

Mr. Big Police Investigations: The Interrogation Trilogy and Charter Implications

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Abstract

Mr. Big operations are a complex undercover investigative technique used to collect evidence on a suspect with limited evidence to press charges. The particular circumstances and very nature of a Mr. Big operation has led to considerable criticism regarding the difficulty of law enforcement being able to balance their independence and oversight concerning the rights of the accused.

Furthermore, significant officer discretion is required. Various investigative strategies that are used in Mr. Big operations, from threatening the suspect, false presentations of evidence, untrue promises and enticements, alongside the complete alteration of reality, have demonstrated the possibility of severe police misconduct. These tactics undeniably raise concerns pertaining to the reliability of the evidence such as, if the confession was coerced, involuntary, or if the impact of these aggressive or enticing tactics could lead the suspect to confess falsely. Such techniques engage the Charter of Rights and Freedoms, section 7 and section 11(d), based on the fundamental principles of justice; these afforded legal rights are engaged to help protect the accused from an unreasonable state intrusion. The unique engagement of these rights and Mr. Big Operations has been addressed in the landmark case of *R v Hart* [2014], with a new common-law rule for addressing the reliability and protections of the accused. However, there is still a prominent lack of oversight and guidance in which there is vast opportunity for harmful police misconduct, increasing the potential for wrongful convictions and miscarriages of justice.

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Mr. Big Operations and the Charter

“Mr. Big operations” are an undercover investigative technique used in cases where there is a lack of evidence required to charge an individual with a crime. Mr. Big represents a hypothetical crime boss of a criminal syndicate that recruits the accused with the intention of collecting a confession or further evidence. In actual fact, Mr. Big is an undercover police officer engaged in an investigation that has, as its goal, the production of a confession. However, these investigations are often subjected to criticism and debate as these operations hold elements that risk the possibility of an unreliable or false confession occurring. In upholding the Canadian Charter of Rights and Freedoms, the rights of the accused must be protected in these investigations. Tactics such as unreasonable probing, inducements, threats, and violence, may intrude on one's right to silence, right to security of the person, their presumption of innocence, and the right not to make self-incriminating statements. Over time, there have been a considerable number of Mr. Big cases that have been appealed and brought to the Supreme Court of Canada (SCC) where Supreme Court justices must consider the admissibility of evidence obtained through this undercover technique as they risk posing an unreasonable infringement on the suspect's s.7 or s.11(d) Charter rights. Therefore, making the confession or other evidence collected in the covert investigation inadmissible and would bring the administration of justice into disrepute.

Research Question

The research question that will be analyzed in this project asks *Do Mr. Big Police operations engage a suspect's rights concerning section.7 and section.11(d) of the Canadian Charter of Rights and Freedoms?* There is concern that evidence obtained through this technique can infringe a suspect's s.7 or s.11(d) Charter rights. Law enforcement officers are provided

appropriate legal protection to engage in deceptive behaviour to solve serious crimes. However, one must consider section 24(2) of the Charter of Rights and Freedoms that obliges law enforcement authorities to “respect all exigencies of the Charter and precludes improperly obtained evidence from being admitted when it impinges on the fairness of the trial” (*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c11 s 24(2)). It is crucial to examine this question in order to identify and determine the extent to which tactics can be used in undercover investigations as police lies, manipulation, and tricks are discouraged to protect the integrity of the police's investigation and ethical reliability respecting an individual's rights. For example, in cases where Mr. Big operations were used, there is a common theme where judges determined coercion and entrapment had occurred, placing the suspect in unreasonable circumstances, often causing false confessions or inadmissible evidence. Mr. Big Operations are still being used as an investigative strategy today. It is vital to identify the boundaries within these tactics to ensure Charter rights are protected to the fullest extent to limit miscarriages of justice in the Canadian criminal justice system.

Methodology

This qualitative analysis aims to describe and clarify the tactics and limitations of undercover Mr. Big police operations regarding Charter implications. The research design for this analysis is a mixed-method design that will be “drawing on backgrounds in both the social sciences and law to carry out this research” (Keenan, & Brockman, 2010, p.27). This analysis will consist of a case study design and a systematic review design to guide and structure the found research. Using this interpretive framework will bring forth thoughtful discussion from findings and generate new understandings and perspectives surrounding the use of Mr. Big

Operations, along with the implications they can impose and the risk of a ‘targets’ Charter rights being unreasonably infringed (USC Libraries, 2020, Mixed Methods Design). The mixed-method design is valuable to this qualitative study as it allows the exhaustive collection of a variety of evidence to support the conclusion (USC Libraries, 2020, Mixed Methods Design). Through the case study design, Supreme Court of Canada cases will be used to identify specific cases in which Mr. Big Operations were used, bringing judicial insight around circumstances in which charter rights are unreasonably or reasonably infringed (USC Libraries, 2020, Case Study Design). The specific cases that will be discussed include *R v Hart* [2014], *R v Mack* [1988], and *R v Mack* [2014]. The cases of *R v Oickle* [2000], *R v Herbert* [1990], and *R v Sinclair* [2010] will also be examined regarding the “confession rule” and the right to remain silent to bring understanding to the police and legal guidelines in obtaining confessions. Using case study design in this way will contribute to the analysis by providing evidence and rulings from precedent cases. Using a systematic review design will allow for definition and exploration of the existing research and criticism around the use of Mr. Big Operations through secondary research such as peer-reviewed journal articles (USC Libraries, 2020, Systematic Review).

Variables that will be addressed are the investigations where Mr. Big Police Operations were used, as well as the Charter rights s.7 and s.11(d) to measure if these investigations engage charter rights and if such engagement could be saved under s.24(2). The specific operational search terms I will be using pertain to “Mr. Big,” “Mr. Big Police Operations,” “Big Boss,” “Undercover Crime Boss,” “criticisms of Mr. Big,” “Confession Trilogy,” Infringement, section 7 and section 11 of the Charter, “RCMP and Mr. Big,” and others. Through this unobtrusive method, pre-existing documents such as journal articles, scholarly publications, and statistics will be analyzed to provide broader coverage, evidence and knowledge around the topic; the

inclusion of SCC cases and news articles for data sources (Van Den Hoonaard, 2015, p.126). To ensure data is being retrieved from reliable sources and is a high-quality source, databases from the Mount Royal University Library, scholarly sources that the library subscribes to, and other library resources that librarians have reviewed will be used in search of information (Del Balso, & Lewis, 2011, p. 49). Using these library sources makes research material convenient and reliable (Del Balso, & Lewis, 2011, p.51). Scholarly online information sources, including multidisciplinary databases, will be searched (Del Balso, & Lewis, 2011, p.51). Databases that will be used are EBSCOhost, PROQUEST, SpringerLink Journals, and CRKN Wiley Online Library (Mount Royal University, n.d., Databases). Legal Databases such as CanLII, Criminal Justice Database, and JSTOR will also be searched along with government websites such as Statistics Canada and RCMP websites. Once the raw data has been collected from these sources, data will be assessed through content analysis to answer the research question. Content analysis is a flexible method for examining raw text data and allows for a descriptive and interpretive framework to be incorporated into this project (Hsieh, & Shannon, 2005, p.1277). This project will follow the more direct content analysis and extend the existing research on Mr. Big police operations. Directing focus on determining if these operations unreasonably infringe charter rights (Hsieh, & Shannon, 2005, p.1281). This methodology provides an opportunity to critically evaluate and analyze data to explore the research question exhaustively, allowing for findings to be synthesized, guiding the analysis of whether Mr. Big Operations reasonably or unreasonably infringe a suspect's Charter rights (USC Libraries, 2020, Systematic Review).

Limitations

Possible limitations of the research design are predominantly concerned with the exhaustiveness of the research. This is because every case that has used the undercover technique

of Mr. Big will not be able to be examined due to the fact that not every case that appears before the judiciary will be entered into a database. For example, it is common for cases where the accused enters a guilty plea to be excluded from these databases unless a sentencing decision is published (Keenan, & Brockman, 2010, p.28). There are also cases where Mr. Big Operations tactics were used in an investigation but may actually be labeled as something other than “Mr. Big” as in Quebec they are often referred to as “l’opération d’infiltration” and “un(e) agent(e) d’infiltration” in which they would be missed in the collection of data (Keenan, & Brockman, 2010, p.27). This means that it will not be possible to examine every single Mr. Big case that has occurred for the case study design and analysis, thus limiting the scope of this study. This also speaks to the notion that no two Mr. Big cases are the same, there are often similar tactics, approaches, and target profiles when comparing Mr. Big cases, but there are differences in terms of *how* investigations play out and the collection of evidence which can pose mild challenges in drawing complete connections and conclusions from the relationships of various Mr. Big Investigations. Outside of the content specifically, limitations can often be personal factors such as age, experience, background, or even gender, but as a young woman who is aware of privilege, discrimination, and biases that are present in society and law enforcement, the author of this project must remain mindful in how the information is managed (Hoonaard, 2015, p.46). When using content analysis, one must also be mindful of presentism when researching data and studying cases due to changing laws and standards that occur over time (Hoonaard, 2015, p.68). Lastly, a minor limitation of this study is that there are no recent statistics on Mr. Big police operations and their usage in Canada. This is not an oversight of the RCMP as they are simply unable to collect statistics on all their investigations, but this does place some limitation on the exploration of the popularity or usage of Mr. Big operations in Canada.

