tends to not be found.[182] This again shows that the test was designed to conform to the highly-specific fact patterns of MBOs and other undercover investigations often operate outside of the scope of the test.

Finally, there is an inherent problem in the ultimate weighing of probative value against prejudicial effect. The balancing required by the test means there is neither a minimum standard of reliability required in a confession, nor is there an upper limit on the extent to which prejudice can exist. Rather, an undercover confession must only be more reliable than it is prejudicial. The tendency for one to outweigh the other is largely protected from appellate scrutiny due to the highly discretionary nature of the trial-level balancing.[183] Given the aforementioned concerns about the imbalance in *Hart*'s analysis of probative value and prejudicial effect, it is perhaps unsurprising to note that probative value outweighed prejudicial effect in nearly every case that was decided subsequent to *Hart*.

36 post-*Hart* cases engaged in this balancing and only two found that the prejudicial effect outweighed probative value. The first, *Sharples*,[184] is detailed above. The other case, *Buckley*,[185] presented a unique combination of a highly impressionable, socially isolated accused with a confession that did not lead to the discovery of any additional evidence. Justice Arnold held that "[t]he probative value of the Mr. Big confession is so low that no instruction could provide the necessary safeguard to ensure a fair trial."[186] Based on the way that other cases were decided, it appears likely that if

---

180 *Ibid* at para 7.16.

181 *Oickle*, *supra* note 9 at paras 34, 141.

182 See e.g. *Zvolensky*, *supra* note 124 at para 84, *Amin*, *supra* note 27 at para 45.

183 *R v Seaboyer*, [1991] 2 SCR 577, 4 OR (3d) 383; *R v Moir*, 2020 BCCA 116 at para 82.

184 *Supra* note 27.

185 *Supra* note 61.

186 *Ibid* at para 99.

Buckley's confession was slightly more reliable, then it would have been admitted as evidence despite the accused's vulnerability.

D. Abuse of Process

The doctrine of abuse of process is relatively new, arriving in Canada in 1985 with *R v Jewitt*.[187] At first, it only applied to prospective situations — that is, instances where the fairness of the accused's trial would be incurably jeopardized going forward.[188] This meant that past abuse by the state, no matter how unjust, fell outside of the ambit of the doctrine if it would not have a forward-looking effect on trial fairness.[189] It was also only applicable in the clearest of cases,[190] likely because the only remedy for an abuse of process at the time was a stay of proceedings. This changed in *R v O'Connor*,[191] which recognized a "residual category". The case held that even if trial fairness was not undermined, a stay of proceedings may be warranted when the prosecution is conducted in a way that "contravenes fundamental notions of justice and thus undermines the integrity of the judicial process."[192] The next important doctrinal advance occurred in *Babos*,[193] which unmoored abuse of process from stays of proceedings. It established that a stay, the most drastic remedy a court can order,[194] is not the only remedy available on finding an abuse of process.[195] Theoretically, this allowed the doctrine to be applied much more freely, removing the judicial bind between letting a likely guilty person walk free or allowing the justice system to be tainted.

Hart neglected to capitalize on these developments, failing to elaborate on Justice Moldaver's assertion in *Babos* that a residual category abuse of process occurs when the state engages in conduct offensive to societal notions of fair play and decency.[196] While this is briefly mentioned in *Hart*, there is no corresponding analysis of what circumstances common to MBOs might fall under this category, with the bulk of the abuse of process analysis

---

187 [1985] 2 SCR 128, 20 DLR (4th) 651 [*Jewitt*]; Coughlan, *supra* note 15 at 422.
188 Coughlan, *supra* note 15 at 423–25.
189 *Ibid* at 423.
190 *Ibid* at 426.
191 [1995] 4 SCR 411, 130 DLR (4th) 235.
192 *Ibid* at para 73.
193 *Supra* note 97.
194 *Ibid* at para 30.
195 *Ibid* at para 39.
196 *Ibid* at para 35.

instead focusing on the use of violence and stating that undercover confessions become problematic when they approximate coercion.[197] While this lack of doctrinal clarity may seem to advantage the accused, it appears as though the *Babos* test sets a lower threshold for finding an abuse of process than *Hart*. In *Babos*, the Court found a residual ground abuse of process on the basis of vague threats made by the police and prosecution that they would bring additional charges against the accused if he did not cooperate.[198] To contrast, it will be revealed below that a finding of an abuse of process is extremely rare in undercover confession cases even though they often involve the use of violence that the accused believes to be real.

