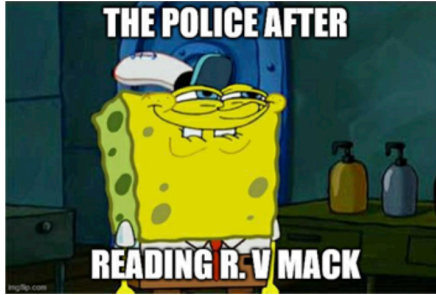


Mr. Big Operations – Mack'in at the Hart of the Operation– by Seminar Group Le-Ma in Introduction to Criminal Law and Procedure at Robson Hall



In this blog, we will summarize two recent Supreme Court of Canada (SCC) cases regarding Mr. Big Operations (MBO), as well as indicate how we believe the new rules from these cases would apply to an older MBO case.

R v Hart

In *R v Hart*, the SCC established a two-pronged approach to determine the admissibility of MBO confessions.¹

The first prong states that any confession made by the accused should be seen as presumptively inadmissible. Here, the onus is on the Crown to establish, on a balance of probabilities (BOP), that the probative value of the confession outweighs its prejudicial effect. They also state that courts must look at the circumstances and content of a confession to assess its reliability. Circumstances include length of operation, number of interactions between undercover officers and accused, nature of relationship between undercover officers and accused, nature and extent of inducements, presence of threats, conduct of interrogation, and personality of accused (age, sophistication, mental health, etc.). Content includes the level of detail in confession, whether it leads to discovery of additional evidence, whether it identifies any elements of the crime that have not been made public, and whether it accurately describes details of the crime the accused would likely not know unless they had committed the crime.

¹ *R v Hart*, 2014 SCC 52 [*Hart*].

The second prong of this approach is the doctrine of abuse of the process. Here, the SCC states that the police cannot overcome the will of the accused and coerce a confession. Some examples of unacceptable coercion include violence, threats, and preying on the accused persons' vulnerabilities.

Example of an MBO

An example of a Mr. Big scenario is the case of Glen Sebastian Burns and Atif Ahmad Rafay.² Burns and Rafay were police suspects for the deaths of Rafay's mother, father, and sister. At the time of this MBO, Burns and Rafay are 19 years old. Burns had told both officers he wanted to make a film costing \$200,000. During the first scenario, officers say that Burns looked scared, pale, and white. However, Burns stated afterwards he wanted to get into more lucrative ventures.

Burns then met with 2 undercover officers at a hotel, where he was shown two handguns. Burns is also told that "if someone betrays a member of the organization, that person or that person's family could suffer extreme violence".³ At another meeting, Burns and Rafay are shown a document from the Bellevue Police Department disclosing information that incriminates the two of them in the murders. At this point, both Rafay and Burns disclose their participation in the murders.

Applying the two-pronged approach from *Hart*, we believe these confessions would not have been admitted. There were multiple interactions and threats during the course of the MBO, and the confessions given did not lead to a discovery of additional evidence. In addition, Burns and Rafay were 19 years old, which makes them more susceptible. Under the second prong, police are not able to use coercion or threats to get a confession. As such, we believe the probative value of the confession does not outweigh its prejudicial effect, and the confessions would not be admitted if this case were tried today.

² *Burns v United States*, 1997 CarswellBC 1320 [*Burns*].

³ *Ibid* at para 4.

Addressing MBO Concerns: *R v Mack* (2014)

Soon after *Hart*, the SCC released *R v Mack* (*Mack*), a case concerned with Mack's confession in which he admitted to undercover officers working as MBOs that he murdered his roommate and burned the body.⁴ M's confession led investigators to the firepit where M had disposed of the victim's bones and teeth fragments. The police arrested and charged M with first degree murder.

The SCC applied the *Hart* framework and held that trial judges must provide juries with the tools they need to address reliability and prejudice concerns arising from MBO confessions. The SCC held that M's confession to the undercover policeman part of the MBO was not to be excluded under s.24(2) of the *Charter*. This is because M's confession was of high probative value because of factors such as:

- ❖ 4 months of well-paid work for M when there was work available to him;
- ❖ the undercover officers did not threaten or coerce M;
- ❖ M's confession led the officer to the firepit where the victim's remains were discovered;
- ❖ shell casings fired from a gun found in M's apartment were found in the same firepit.

So, are MBOs "fair game"?

Well, we have seen how under the *Hart* framework, an MBO confession will be excluded "where its prejudicial effect outweighs its probative value, or where it is the product of an abuse of process".⁵ However, it did not address concerns of reliability or prejudice that may persist if the MBO confessions are to be admitted into evidence.⁶

Nonetheless these concerns were addressed in *Mack*, by providing guidance for trial judges who must instruct juries in cases where MBO confessions have been admitted into evidence. To begin, the trial judge should let the jury know that they are to address the reliability of the accused's confession, which is done by reviewing relevant factors and evidence

⁴ *R v Mack*, 2014 SCC 58 [*Mack*].

⁵ *Ibid* at para 30.

⁶ *Ibid* at para 51.

surrounding the confession itself, such as: length of operation, interactions, nature of relationship, extent of any inducements, threats, conduct of the interrogation itself, and the accused's character.

So, how do we reconcile Mack and Hart?

Both cases advanced a framework that could be put into practice when dealing with MBO confession cases in a way that it does not deny the accused's right to a fair trial under the *Charter*. If the decision in *Hart* seemed to have shut down the possibility of admitting MBO confessions into evidence through a stringent framework, the court in *Mack* showed that, despite a stringent test, MBO confessions can still be admitted into evidence and have a high probative value.⁷ When considering the decisions in *Hart* and *Mack* together, they can be used to offer guidance to future cases by showing different results despite using the same two-pronged approach. Taken together, *Hart* and *Mack* show that MBOs may still have a place in evidence law and police power.