Defining and Explaining a Mr. Big Operation

Mr. Big is a Canadian undercover investigation technique developed by the Royal Canadian Mounted Police (RCMP) in British Columbia in the early 1900s. The first Mr. Big case in Canada was not all that successful, being referred to as “vile, base, and contemptible” by the Crown due to questions around the admissibility of a confession (Keenan, & Brockman, 2010, p. 17). However, since then this investigative technique has become more advanced and has been used widely by the RCMP, the most recent reliable statistics pertaining to the use of Mr. Big operations can be found from 2008 from the RCMP reports that they had carried out 350 Mr. Big sting operations in Canada with a 75% success rate; meaning the outcome of the investigation resulted in obtaining a confession or that a suspect was cleared from the investigation (Holmgren, 2017, p.159). Within this sample, the RCMP reported a 95% conviction rate when able to gain a confession from the suspect that was admissible in court (Holmgren, 2017, p.159). Although this is a positive statistic to reflect the use and the “success” of the operation in Canada, it only addresses the outcome of using the technique, this does not provide a complete assessment of the process in how a successful outcome is achieved. Mr. Big operations can be a beneficial technique for law enforcement to rely on. However, due to creatively fashioned interrogation techniques that allow for discretion within very nature of undercover investigations they often have elements of coercion and deception in the pre-custody interrogations. There are considerable questions around the operations credibility and reliability in obtaining confessions that lead to “successful” convictions (Keenan, et al., 2010, p.17). Thus, opening the door for criticism, critique, and a demand for oversight.

To provide background context, this is considered to be a last resort technique for cases that have gone cold or where law enforcement strongly suspects someone of committing a crime

but has been unable to obtain any effective physical evidence to file a charge (Milward, 2013, p.81). This is a covert investigative technique because of the wide range of investigative activities that fall under the umbrella of undercover investigations (Holmgren, 2017, p.154). However, this technique differs from other kinds of undercover tactics because the officers actually build an alternate environment by creating an entire ‘fake’ criminal organization syndicate. Officers do this with the intent of building a relationship with the suspect to collect the necessary confession and other incriminating evidence that is believed to be involved in the crime under investigation. Evidence collected allows police to formally charge a suspect and put them before the courts. According to Keenan and Brockman (2010), a Mr. Big scenario can be explained as a number of undercover police officers who adopt fictitious criminal personas and pose as crime figures, like gang members that are a part of a criminal organization in order to deceive a target (suspect of said crime) into believing they are being initiated and conditioned to join said criminal syndicate under the direction of the boss, Mr. Big. (Keenan, et al., 2010, p.19). The investigation is essentially built on the premise of deceiving the suspect into believing he is being conditioned to join this successful criminal organization in which his initiation into this syndicate requires him to confess to his past crimes to “Mr. Big” (Holmgren, 2017, p. 152). It has been said that the RCMP have perfected the backdrop that stimulates a “real-world criminal environment” in which agents become swiftly intertwined directly and surreptitiously with the criminal world projecting the fantasy making it nearly impossible for a target to differentiate to reality (Keenan, et al., 2010, p.19).

The Process of a Mr. Big Operation

To further explain, Mr. Big police operations can be broken down into a 4-stage process of intelligence probe, introduction, credibility-building and evidence gathering. During the

intelligence probe police officers will conduct surveillance on the target to obtain information about his friends, family, employment, lifestyle, hobbies, where free time is spent, routine, etc. (Luther, & Snook, 2016, p.132). This prepares the officers for the next stage of introduction so that they may tailor their approach, behaviours, and attitudes to best match those of the target (Luther, & Snook, 2016, p.132). This will also help to prepare them for their interactions and develop interactive scenarios prior to befriending the target (Keenan et al., 2010, p.19). Researchers like Poloz (2015) emphasize the importance in this preparation as he suggests that the fundamental success of a Mr. Big operation lies within the architecture of “establishing a deliberate and disproportionate degree of psychological and emotional control over the accused” (Luther, & Snook, 2016, p.232).

As for the introduction stage, an undercover officer will likely make contact with the target while in police custody by the means of a third party or by attempting to recruit them through their attendance at rehabilitation facilities, or their place of employment (Luther, & Snook, 2016, p.132). The introduction consists of an undercover officer befriending the target and introducing them to the fictitious criminal organization (Luther, & Snook, 2016, p.132). After making contact with the target the officers will then engage in the credibility-building stage by working to gain the targets trust through means of cash, sexual enticements, and drugs/alcohol. The undercover operatives involve targets in fake criminal acts to give the appearance of a real criminal syndicate; for instance, there could be physical assaults, drug trafficking, mafia-style executions, picking up and dropping off parcels, counting large sums of money, collecting unpaid debts, dealing with firearms, and the appearance of money laundering all to demonstrate power and legitimacy (Puddister, & Riddell, 2012, p.386). This stage is crucial to the success of the investigation as it is essential for the undercover officers to build a rapport

and trust in this carefully structured relationship in order to be in a plausible position to obtain a confession from the target (Keenan, et al., 2010, p.19). The undercover officers introduce the suspect to this “gang lifestyle” over several weeks or months by involving them in minor crimes, payment for criminal activities, and by displaying evidence of wealth (Smith Stinson, & Patry, 2009, p.170). This can be also be viewed as a bonding and grooming process as the officers take the target on a range of crimes and activities from watching strippers, attending hockey games, going to bars, discussing sexual exploits, and other various scenarios created by the officers to establish ‘friendship’ and credit to the criminal enterprise this target is being recruited into (Keenan, et al., 2010, p. 20).

Lastly, is the evidence gathering stage where the target is introduced to “Mr. Big” and the officers work to obtain a confession and additional evidence that becomes crucial at trial in convincing the suspect of the serious crime they are accused of. It is only once trust is solidified that the target will be introduced to Mr. Big who will demand absolute truth and honesty from the target about previous crimes (the offense in question) in order to establish credibility, loyalty and to protect the criminal organization against future problems or surprises (Puddister, & Riddell, 2012, p.386). Mr. Big is portrayed to the target as an all-powerful individual who has connections in the criminal underworld as well as reliable police resources and other justice officials in his pocket so that the target feels comfortable opening up (Keenan, et al., p.20).

The fictional crime boss works to get the confession during a covertly taped sit down with the target and telling them that their honesty regarding the offense in question is mandatory in order for them to be able to join the organization or for them to be helped by Mr. Big (Keenan, et al., 2010, p.20) (Poloz, 2015, p.234). For example, Mr. Big could tell the target that he will help him avoid criminal prosecution if he is honest about his involvement with the criminal

investigation at hand. This stage puts pressure on undercover operatives to ethically follow the legal guidelines established for them in how they should obtain a confession. Therefore, officers must be extremely cautious in terms of “how they articulate the demands of honesty, trust, dependability, and loyalty as requirements of the suspects membership” to the organization, as the wrong moves can result in entrapment, coercion, false confessions and unreasonably infringed rights of the target (Keenan, et al., 2010, p.20). It is due to these unique tactics Mr. Big Operations call for guidelines and oversight to ensure due process and rights of a target are upheld.

Criticisms of Mr. Big Operations

Since the early 1900's, Mr. Big investigations have seen success, as Supreme Court of Canada (SCC) Justice Moldaver said in the landmark *R v Hart* [2014] decision, the technique has proven to be an effective investigative tool resulting in many convictions of cases that would have likely gone unsolved, but the technique “comes with a price” (*R v Hart*, [2014] 2 SCR 544, p.4-5). These investigations have become scrutinized and questioned for their tactics and ethics as the target is expected to confess to Mr. Big during a non-custodial situation with often “pointed interrogations and sometimes veiled threats” which leads to the rising speculation that these investigations produce unreliable confessions (*R v Hart*, [2014] 2 SCR 544, p.5). Mr. Big operations are often scrutinized due to their cost, secrecy (lack of public knowledge), the difficult balance between police independence and oversight as these tactics demand un-biased officers with capable discretion, and the fact there is an increased potential for false confessions and wrongful convictions (Puddister & Riddell, 2012, p.385). As well as the ethical and legal issues regarding the protection of the Charter of Rights and Freedoms section.7 and the right to silence, s.11's presumption of innocence, the applicability of the law in determining the voluntariness of the confession, and if the tactics used are paramount to abuse of process or police trickery

(Keenan, et al., 2013, p.67). Mr. Big operations have begun to raise three distinct concerns, prejudice, reliability, and potential for police misconduct (Holmgren, 2017, p.155). The questionable salient features being referred to are found in the implied threats of violence, repeated confrontations with suspects with allegations of their guilt, false presentations of evidence, and the untrue promise of “making the problem go away” (Milard, 2013, p.106). These concerns address the reliability of information, the shadows of entrapment, and the potential for coercion (Murphy, & Anderson, 2016, p. 30).