In *Hart*, the only example of coercion mentioned by Justice Moldaver is violence or threats of violence being used against an accused.[199] Perhaps as a result, there has not been a single undercover confession excluded as an abuse of process on any ground other than violence. This is evident in *Laflamme*,[200] the only Mr. Big case to have a confession excluded because of an abuse of process.[201] In that case, the accused became involved in a MBO where the undercover police officers used simulated violence on multiple occasions.[202] This included a fake beating of a bad debtor, which involved the use of fake blood.[203] Later, the primary undercover officer on the investigation threw another officer — a co-member of the criminal organization — out of a moving vehicle.[204] Then, the final confrontation with the Mr. Big figure involved the presence of veiled threats, which the Quebec Court of Appeal found to be a bridge too far in light of the earlier violence.[205]

The judicial reluctance to find an abuse of process is best exemplified by the way subsequent courts have treated *LaFlamme*. Courts have engaged in an extremely narrow interpretation of the level of violence that will give rise to an abuse of process, primarily by holding that because the violence was not specifically directed towards somebody within the fictional criminal

---

197 *Hart*, *supra* note 2 at para 115.
198 *Babos*, *supra* note 97 at paras 58–73.
199 *Supra* note 2 at para 116.
200 *Supra* note 102.
201 MacLean & Chapman, *supra* note 15 at 3.
202 *LaFlamme*, *supra* note 102 at para 9.
203 *Ibid* at para 65.
204 *Ibid* at paras 69–71.
205 *Ibid* at paras 77–78, 87.

organization, the accused was not at risk of being coerced. For example, in *Randle*,[206] the undercover officers carried out a mock execution in front of the accused, which Justice Willcock describes as:

> The officers pretended to kidnap the informant and assault him in the vehicle during a short drive to a remote location. During that drive the undercover officer posing as the person abducted urinated on himself. The other undercover officers took the "victim" for a short walk to a spot where they were unseen and fired two rounds from a gun. They returned to the vehicle, having apparently shot the victim, and drove to a parking lot where they used bleach to clean their hands and then disposed of evidence. The appellant was dropped off at a hotel room.[207]

These facts were deemed to not be an abuse of process because "[t]here were no direct threats of force or violence against gang members and the appellant was given numerous opportunities to withdraw from the operation without any apparent consequence."[208] The same reasoning is present in the BC Court of Appeal decision, *Johnston*,[209] which held that the fact that the violence was directed externally meant there was no coercion.[210]

This is troubling because it assumes that accused persons who are exposed to violence that they believe to be real will neatly separate violence against people external to the organization from violence that could be directed at them. The alternative — that once an organization reveals it has no reservations against using violence to enforce a debt or silence an informer, there is no telling how far they are willing to go — was never discussed by any court.

Instead of focusing on the possibility that the accused may be coerced to confess in light of these interactions, courts are often content to examine simulated violence through the lens of police intentions. For example, the Court in *Yakimchuk*[211] held that despite the use of simulated violence during six of the scenarios in the operation, there was no abuse of process due to the fact that "[t]he impression that the police intended to convey was that there would not be violence towards members of the organization."[212] The same reasoning exists in *R v Tang*,[213] where an abuse of process was not

---

206 *Supra* note 41.
207 *Ibid* at para 10.
208 *Ibid* at para 87.
209 *Supra* note 47.
210 *Ibid* at paras 58–61.
211 *Supra* note 154.
212 *Ibid* at paras 61, 92, 95.
213 2015 BCSC 1643.

found on similar grounds. In that case, Tang was suspected of killing his mother and disposing of her body in a suitcase and dropping it into a river.[214] The police posed as criminals who found the body and they threatened to tell the police about it if Tang did not give them $20,000.[215] The defence argued that this amounted to extortion, but Justive Ehrcke disagreed on the grounds that the officers did not have the necessary *mens rea* to extort the accused because they did not intend to keep the money.[216] This reasoning ignores the fact that regardless of their intentions, the police still threatened the accused, decreasing the likelihood that his confession was actually voluntary.