Although these tactics are considered necessary to deliver the alternate environment, this technique neglects the protections of an in-custody interrogation and gives officers great power to exercise discretion; leaving officers with the ability to freely apply confrontational tactics to obtain a confession (Milard, 2013, p.110). Although, we see the RCMP claims a 75% success rate with the Mr. Big investigative techniques, little is known about its “failures” (Smith, et al., 2009, p.172). Speaking to the cases where the target was investigated but found innocent, was wrongfully convicted, or had evidence ruled inadmissible (Smith, et al., 2009, p.172).

With that being said, some researchers hold the argument that the techniques of Mr. Big operations are a serious intrusion into citizen privacy and create the breeding ground for false confessions and unethical behavior to produce a guilty outcome (Milward, 2013, p.82). Thus, pointing to the secrecy and the salient features within the operation that should require the oversight and regulation by the SCC to scrutinize and assess the reliability of this technique (Milward, 2013, p.82). Kouri Keenan, a consult and expert on Mr. Big investigative tactics, explains that the details surrounding this technique are often shrouded in secrecy because the success and nature of this investigation is dependent on the undercover work, revealing this information would make this carefully developed technique essentially less effective (Holmgren,

2017, p.151). Although Mr. Keenan recognizes the classified nature of this undercover work being essential to the technique's success, he warns that the restricted access about how the RCMP conduct these Mr. Big investigations can prevent oversight and public scrutiny; for the presence of secrecy in any government organization can create the opportunity for abuse of power and ultimately threaten our Charter rights (Keenan et al., 2013, p.21). Therefore, one must consider what errors fall and are hidden within this secrecy. This indirectly leads to another concern that the legal system has difficulty balancing police independence in conducting their investigations with the necessary accountability and oversight. Law enforcement must remain independent without the government having too much control over police operations as this would disrupt citizen's independent bureaucracy and the legitimacy of policing.

The personal biases that law enforcement officers also carry can greatly influence the process of the Mr. Big investigation and the interrogation. For instance, officers who hold a "guilt presumptive" state of mind, meaning they believe and expect the suspect to be guilty, are more likely to ask guilt presumptive questions, use more techniques to try to get the target to confess, and often exert more pressure on suspects which often results in them becoming anxious which displays itself as "suspicious behavior" (Smith, et al., 2009, p.181). This guilty presumptive framework is especially worrisome as it can negatively influence the operations success and infringe on the suspects s.11(d) Charter rights by not presuming them innocent until proven otherwise in a court of law (Smith, et al., 2009, p.180). The operatives are also scrutinized as it often appears that "when the courts impose restrictions on what police officers can do in order to enhance reliability or protect the constitutional rights of the accused, the police seem to find another procedure to bypass the rules" in order to obtain their evidence (Keenan et

al., 2013, p.32). The inability to be sure of officer bias and their ability to navigate oversight creates room for criticism as a great deal of discretion is placed in the officer's hands.

Another structural criticism of these operations lies in the financial burden and manpower that Mr. Big operations require (Puddister, & Riddell, 2012, p.390). For example, one Mr. Big operation alone may utilize as many as 50 police operatives and cost upwards of a million dollars or more as they can extend from months to even a year (Luther, & Snook, 2016, p.133). This places a great burden on law enforcement agencies and the justice system.

Producing False Confessions

Lastly, a vital criticism of Mr. Big operations is that they may produce false confessions, often leading to wrongful convictions, this can happen through the salient means discussed above. Past literature on wrongful convictions identifies police-induced false confessions as one of the leading factors and causes for wrongful convictions today, with roughly 12% of incarcerated criminals self-report that they falsely confessed to police (Smith, et al., 2009, p.180). It is not all that uncommon for someone who is not guilty of a crime to plead guilty in court once consulting counsel; therefore, it is not unreasonable to consider that innocent targets in Mr. Big operations may confess to crimes they did not commit given the circumstances (Keenan, 2013, p.32). For instance, the targets may overestimate their participation and culpability in the crime in question and create stories of previous misdemeanors or add 'details' to portray themselves as worthy candidates to join the criminal organization or impress the crime boss, Mr. Big (Keenan, 2013, p.47). They may also confess in order to escape the intense situation with Mr. Big or to gain the perceived reward that Mr. Big is offering (Smith, et al., 2009, p.180). After all, it is clear that the pressure on a target to confess in this evidence gathering is substantial. It is evident through the examination of prior cases that the offers of

leniency or various benefits or gain, using threats of harm, or quid pro quos are casual links to false confessions and thus wrongful convictions (Smith, et al., 2009, p.180).

This is not to mention that another crucial factor is the target's age and mental capacity (such as intellectually disadvantaged or mental illness). These two vulnerability factors can increase the likelihood of suspects falsely confessing, in which these factors in combination with Mr. Big tactics are more likely to produce false confessions from the target (Keenan, 2013, p.41). In summary, Mr. Big operations often have elements that can lead to an individual to falsely confess. Based on the very principle of the operation, a target may be seeking advantage, acceptance, or street credibility, or the avoid negative consequences; all while being placed under pressure unaware of the police presence. Which can lead to an individual to falsely confess. Therefore, the circumstances of Mr. Big may be viewed as unethical as they undermine the reliability of the confession and increase the chance of an innocent person confessing to a crime they did not commit (Keenan, 2013, p.47).

Mr. Big Operations and Entrapment

In Canadian law, entrapment occurs when a government agent such as a law enforcement officer induces someone to commit an illegal act that they would not have otherwise committed (Smith, et al., 2009, p.179). Entrapment can be defined as the “conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for the *trickery, persuasion, or fraud of officer*” (*R v Mack*, [1988] 2 SCR 903, I. *The Context*). Entrapment can then be used as a criminal defense based on the interaction between police officers and the defendant. In other words, this defense may be allowed in court when someone has been “set up” or “trapped into committing a crime by police or police informants (Barnhorst, & Barnhorst, 2013, p.87). The defense of entrapment would be a specific

application to the doctrine of abuse process. This would be the conviction of a person who had been entrapped into committing an offense which brings the administration of justice into dispute and would violate the values of the Charter and principles of fundamental justice (Stewart, 2012, p. 268). This is often what people assume happens under the influence of an undercover operation like Mr. Big.

R v Mack [1988]

The SCC case of *R v Mack* [1988] defined and discussed the issue of entrapment in great detail. The SCC justices had to consider the specific threshold limits in which police misconduct such as entrapment could be considered exceeding their reach of the permissible common law limits (Keenan, 2013, p.36). As seen in other precedents the threshold to determine an abuse of process by the police such as entrapment is quite high; with the complex variables at play in Mr. Big investigations guidance and scrutiny is needed from the SCC to protect society (Puddister, & Riddell, 2012, p.395).

Mr. Mack was charged with unlawful possession of narcotics for the purpose of trafficking, but at the end of his trial his defense brought an application for a stay of proceedings on the basis of entrapment (*R v Mack*, [1988] 2 SCR 903, *The Facts*). Mr. Mack said that the individual who was a police undercover informer repeatedly asked to sell him drugs in person and via phone calls. Mr. Mack refused to do so on multiple occasions until the undercover officer threatened him and told him “to get his act together” when he did not provide the requested drugs, he then eventually agreed to sell the narcotics (Barnhorst, & Barnhorst, 2013, p.87). The appellant held that the police were not interrupting an ongoing criminal act but rather brought about a conduct that wouldn’t have occurred without their involvement (*R v Mack*, [1988] 2 SCR 903, p.13). Therefore, the police were seen to be going further than merely providing an opportunity to commit an offense (*R v Mack*, [1988] 2 SCR 903, p.13). The stay of proceedings

application at the first trial was refused and a conviction was entered, a notice of appeal was then filed with the BC Court of Appeal, but it was dismissed. The case was appealed to the SCC who allowed the appeal and officially determined that entrapment exists as a part of the abuse of process doctrine (Barnhorst, & Barnhorst, 2013, p.87).

It is expected that police conduct is to be directed at obtaining evidence when an offense is committed, but the tactics that involve questionable conduct that violate Charter rights cannot be tolerated. In order to determine entrapment, there must be a critical distinction between the police acting on a reasonable suspicion in the pursuit of a criminal investigation and providing the suspect with the opportunity to commit a crime, and the state actually creating a crime for the purpose of prosecuting said individual (*R v Mack*, [1988] 2 SCR 903, *I. The Context*). Canadian Supreme Court Justice Willard Estey (as he was known then) explains that entrapment occurs when the authorities (a) provide an opportunity to persons to commit an offence without reasonable suspicion or, (b) have a reasonable suspicion and are acting in the course of a bona fide inquiry but then go beyond merely providing an opportunity and induce the suspect into the commission of an offense (*R v Mack*, [1988] 2 SCR 903, *IV. The Proper Approach*). Some inducements that law enforcement include deceit, fraud, trickery, a reward, or calculated inveigling and persistent importuning (*R v Mack*, [1988] 2 SCR 903, *IV. The Proper Approach*). To determine whether the police have employed means which go beyond providing an opportunity, the trial judge will consider factors such as the type of crime being investigated, whether the *average* person in the position of the accused would be induced into the commission of the crime, the accused's resistance and number of attempts made by the police, type of inducement, whether the police contact was exploitative, among other factors (*R v Mack*, [1988] 2 SCR 903, *Summary*). Therefore, if the trial judge decides there was entrapment from law

enforcement, it means the evidence obtained violated the Charter, thus bringing the administration of justice in disrepute (*R v Mack*, [1988] 2 SCR 903, p.8).

In determining whether the doctrine of entrapment applies to the appeal of *R v Mack* [1988], the SCC found that the police did entrap the suspect as it did not appear to be an interruption of an ongoing criminal enterprise, the offense was clearly brought about by their conduct, and they exploited Mr. Mack's narcotic addiction (*R v Mack*, [1988] 2 SCR 903, *Summary*). The appeal was allowed, and the conviction was set aside and entered a stay of proceedings (*R v Mack*, [1988] 2 SCR 903, *Summary*).

Therefore, a target of a Mr. Big operation could be entrapped into producing a confession when law enforcement officers overstep and induce a suspect rather than just providing an opportunity. Law enforcement officers are given the right to investigate in which they are legally and ethically allowed to use the Mr. Big technique, but if such tactics entrap a suspect to collect evidence like a confession, it will likely be inadmissible as it violates the Charter and the fundamental principles of justice. The decision of *R v Mack* [1988] is an important foundational precedent that determines the threshold of entrapment so this principle can be applied to future cases. This principle is further developed in more recent cases like *R v Hart* [2014].

R v Hart [2014]

In *R. v. Hart* [2014], the appellant was a father of two young twin daughters who drowned in a lake adjacent to a park nearby their family home in 2002 (*R v Hart*, [2014] 2 SCR 544, p.17). Mr. Hart was immediately suspected to be responsible for their deaths but there was a lack of evidence to charge him; two years following the drowning the RCMP began a Mr. Big operation and recruited him into their fictitious criminal organization in order to collect evidence (*R v Hart*, 2014, 2 SCR 544, p. 23). Four months into the investigation, Mr. Hart met Mr. Big

and confessed to killing his daughters, he was eventually charged with two counts of first-degree murder and was convicted (*R v Hart*, 2014, 2 SCR 544, p. 35-37).

Mr. Hart appealed the conviction holding the operation was oppressive and led to a breach of his fundamental rights under s.7 of the Charter and that his confessions should be inadmissible (*R v Hart*, [2014] 2 SCR 544, p. 40). Bringing attention to the admissibility of confessions but also an entrapment defense as Mr. Hart was implying, he was exploited and led into his ‘confession’. On appeal from the Newfoundland Court of Appeal, the SCC determined whether a new common law rule of evidence should be developed to determine the admissibility of Mr. Big confessions and if such confessions should be excluded. *R v Hart* [2014] is a monumental case that changed the course of Mr. Big operations in Canada with the introduction of a new common law confession rule for undercover operations.

The Interrogation Trilogy

The three cases of *R v Oickle* [2000], *R v Singh* [2007], *R v Sinclair* [2010] were heard by the SCC and, in the Court’s rationale in the three cases, created the “interrogation trilogy” that addresses different rules and rights under the common law and the Charter of Rights and Freedoms. These precedents lay out safeguards for individuals in terms of limits on police interrogation in obtaining confessions, the right to silence during interrogations, and the right to counsel in context of police questioning (Dufraimont, 2011, p.309). The rationales from the SCC in these decisions are critical in understanding the purposive principle of the Charter and the protections it provides suspects, thus checking police conduct. The SCC emphasizes the fundamental need for an appropriate balance of state interests and respecting entrenched protections of the individual.

Confession Rule - *R v Oickle* [2000]

R v Oickle [2000] was an important case as it was the first comprehensive restatement the SCC made of the ‘confessions rule’ since the Charter was established in 1982 (Smith, et al., 2009, p.175). This case introduces the common law confession rule which outlines limits on police interrogation, which also addresses some considerable concern around Mr. Big operations producing false confessions (Dufraimont, 2011, p.309), (Keenan, 2010, p.33). The central issue for appeal of Mr. Oickle’s conviction was the voluntariness of his confession, the defense claimed that a number of factors in the interrogation raised reasonable doubts because the police exaggerated the reliability of the polygraph, threatened his fiancé with a polygraph, and minimized the legal significance of multiple convictions (Smith, et al., 2009, p. 175). Furthermore, the justices were tasked with deciding whether the police improperly induced the respondent’s confession through an environment of oppression, or through any threats or promises, or tactics that would raise a reasonable doubt to the voluntariness of the confession (*R v Oickle*, [2000] 2 SCR 3, p.1). In other words, the court was required to consider factors of voluntariness in the use of police trickery, threats, or promises which set precedent to be applied in multiple contexts such as Mr. Big operations (Smith, et al., 2009, p.175).

To briefly explain this case, between February 5th, 1994 and April 4, 1995, there were a series of fires that appeared to be deliberately set involving buildings and motor vehicles, nearby where Mr. Oickle and his fiancé lived, one fire which happened to consume his fiancé’s car (*R v Oickle*, [2000] 2 SCR 3, p.4-5). The police conducted their investigation and narrowed their list to seven or eight individuals to submit polygraph tests; most agreed to take the test or were cleared, but Mr. Oickle was seen resistant and within a matter of minutes of the test being administered it was determined he failed (*R v Oickle*, [2000] 2 SCR 3, para. 6-7). After being

reminded of his rights Mr. Oickle then confessed to setting fire to his fiancée's car, within the next four hours he would also confess to setting seven to eight fires (*R v Oickle*, [2000] 2 SCR 3, p.9).

At the initial trial, the judge held a *voir dire* to determine the admissibility of the accused's statements and ruled they were admissible and voluntary; Mr. Oickle was then convicted on all counts (*R v Oickle*, [2000] 2 SCR 3, p.10). However, Mr. Oickle's charges were appealed to the Nova Scotia Court of Appeal and they overturned the conviction, excluded the confessions from evidence, and an acquittal was entered. This was after considering the respondent was

(N)ot coherent and in control during the videotaped interrogation, he was not aware the role of the equipment, while the police were minimizing the seriousness of the offense and did not clarify the polygraph results were not admissible as evidence which breached the respondent's trust by unfairly and aggressively exploiting the results of the tests as a confession inducing instrument (*R v Oickle*, [2000] 2 SCR 3, p.10-18).

The SCC allowed the appeal on the basis that the statements in question were the only evidence that directly implicated the respondent and without establishing their admissibility there would be no reasonable trier of fact to convict Mr. Oickle which was needed to convict without a reasonable doubt (*R v Oickle*, [2000] 2 SCR 3, p.21). This highlighted the importance in protecting the Charter which upholds fundamental rights of due process and the value in ensuring innocent people are not convicted (Smith, et al., 2009, p.175). Justice Iacobucci (as he was known then) wrote the majority rationale for the decision and identified that the Charter is not an exhaustive catalogue of rights for one to follow. He stated there is the utmost importance for the confessional rule to be administered on the principle of protecting the rights of the accused, but

without unduly limiting society's need to investigate and solve crimes (*R v Oickle* [2000] 2 SCR 3, p.31, p.33) (Keenan, 2010, p.34). Justice Iacobucci (as he was known then) also addresses the value of the confession rule in its ability to help with understanding problems surrounding false confessions and how it will uphold the diversity in confession approaches taken by law enforcement. (*R v Oickle*, [2000] 2 SCR 3, p.32).

The SCC majority decision outlined that confessions must be identified as voluntary to be reliable, because an involuntary confession will be likely unreliable and thus inadmissible. This distinction is important as the confessions rule does not explicitly exclude statements elicited by undercover officers; statements could often be interpreted as involuntary due to the undercover nature of the interrogation and various and “can still violate the Charter” but that would become a matter for the courts to decide, any statements is not automatically involuntary or inadmissible (*R v Oickle*, [2000] 2 SCR 3, p.28). The confession rule can be explained as, *out of court statements made by an accused to a person of authority (law enforcement) are admissible as evidence, but only when statements can be without a reasonable doubt deemed voluntary in nature*. For instance, “statements made as the result of intimidating questions, or questioning which is oppressive and calculated to overcome the freedom of will of the suspect for the purpose of extracting a confession” could become involuntary (*R v Oickle*, [2000] 2 SCR 3, p.33). This is not to neglect the operating mind of a suspect when confessing as this is important to consider alongside other elements of voluntariness (Dufraimont, 2011, p.312). To further explain, interrogation tactics that subtly minimize moral and legal consequences of a conviction by discrete suggestions about the benefits of confessing to an offense are deemed useful to police. These are not considered unreasonable or shock worthy to the community; but only as long as these tactics do not raise questions as to the voluntariness of the accused's confession

(Smith, et al., 2009, p.176). In which police interrogations are subjected to limits of the SCC decisions of the interrogation trilogy like the confession rule, right to counsel and right to silence (Achenefotos, 2010, para.2).

Certain interrogation tactics such as Mr. Oickle being misled by having the reliability of evidence in the accuracy of polygraph exaggerated to him by police alone does not invalidate a confession, rather the manner in which conducted could challenge admissibility and the voluntariness (*R v Oickle*, [2000] 2 SCR 3, p.95). However, some tactics with greater threat like deception that fall under “police trickery” as seen in investigative tactics of Mr. Big operations, the common law requires a separate inquiry into the police trickery, meaning tactics must be held to a standard that would not “shock the community’s conscience” (Dufraimont, 2011, p.312). Not only would the voluntariness of a statement then need to be decided but it would also need to be held to a standard of shock worthy to the community.