While simulated violence is by no means a necessary component of MBOs or other undercover operations, its use is surprisingly common, perhaps due to the courts' failure to explicitly prohibit it. Violence or threats of violence were used in some capacity in 13 of the 42 cases analyzed. Examples of these tactics include an officer putting an ostensibly loaded handgun into the mouth of another officer as part of a robbery,[217] a high-impact kidnapping scenario involving the use of "extreme violence",[218] and placing a dead pig into a hockey bag, while telling the accused that it was a human body that he had to dispose of.[219] None of these examples resulted in an abuse of process being found. Instead, courts have uniformly viewed the use of fake violence as a necessary way for officers to broach the subject matter of the crime that they suspect the accused has committed. This reasoning is present in *West*,[220] where the undercover operation involved an officer grabbing an undercover female officer, throwing her to the ground,

---

214 *Ibid* at paras 8–12. There was also significant physical and circumstantial evidence known to the police before they began this operation, raising the question of why they felt it necessary to use an undercover investigation in the first place.

215 *Ibid* at paras 77, 140.

216 *Ibid* at para 83. Justice Ehrcke supports his assertion that *mens rea* requires an intention "to obtain anything." This fails to consider that the despite not actually wanting money from the accused, the officers still intended to obtain a confession.

217 *R v Balbar*, 2014 BCSC 2285 at para 379.

218 M(M), *supra* note 41 at para 171. The reason given by the officer for the use of violence was to "ensure that the accused was comfortable with it." This represents a line of reasoning on the part of law enforcement that seems to believe that the only way to get an accused talking about violent acts they have committed is to expose them to further violence.

219 *Potter*, *supra* note 43 at para 54. The officers went to the lengths of slaughtering the animal themselves, shaving it, and covering it in fake blood.

220 *Supra* note 154.

and threatening to kill her in front of the accused.[221] The Court found that this display of violence did not contribute to an abuse of process because it was "understandable that the police would want to create an atmosphere in which Mr. West would not be reluctant to discuss his own involvement in violence against women."[222]

Furthermore, in *Randle*, the British Columbia Court of Appeal relied on *West* to hold that "the propriety of the police conduct must be weighed in relation to the gravity of the offence being investigated."[223] This reasoning is highly problematic because it presumes that the only reasonable way for undercover officers to get an accused to talk about their past violence is to recreate the circumstances surrounding it. This fails to consider the numerous undercover investigations where the officers were able to get the accused to talk about their crime by forming a friendship based on trust and mutual understanding.[224] It is also worth noting that *Hart* seems to place a blanket prohibition on violence or threats of violence, holding that "[a] confession derived from physical violence or threats of violence against an accused will not be admissible — no matter how reliable — because this, quite simply, is something the community will not tolerate."[225] Note that this analysis does not distinguish between violence that directly threatens the accused and violence that is merely used in the accused's presence.

Despite *Hart* ostensibly reinvigorating the abuse of process doctrine, empirical analysis shows that it has not amounted to much. Of the 38 cases surveyed that addressed abuse of process, only three of them found an abuse (7.9%).[226] Two of those cases were non-Mr. Big undercover operations that did not actually employ the *Hart* framework.[227] To date, *LaFlamme*[228] remains the only Mr. Big case in Canadian history where an abuse of process was found. There is an argument to be made that the reason for this finding is that *Hart* had a chilling effect on coercive police tactics. However, one only needs to look at the above examples of simulated violence to determine that this is not the case.

---

221 *Ibid* at para 18.

222 *Ibid* at para 99.

223 *Randle*, *supra* note 41 at para 86.

224 See e.g. *Amin*, *supra* note 27.

225 *Hart*, *supra* note 2 at para 116.

226 *Laflamme*, *supra* note 102; *R v Nuttall*, 2016 BCSC 1404 [*Nuttall* 2016]; *R v Derbyshire*, 2016 NSCA 67 [*Derbyshire*].

227 Nuttall, *supra* note 226; *Derbyshire*, *supra* note 226.

228 *Supra* note 102.

V. Ultimate Exclusion and Conclusion

Ultimately, the application of the *Hart* framework has resulted in a confession being excluded in five out of 40 undercover confession cases,[229] or 12.5%. When analyzing MBOs only, two out of 31 confessions were excluded, or 6.4%. To put it another way, 93.6% of Mr. Big confessions that have had the benefit of the *Hart* decision have been admitted. To put these numbers in context, two independent academic studies prior to *Hart* assessed the percentage of Mr. Big confessions that were admitted. The admission rates found were 88%[230] and 91.5%,[231] respectively. This means that the rate at which Mr. Big confessions were admitted has actually increased since *Hart* was decided.