The SCC found that Mr. Oickle was not offered any inducements strong enough to raise a reasonable doubt to the voluntariness of the confession where there was no mistreatment and a mildly oppressive environment (*R v Oickle*, [2000] 2 SCR 3, p.104). The SCC then moved to restore the trial judge’s conviction of Mr. Oickle and set aside the Court of Appeal’s judgment. Therefore, Mr. Oickle’s were considered voluntary given the circumstances and could be admissible and used as evidence to convict him of his guilt. To interpret this confession rule in the circumstances of a Mr. Big operation where police trickery is often used, it is beneficial to identify that there is a standard of voluntary and involuntary confessions in which they must be obtained in a manner that would not “shock the community”, meaning interrogation tactics must not go beyond a reasonable level of inducement, oppression, or mistreatment in order to mitigate false confessions or confessions obtained at the expense of the accused’s rights.

In conclusion, the circumstances surrounding the voluntariness of a confession depend on the use of presence of threats or promises, oppression, and the operating mind; this also includes the consideration of police trickery that would “shock the community” to obtain a confession.

Right to Silence - *R v Hebert* [1990] and *R v Singh* [2007]

As the Charter does not explicitly state a “right to silence”, the SCC played a critical role in shaping limitations on interrogation practices as they recognize Charter s. 7 principles of fundamental justice are constitutionally protected (Dufraimont, 2011, p.313).

***R v Hebert* [1990]**

The recognition that an accused’s right to silence is protected by s. 7 of the Charter is derived from the precedent of *R v Hebert* [1990], which first addressed s.7 in terms of pre-trial right to silence. This was a foundational decision for focusing on whether a statement made by a detained person to an undercover officer would violate the Charter; based upon the critical importance of achieving a balance between societal interests and the interests of the individual’s rights (*R v Singh*, [2007] 3 SCR 405, p.45). Supreme Court Justice McLachlin (as she was known then) narrowly defined the right to silence in the rationale as, “the right to choose freely whether or not to speak to authorities” (Dufraimont, 2011, p.313). Therefore, in scope of the confession rule, jurisprudence on confessions revealed a theme linking the exercise of one’s free will in choosing to speak to ensure the impugned statement would not result in bringing the administration of justice into dispute (*R v Singh*, [2007] 3 SCR 405, p.34). In the *Hebert* case, the appellant (Hebert) refused to speak with police but was tricked into making incriminating statements to an undercover officer in the same jail cell. The Court found that the police effectively negated Mr. Hebert’s free will in his choice to remain silent thus violating his rights. The particular circumstance in undercover investigations where the individual is not aware they

are speaking to an authority the court outlined specific facts to support a suspect who is not yet detained (*R v Singh*, [2007] 3 SCR 405, p.46).

To further explain, the *Hebert* decision established the fact that officers who are not undercover, in which an accused chooses on their own will to volunteer information, there is no violation of the charter. Furthermore, police persuasion, “short of denying the suspect the right to choose or depriving them of an operating mind” will also not breach the right to silence (*R v Hebert*, [1990] 2 SCR 151, *D. Conclusion*). Although, there are different facts and considerations for undercover operations where officers are able to obtain information from the suspect prior to the detention. The Court explains this is because an undercover operative is technically not in control of the state and there is no need to protect a suspect from the “greater power of the state” in such instances (*R. v. Hebert*, [1990] 2 SCR 151, *D. Conclusion*). In other words, the undercover operative is not detaining the individual but rather investigating, in which the Court found this section 7 protection would only apply after the suspect is detained by law enforcement (Puddister & Riddell, 2012, p.394). Justice McLachlin then emphasizes a distinction between undercover agents to observe a suspect and the use of undercover agents to elicit information in violation of the suspects choice to remain silent (*R. v. Hebert*, [1990] 2 SCR 151, *D. Conclusion*). For example, as Mr. Big operations are a way of obtaining information or evidence from the target prior to detention, police may often use tactics such as deceit to interrogate the target *after* he or she has advised the police that they do not want to speak any further. The police would then likely be considered breaching the suspects rights by improperly eliciting information they were unable to obtain when initially respecting the suspects right to silence, thus taking away the suspects choice (*R v Hebert*, [1990] 2 SCR 151, *D. Conclusion*). Regardless, Mr. Big

stings do not require protection from the state because the technique is considered an investigative function not a process of detaining the suspect (Puddister, & Riddell, 2012, p.394).

R v. Singh [2007]

More recently, the SCC in *R v Singh* [2007] had to readdress and consider the concept of self-incrimination from which the confession rule and right to silence are derived. There was considerable overlap between the inquiry into voluntariness of the statement and the review of s.7 in the alleged breach of the right to silence (*R v Singh*, [2007] 3 SCR 405, p.24). To provide a brief case summary for context in explaining this decision, Mr. Singh was arrested for second degree murder of a bystander outside a pub who was killed by a stray bullet. There was no forensic evidence, but a doorman of the pub was able to identify Mr. Singh as the shooter in a photo lineup (*R v Singh*, [2007] 3 SCR 405, p.11). Mr. Singh was told of his right to counsel under s.10 and did consult with counsel (*R v Singh*, [2007] 3 SCR 405, p.2). In two police interviews, Mr. Singh made it known he did not want to talk about the incident or knew anything about it. He asserted his right to silence 18 different times in these interrogations, officers would affirm his right but would continue to engage (*R v Singh*, [2007] 3 SCR 405, p.13). By the end of the interrogation, Mr. Singh did make incriminating statements as he admitted to being in the pub on the day of the shooting and identified himself in the photograph, and then identified himself as a man in a videotape taken outside the pub on the night of the shooting (*R v Singh*, [2007] 3 SCR 405, p.12).

During the *voir dire* to determine the admissibility of these statements prior to the trial, the judge followed the precedent of the confession rule from *R v Oickle* [2000], where he rationalized, he was “satisfied beyond a reasonable doubt that the statements were voluntary” and admitted the evidence based upon its probative value (*R v Singh*, [2007] 3 SCR 405, p.3).

Mr. Singh was convicted at trial and appealed to the British Columbia Court of Appeal on grounds of his s.7 right, arguing that if there was a proper application of s.7 the police would have had to of stopped trying to obtain admissions (*R v Singh*, [2007] 3 SCR 405, p.17). The Court of Appeal dismissed the appeal and concluded that the way in which the trial judge relied on the precedent of *R v Hebert* [1990], in terms of s.7 protection, the police persuasion in this interrogation did not deny Mr. Singh of the right to choose, nor did it deprive him of an operating mind; therefore, Mr. Singh's s.7 right was not infringed, making the evidence admissible (*R v Singh*, [2007] 3 SCR 405, p.18). The SCC, in a 5-4 majority decision, dismissed Mr. Singh's appeal for conviction as the statements made in a police interrogation room were found to be made voluntarily, meaning they were obtained in a manner that did not infringe Mr. Singh's rights and his conviction was upheld (Dufraimont, 2011, p.314).

The majority decision explains that in the context of a police interrogation of a person in detention, "there are two tests for determining whether the suspect's right to silence was respected" and are functionally equivalent (*R v Singh*, [2007] 3 SCR 405, p.25). One test assesses the voluntariness of a confession under s.7 by using an objective test to assess the exercise of the accused's free will (*R v Singh*, [2007] 3 SCR 405, p.36). The second test follows the same directives of the confession rule (*R v Singh*, [2007] 3 SCR 405, p.36). However, Justice Charron (as he was known then) who wrote the decision notes that these tests are only functionally equivalent when the "the confession rule effectively subsumes the constitutional right to silence," meaning this test only applies in circumstances where the person is obviously in detention and is being interrogated by a known authority (*R v Singh*, [2007] 3 SCR 405, p.39). As mentioned, *R v Oickle* [2000], this means that the confession rule will only apply when the suspect is aware that they are making a statement to a person in authority. Furthermore, the

jurisprudence relating to the right to silence has never, and currently does not extend to the protection against police tricks or any pre-detention interrogations (*R v Singh*, [2007] 3 SCR 405, p.46). Police persuasion or any conduct considered just short of denying the suspect their right to choose or depriving their operating mind does not breach the right to silence *only* once the accused is detained (*R v Singh*, [2007] 3 SCR 405, p.46). Therefore, an undercover agent who is unknown to the accused does not fall into this category and as *R v Hebert* [1990] and *R v Singh* [2007], have established the target in such operations really has limited protection of s.7 in their right to silence until detained.

The notion of voluntariness in the right to remain silent speaks to the principle that a person is not obliged to talk, answer, or give information to police, in which an individual is unaware of the authority they unintentionally waive a ‘volunteering’ of a statement (*R v Singh*, [2007] 3 SCR 405, p.31). In the consideration of the confession rule, police trickery that would deny an accused’s right to silence could then be considered to produce an involuntary statement, and if found to reach the standard that shocks the community it is likely to be ruled inadmissible as it is an unreliably obtained statement (*R v Singh*, [2007] 3 SCR 405, p.35). Therefore, further emphasizing that in Mr. Big Operations officers engaging in police trickery may overstep and deny the accused their right to silence through oppressive environments with Mr. Big and the use of threats or promises that influence his or her operating mind making any statements involuntary. However, to assess the voluntariness of a confession under s.7, Justice Charron explains that focus is directed to the conflict of police and the effect on the suspects ability to exercise their free will (*R v Singh*, [2007] 3 SCR 405, p.36).

Mr. Singh’s appeal was based on an issue that the police did not respect his constitutional right to remain silent. However, the SCC’s majority decided that under this two-step functional

equivalent test of the confession rule the statements were found voluntary, and the fact Mr. Singh had free will but chose to continue to speak to officers after asserting his rights makes these statements admissible evidence (*R v Singh*, [2007] 3 SCR 405, p.49). The dissenting justices, however, held an interesting alternative in disagreement of the majority decision, explaining they believe that the ability of the police to investigate crime in Canada would be not be impaired by effective exercise to pre-trial right to silence as implied by rationale of Justice Charron (*R v Singh*, [2007] 3 SCR 405, p.82). Holding that a detainee's right to silence should rather be respected and not deliberately undermined by police through their persistence (Dufrainmont, 2011, p.315).

Right to Counsel – *R v Sinclair* [2010]

R v Sinclair [2010] is the third and final case to explore in the interrogation trilogy. In this case, the SCC considered the meaning of s.10, and the various implementation duties of police in custodial interrogations (Dufrainmont, 2011, p.315). Chief Justice McLachlin and Justice Charron wrote the majority decision explaining that the appeal concerns the nature and limits of the right to counsel under s.10 of the Charter, concerning statements made during interrogations. Section. 10(b) of the Charter is to allow a person who has been arrested or detained the “right to retain and instruct counsel without delay and to be informed of that right” which places informational and implementation duties on the police which they must inform the detainee and also provide the opportunity and ability to exercise that right (Dufrainmont, 2011, p.315). The issue for Mr. Sinclair was whether he, as a detainee in police custody, had properly been accorded his s.10 Charter right to further consultations with counsel during the course of interrogations (*R v Sinclair*, [2010] 2 SCR 310, p.1).

Mr. Sinclair was charged with second degree murder for killing another man but was convicted at trial for manslaughter (*R v Sinclair*, [2010] 2 SCR 310, p.4). The conduct in

question concerns the interrogation of Mr. Sinclair after his arrest. Mr. Sinclair was said to be advised he was being arrested and was read his Charter warning of the right to retain and instruct counsel without delay, and that a legal aid lawyer would be available free of charge (*R v Sinclair*, [2010] 2 SCR 310, p.5). He did not want to contact a lawyer right away and was taken to the RCMP detachment where he was asked if he wanted to exercise his right. Mr. Sinclair did speak to his lawyer by the phone in a private room for three minutes (*R v Sinclair*, [2010] 2 SCR 310, p.6). Later in the day, Mr. Sinclair's interrogation lasted for around 5 hours and he upheld his right to silence. As questioning continued to progress, Mr. Sinclair repeatedly expressed discomfort within being interviewed without his lawyer. Four- or five-times Mr. Sinclair adamantly expressed a desire to speak with his lawyer and his intent to remain silent without his guidance (*R v Sinclair*, [2010] 2 SCR 310, p.10). However, each time he asked the interrogator validated Mr. Sinclair's right but continued to proceed with further questioning and tactics of confrontation to get Mr. Sinclair to confess (Dufraimont, 2011, p.316). The RCMP explained that Mr. Sinclair's right to counsel was considered satisfied through the prior telephone call and he was not entitled to have his lawyer present during the questioning. By end of day, the police had placed Mr. Sinclair in a cell with an undercover officer in which he made an incriminating statement and then accompanied the police to where the murder occurred and participated in a re-enactment (*R v Sinclair*, [2010] 2 SCR 310, p.13).

At trial, a *voir dire* was conducted to determine the admissibility of the statements Mr. Sinclair made during the initial interview, the exchange with the undercover officer and the re-enactment (*R v Sinclair*, [2010] 2 SCR 310, p.15). It was proven that the statements were voluntary and admissible in court. The trial judge further decided that s.10 of the Charter had been satisfied with the phone call with his lawyer prior to the interview (*R v Sinclair*, [2010] 2

SCR 310, p.15). The defense appealed the conviction of manslaughter specifying the appellant's repeated requests to speak with his lawyer during the course of the interview that were denied constituted a breach of s.10 (*R v Sinclair*, [2010] 2 SCR 310, p.16). The British Columbia Court of Appeal dismissed Mr. Sinclair's appeal and affirmed his conviction. The case is then brought to the SCC where Mr. Sinclair continued to argue that s.10 requires the police to respect a detainee's request to have counsel present during a custodial interrogation (*R v Sinclair*, [2010] 2 SCR 310, p.18). The SCC dismissed the appeal in a majority decision of 5-4, finding Mr. Sinclair's s. 10 right was not unreasonably breached.

Mr. Sinclair had argued that the wording of s.10 makes it clear this right arises upon detention but there is no text to directly indicate when the right is exhausted or satisfied, The Court had to consider if "retain and instruct" implies a continuing right, or if "on arrest or detention" indicates a specific point in time and not a continuum (*R v Sinclair*, [2010] 2 SCR 310, p. 20-21). This required the SCC to conduct a purposive analysis of s.10 of the Charter, where the Court determined the purpose of this right is to provide the detainee with an opportunity to obtain legal advice relevant to the legal situation (*R v Sinclair*, [2010] 2 SCR 310, p. 24). As identified in *R v Hebert* [1990], s.7 and s.10 work together to ensure a suspect is able to make the *choice* to speak to investigators in which they can exercise their operating mind through free will and informed decisions (*R v Sinclair*, [2010] 2 SCR 310, p. 25). The SCC then made a crucial distinction specifying that the state is not obliged to protect the suspect against making incriminating statements, but rather obliged to use legitimate means of persuasion to encourage a suspect to do so and allow the suspect to make informed choices (*R v Sinclair*, [2010] 2 SCR 310, p. 26).

In further analysis of s.10, Chief Justice McLachlin and Justice Charron analyze the purpose and continuance of the right. The SCC decided that the right to counsel that arises upon detention is satisfied by law enforcement doing two things: offering an initial warning where the detainee is informed of their right to counsel and affording reasonable opportunity for the detainee to consult the counsel (Dufraimont, 2011, p.316) (*R v Sinclair*, [2010] 2 SCR 310, p. 27). This was demonstrated by law enforcement notifying Mr. Sinclair of his s.10 right and providing him two opportunities to reach a lawyer and allowed him to speak to said lawyer. However, Sinclair advanced that a detainee should have a lawyer present upon request during the entirety of the interview and that this right should be a continuous ‘protection’ (*R v Sinclair*, [2010] 2 SCR 310, p. 33). The Court explained that s.10 does not contemplate such a requirement, as the wording in the Charter “reasonably connote more than a perfunctory consultation *prior* to the interrogation” (*R v Sinclair*, [2010] 2 SCR 310, p. 35). Thus, there is no implied notion that counsel should be present throughout the interview process. There is also the notion that changing circumstances would allow the detainee to consult their counsel a second time. In a matter of a “change in jeopardy”, meaning the investigation takes a more serious turn the initial advice from the lawyer may no longer suit the situation (*R v Sinclair*, [2010] 2 SCR 310, p. 51). Therefore, the Court decides that the detainee must be given further opportunity to consult with counsel to obtain advice on the new situation to fulfil the purpose of s.10 (*R v Sinclair*, [2010] 2 SCR 310, p. 51).

Section 10 of the Charter should be interpreted in a way that fully respects the purpose of supporting the detainees s.7 right to silence (*R v Sinclair*, [2010] 2 SCR 310, p. 47). The Charter intersects as s.10 and s.7 often overlap. For instance, if an accused’s s.10 right to counsel is denied, their statement will likely be involuntary, thus inadmissible as evidence in consideration

of s.7 and the confession rule. Furthermore, if the police comply with s.10, it will not make a statement automatically voluntary. If a voluntary statement is made by the accused, there could still be a breach of s.10 (*R v Sinclair*, [2010] 2 SCR 310, p.29). The question outlined in this case concerned whether Mr. Sinclair should have been given a second opportunity to consult with a lawyer when asked. The majority decided that Mr. Sinclair did not satisfy any of the categories that would satisfy re-consultation with his counsel. Hence, he received his legal advice fulfilling the purpose of s.10 as there was no change in jeopardy he was facing (*R v Sinclair*, [2010] 2 SCR 310, p.66). In conclusion, this case set precedent that outlined the proper performance functions of s.10, further identifying the critical balance between individual rights and the intentions of the state.