This discovery should not be surprising. In a free and democratic society, there are recognized limits on what the state is allowed to do when investigating crimes. This is not based on logic, but on the recognition that the state has a monopoly on the legitimate use of force[232] and that such a power comes with a corresponding imperative to use it responsibly. Since the 1990s, law enforcement has repeatedly skirted this responsibility by — intentionally or not — circumventing legal protections for accused persons who unwittingly end up in the hands of the state. The Supreme Court, as evidenced by their decision in *Hart*, has equivocated on the seriousness of the matter, choosing to introduce a framework that has done little to resolve the problems that it attempts to address. Each element of the framework fails to adequately protect the interests of those who confess to undercover officers, from the illusory safeguards of the presumption of inadmissibility to the abuse of process doctrine's continued failure to prevent police misconduct.

It has now been more than five years since *Hart* was decided. It is clear that the framework has failed to meet the Court's goal of deterring

---

229 Two of the 42 total cases were appellate decisions that ordered a new trial. I have not included them in the final tally, instead focusing on admission or exclusion.

230 Kouri T Keenan & Joan Brockman, *Mr. Big: Exposing Undercover Investigations in Canada*, (Halifax: Fernwood, 2010) at 252.

231 Kate Puddister & Troy Riddell, "The RCMP's 'Mr. Big' Sting Operation: A Case Study in Police Independence, Accountability and Oversight" (2012) 55:3 Can Public Administration 385 at 393.

232 Max Weber, Hans Heinrich Gerth & C. Wright Mills, *From Max Weber: Essays in Sociology* (New York: Oxford University Press, 1946) at 78.

unreliable confessions, prejudice to the accused, and police misconduct.[233] The above empirical analysis shows that it has not had effect that it intended. The overall admission rate of Mr. Big confessions has increased and most of the non-Mr. Big confession exclusions occurred under an abuse of process analysis that did not apply the *Hart* framework. The case law shows that many police forces do not have reservations about using simulated violence and other coercive tactics in the presence of accused persons. Moreover, it shows that courts generally do not take issue with admitting the confessions gleaned from those operations. In other words, the *Hart* framework has done very little to fill the legal vacuum that the Court explicitly recognized.

It is clear that something more is necessary to prevent the state from overstepping the normative limits of their authority. The ideal solution is to extend the applicability of the voluntary confession rule by changing the standard for assessing whether someone is a person in authority from a subjective to an objective standard. The voluntary confessions rule exists to protect those who are "under pressure from the uniquely coercive power of the state",[234] but only when the accused knows about it. This fails to consider that the accused may be in even more jeopardy when they are unaware of the coercive power to which they are subjected. MBOs and other undercover operations entail the police spending anywhere from hundreds of thousands to millions of dollars on a single operation that has the sole purpose of eliciting a confession from the accused.[235] If this kind of resource allocation cannot be considered uniquely coercive, it is hard to tell what would be.

Extending the confession rule would also not necessarily prevent MBOs from being used; it would only subject them to a framework that would prioritize the need for confessions to be voluntary in all circumstances, prevent officers from offering inducements that would overbear the will of the accused and prevent a level of trickery that would shock the community's conscience.

If the voluntary confession rule is not extended or the *Hart* framework is not significantly bolstered, then unreliable and abusively obtained confessions will continue to be admitted as evidence. Legally innocent people, whom the police do not have sufficient evidence to bring charges

---

233 *Hart*, *supra* note 2 at paras 81, 84.

234 *Grandinetti*, *supra* note 58 at para 35.

235 Iftene, *supra* note 15 at 151, 156.

against, will continue to be subject to highly manipulative and expensive operations. Police officers who go undercover will have to bear the self-imposed burden of role-playing as violent criminals. And courts will have to continue assessing the admissibility of these confessions in the legal vacuum that *Hart* only partially filled. If courts do not fully recognize the moral price that is paid when confessions are elicited in this manner, they risk undermining some of the most fundamental tenets of the criminal justice system — that confessions should be given voluntarily and that accused persons are innocent until proven guilty.