Canadian Charter of Rights and Freedoms Implications

To understand an accused's rights during police investigations, the purposive elements of the Charter must be explained. The Charter is a critical document that lays out the rights and freedoms Canadian's believe are necessary in a democratic and free society (Government of Canada, 2020, para.1). The Charter identifies and enshrines six broad categories of rights consisting of: fundamental freedoms, democratic rights, mobility rights, legal rights, the right to equality and equal benefit under the law, and language rights (Sharpe & Roach, 2017, p.48-49). The Charter's rights and freedoms radiate its foundational values that are used to protect individuals and the social contract in Canada; values of equality, human dignity, autonomy, religious freedom, fairness, expressive freedom, advancement of democracy, and privacy are upheld through various sections (Sharpe, & Roach, 2017, p.54-57). The Charter of Rights and Freedoms is entrenched in the Canadian Constitution making it supreme in law with its rights

and freedoms to Canadian's. Therefore, it is protected and highest of all other laws, meaning all other statutes must be consistent with the Charter.

The boundaries, purposes, and definition of the sections of the Charter have developed over time from Supreme Court precedent, which has transformed the course of criminal investigations and the judicial proceedings while expanding legal rights in terms of the accused. The Court must interpret and apply the meaning of the Charter to protect the core principles and values of equality, human dignity, fairness, autonomy, expression freedom, religious freedom, democracy advancement, and privacy. Overtime the Charter has been able to increase the judicial responsibility and the ability delineate the line between crime control and due process (Sharpe, & Roach, 2017, p. 295). In exploring the legal rights that are engaged by criminal investigations such as Mr. Big operations it is important to understand that the Charter is a purposive document that is interpreted and explained based upon the Court's purposive method of interpreting the meaning of the right or freedom with the issue at hand to determine whether the matter consists of an infringement (Sharpe, & Roach, 2017, p.56).

However, the rights and freedoms provided by the Charter are also not absolute, as identified by s.1 there can be justifiable 'reasonable' limits to where the interests of society at large or the rights of other individual will justifiably require limitations (Sharpe, & Roach, 2017, p. 53). Section 1 guarantees the rights and freedoms but defines they are subject to "limitations prescribed by law" in which the sections are subject to "reasonable limits" when they can be demonstrably justified in a free and democratic society (*The Constitution Act, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c11, s.1*). To determine what is reasonable in terms of infringement section 1 imposes the Oakes test, derived from *R. v. Oakes* [1986], in which this

decision made it clear, judges must proportionally review the case using the discretion of minimal impairment (Sharpe, & Roach, 2017, p. 81).

The Oakes test is a two-step process: the first step asks if the legislative goal is pressing and substantial, speaking to the state's objective being important enough to justify the limitation. The second step asks if there is proportionality between the objective and the means used to the state's objective (Department of Justice, 2021, para. 3. *The Oakes Test*). If a judge answers yes to the above questions, they must then consider three different branches of (a) rational connection, the limit being rationally connected to the objective, (b) minimal impairment, asking if the challenged legislation infringes on the right or freedom more than what is necessarily for the legislation's objective, and (c) the final balancing, that there must be proportionality between the effects of the law (Department of Justice, 2021, para. 3. *The Oakes Test*). Although, section 1 "does not play a role in police officer's actions in limiting the Charter right are not specifically authorized or prescribed by law" (Sharpe, & Roach, 2017, p. 67). In other words, if the conduct of law enforcement violates, but is not authorized by statute or is not set out in the law, it cannot be justified under section 1. In such situations, a court would go straight to a remedy phase of the analysis (Sharpe, & Roach, 2017, p. 67).

The Charter essentially provides legal safeguards to protect the right of the defendant and to try to minimize errors of the investigation process; in which section 7 of fundamental freedoms and section 11, pertaining to proceedings in criminal and penal matters are most often engaged in this regard (Smith, et al., 2009, p.173). The Supreme Court of Canada's role in setting precedent that determine the parameters of police powers has expanded greatly since the introduction of the Charter of Rights of Freedoms in 1982; leading the SCC to hear arguments questioning Mr. Big cases that infringe section 7 rights (right to silence), the admissibility of

statements, persons in authority doctrine, and the abuse of process and dirty tricks (Puddister, & Riddell, 2012, p. 393).

Section 7 of the Charter: Fundamental Justice

Section 7 of the Charter of Rights and Freedoms states, “everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice” (*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c11 s 7). This right is seen upholding many Charter values as it engages personal liberty. To further explain, courts have determined the concept of “fundamental rights” and the scope of their protections in applying section 7. As the Charter holds a purposive approach, this section of the Charter addresses the concern between proper balance of individual rights and the proceedings of an accused’s life, liberty or security (*R v Herbert*, [1990] 2 SCR 151, *III. Purpose of Right to Silence*). Section 7 is an essential legal right as it seeks to impose limits on the power of the state over a detained person (*R v Singh*, [2007] 3 SCR 405, p.45). It provides protection against the unfair use of the state’s superior resources but also maintains the state’s power to deprive a person of their life, liberty, or security in which balance of right is crucial to the administration of justice.

To begin understanding section 7, the language of this right such as concepts of life, liberty, and security of the person must briefly be defined. The right to life would be used in instances where the state conduct would deprive an individual of their life (Stewart, 2012, p.63). This is to say the SCC has recognized “life” in a civil sense and in consideration when someone’s survival is at stake. They have not yet addressed the scope of life directly; although it is engaged when there is a substantial risk to life. Liberty is more complex with its various legal

and political discourses, but liberty allows individuals to be free from physical constraint. When there are deprivations of liberty by state actions like inhibiting an individual from making choices on personal decisions without interference their section 7 right would be engaged (Stewart, 2012, p.65). This means that an average citizen is free from state-imposed unjustified constraint or imprisonment because they cannot be deprived of their liberty; hence people's liberty is only restricted once they have been given a fair trial and are guilty beyond reasonable doubt as this is a fundamental principle.

The SCC has identified that in the interest of liberty it is not merely restricted to mean physical restraint either, but in instances where the state compulsions or prohibitions affect the importance of fundamental life choices (Stewart, 2012, p.68). This aspect of liberty is engaged in penal proceedings, civil proceedings, prison conditions, parole eligibility, psychiatric detention, among others. This ensures that section 7 is meant to protect against any state-imposed deprivation of one's liberty that does not comply with principles of fundamental justice (Stewart, 2012, p.71). Lastly, security of the person refers to both bodily and psychological integrity of the individual. It has been interpreted by the SCC that state imposed "psychological stress" is a component of the criminal law context (Sharpe, & Roach, 2017, p.252). Therefore, security of the person includes and exceeds physical integrity of the person, property and immediate surroundings of a person, and their psychological integrity. These foundational concepts of life, liberty, and security will be engaged when the state interferes in profoundly intimate and personal choices of the individual (Sharpe, & Roach, 2017, p.252).

Through continuous SCC decisions the principles of fundamental justice are constantly evolving, growing, and being redefined. Since section 7 is the foundation of the legal rights the fundamental freedoms it upholds are necessary in advancing this discussion. The aspects of

fundamental principles connect with individual personal choices and privacy interests, in which there are three main categories in which the SCC has defined a range of principles: fault, procedural and substantive. The “fault principles” refers to mens rea, the act of the crime relating to the individual’s criminal intent. As well as including aspects of procedural fairness (justice) that serve to protect the administration of justice and substantive justice principles that protect the individual from unjust laws (Stewart, 2012, p.126). To further explain, substantive principles of fundamental justice are most often associated with the areas of statutes, regulations, and common law rules. Thus, principles of fundamental justice under a substantive lens require laws not to be overly vague, not to be overly broad, nor arbitrary, or not grossly disproportionate and must uphold moral blameworthiness (Stewart, 2012, p.127-149). With that being said there are numerous principles to govern the penal aspects of the law including investigations. This introduces the need for procedural justice which covers a wide range of fundamental principles that the SCC has deemed crucial such as: the right to full disclosure, best evidence rule, the right to full answer and defense, as well as the presumption of innocence and the right to silence. All of which are seen as interacting principles in the context of Mr. Big operations.

Although section 7 provides an individual procedural right under the general language of section 7, they are not specifically guaranteed as specifically laid out in legal rights of sections 8 to 14 but through these internal principles are upheld (Sharpe, & Roach, 2017, p.303). This is to mention that this section of fundamental justice is different from other Charter sections as they are not a free-standing guarantee. A critical distinction that these rights are only invoked where state action or law has violated life, liberty, and security of the person, (Sharpe, & Roach, 2017, p.255). Furthermore, the SCC has recognized this point through the “residual role” section 7 plays in relation to the other specific guarantees in s.8 through s.14. This section is a

“steppingstone” for other protections, serving as a foundation of all conduct that fundamental justice principles must be respected and upheld (Stewart, 2012, p.9).

Procedural Fundamental Justice Principles: Right to Silence

Section 7 and the right to silence applies when a detainee is speaking to an agent of the state (Stewart, 2012, p.211). In penal investigations, section 7 protects the procedural principles of fundamental justice that a detainee has the right to silence and thus should make an ‘informed’ decision about whether to speak to an authority (Stewart, 2012, p.210). The SCC has demonstrated, as written by then Justice McLachlin, that the right to silence of a detained person must be broad enough to grant a detained person a free choice on whether to speak or remain quiet (*R v Herbert*, [1990] 2 SCR 151, *I. Related Rights*). This is notwithstanding the fact that he or she is in the superior power of the state. (*R v Herbert*, [1990] 2 SCR 151, *III. Purpose of Right to Silence*). This fundamental principle affords that a person who is not detained, rather a suspect in an investigation retains the protection of general liberty under section 7 in which they are to decide whether or not to speak to an officer (Stewart, 2012, p.210). As established through the confession rule a statement must be deemed voluntary for it to be admissible, in which an individual is protected from prejudice, inducement, oppressive questioning, or other police misconduct or trickery as the right to remain silent is a principle of fundamental justice and engaging in such behavior to obtain confessional evidence would be a section 7 infringement of the suspects liberty and right to silence (Stewart, 2012, p.212).

To further explain, the right to silence by its nature is exercised differently than the other legal Charter rights. For example, the Charter’s section 8 right to counsel is held within the control of an accused with an operating mind in which conduct from the authorities does not impact the detainee by taking away his or her ability to choose (*R v Singh*, 2007, 3 SCR 405,

p.43). This means in an undercover officer scenario where a “fellow inmate” is sharing a cell in which a confession is spoken it is not always considered an infringement of section 7 in how it was obtained. As explained in *R v Singh* and *R v Hebert*, the common law recognizes an individual’s right to remain silent, but this does not mean that authorities cannot speak to this individual, there is constitutional importance in law enforcement being able to perform their investigative duties. The SCC has identified that the scope of this right to silence for individual to exercise must also extend to exclude tricks which would effectively deprive the suspect of this choice, this means authorities cannot trick the suspect into making a confession after they have exercised their right (*R v Hebert*, [1990] 2 SCR 151, *III. Purpose of Right to Silence*).

In the case where police trickery is in question, the SCC held that two questions must be asked, “was the evidence obtained by the state?” and “was the evidence elicited?” only if the answer is yes to both of these will there be a section 7 violation. This is not to say that this protects an individual from being questioned, or that the police are not allowed to continue questioning the suspect once they have reasserted their right to silence or once they have obtained counsel (Stewart, 2012, p.212). It is only where police questioning or trickery denies the suspect of the right to choose or deprives them of an operating mind that police questioning can violate the right to silence (Stewart, 2012, p.212). As the Charter does not explicitly guarantee a right to silence, this principle of fundamental justice must continue to be outlined in consideration of the evolving cases. Although the recognized pre-trial right to silence afforded under section 7 also leads to section 11(c) of the Charter that protects against the principle of self-incrimination; both of these rights prevent the Crown from arguing that an individual selecting to invoke their right to silence would imply or be evidence guilt (Stewart, 2012, p.247).

Violation of Section 7.

Section 7 is considered infringed if there is a deprivation of life, liberty, or security of the person or if there is deprivation of the principles of justice (Department of Justice, 2019, para. 4).

Therefore, in face of a section 7 Charter violation (section 7 test) the applicant must demonstrate that (1) there is some state conduct to which the Charter applies, meaning is there a practice, policy, law, or lawful exercise of state authority that infringes on the individuals life, liberty or security, (2) the applicant is a ‘natural persons’, (3) the state conduct affects the applications life, liberty, security of the person and (4) the conduct is not in accordance to those afforded principles of fundamental justice (Stewart, 2012, pp. 21-22). This burden of proof for the analysis of section 7 puts the burden on the applicant to demonstrate that their right to life, liberty, or security of the person had been denied against the indefinable principles of fundamental justice in which it must meet the civil standard on the balance of probabilities (Sharpe, & Roach, 2017, p.254). State conduct that will be assessed refers to the areas of statutes and regulations, government entities, private and public law litigation, as well as the exercises of statutory powers and discretion among the various state conduct surrounding investigations. In summary, an applicant must be able to demonstrate that their section 7 right was violated on the basis of the discussed fundamental principles.

Justification under Section 1.

If the three elements required of a violation are established it is still “theoretically” possible for such act to be rescued by section 1 where the government could be justified but these cases will be extremely rare (Sharpe, & Roach, 2017, p.88 & pp.246-247). The SCC has specified that a violation of the Charter s.7 will only be saved by s.1 in cases arising out of “exceptional conditions like natural disasters, the outbreak of war, and epidemics, and the like” (Sharpe, & Roach, 2017, p.247). The strict definition of section 7 places limitations on

determining violations where the influences of section 1 analysis to determine an infringement of the right is not required (Sharpe, & Roach, 2017, p. 88). To further explain, section 7 is different at its core as it holds internal qualifiers where the requirement of the state to respect the “principles of fundamental justice” will overlap with the section 1 test for justification of a reasonable infringement, in which it is very difficult to justify a violation under section 1 (Stewart, 2012, p.5).

A section 7 violation holds a significant burden of proof, which if met would demonstrate that such conduct was not in accordance with the principles of fundamental justice that could rarely be justified under section 1 of the Charter as it violated the individuals very right to life, liberty, and security (Stewart, 2012, p.289). Justice Wilson furthers this rationale by saying, he does “not believe that a limit on s.7... could either be reasonable or demonstrably justified in a free and democratic society” (Stewart, 2012, p.289). This identifies the utmost value and respect for the principles of fundamental justice on their own, for only in extreme cases should an individual’s section 7 right ever be justifiably infringed. Otherwise, section 7 and the principles of fundamental justice are so critical they cannot be overridden or infringed on the basis of state or social interests (Stewart, 2012, p.290). Therefore, the section 1 justifications for violations under section 7 are considered “rare” as they simply would not be able to pass the minimal impairment aspect of the Oakes test due to the utmost importance of the fundamental principles of justice (Sharpe, & Roach, 2017, p.89). The threshold for justifiably in limiting section 7 rights is a higher threshold than the one used in s.1 for limiting other charter rights as it requires extreme circumstantial situations to even consider a “reasonable” justification for such violation (Stewart, 2012, p. 290).

Section 11(d) of the Charter: Innocent Until Proven Guilty

Section 11 of the Charter identifies the legal rights afforded to an individual who is charged with an offense. It highlights procedural justice foundations that lay out principles and rights while placing limitations on judicial proceedings within the subsections a through i. This section only applies to criminal or quasi-criminal proceedings, and proceedings that give rise to penal consequences, meaning it applies to the prosecutions for criminal offences (Sharpe, & Roach, 2017, p.325). Section.11(d) will be of particular focus as it states the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal (Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c11 s 11). The presumption of innocence itself is an essential principle in Canada's free and democratic society in which it is committed to values of fairness and social justice (Sharpe, & Roach, 2017, p.330). The rights protected under section 11 are residual, pertaining to upholding all the principles of fundamental justice, and the life, liberty, and security of the person as identified in section 7 (*Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c11 s 11).

With that being said, in light of undercover Mr. Big operations and confessions, section 11(d) is critical to understand in securing an accused's liberty. Section 11(c) is another important residual right. It also protects an individuals' right against self-incrimination, but it only relates specifically to the event of the trial of an accused and protects them from not having to testify in court that would incriminate them. This right is not of value to the discussion of Charter right engagement and Mr. Big (Sharpe, & Roach, 2017, p.328). With that being said, the purpose of section 11(d) ensures that those who are guilty are ultimately condemned by the justice system,

but also ensures the guilt is determined in a fair process of reasonable doubt, upholding the essential foundational values of the Charter such as, fairness and life, liberty and security (Department of Justice, 2021a, Purpose). This brings attention to the presumption of innocence, the very principle the Canadian criminal justice system operates on, the principle that people are presumed innocent until they are proven, beyond a reasonable doubt to the satisfaction of judge or jury that they are guilty of the offense being tried; meaning everyone is innocent until they are convicted in court of law (Sharpe, & Roach, 2017, p.469).

The presumption of innocence is a basic fundamental right in the Charter. Its specifically aims to restrain coercive power which helps avoid the risk of wrongful conviction and it also upholds the due process of the justice system to those who are 'guilty' (Sharpe, & Roach, 2017, p.295). The term "innocent" is defined as "wrongly accused of having committed all the elements of the offense" or including they have no true defense to their charge (p.13). Section 11 is protected under the legal rights and is built upon the foundation. of section 7 but they do vary in terms of their applicability. For instance, for s.11 infringements it becomes the crown's responsibility to determine that the proved fact does not flow from the presumed fact in which 11(d) would be limited and requires to be justified under the section 1 Oakes test (Department of Justice, 2021a, Section 1 Considerations).

This can be a difficult right to understand as an accused must rely on their defense in which they are subjected with the legal burden of proving their innocence; but yet the right is supposed to allow them to be presumed innocent (Mahoney, 1988, p.14). Regardless of how complex, the SCC has ruled that an accused relying on a defense is not necessarily asserting innocence, in which it reaches outside the sphere of a Charter guarantee of the presumption of innocence (Mahoney, 1988, p.14). The presumption of innocence then becomes a more moral

aspect of the Charter than legal, but it is crucial to uphold until the accused is proven guilty (Mahoney, 1988, p. 18).

In order to justify a section 11 infringement, it would be subjected to s.1 Oakes Test, in which the individual would need to rebut the presumption and the crown would need to establish the standard of minimal impairment in which the absence of the presumption would mean the offence cannot operate effectively (Department of Justice, 2021a, *Section 1 Considerations*). This interpretation can be applied to regulatory offences and judicial independence outside of the presumed facts facing an accused. However, the SCC has demonstrated that under section 1, the accused must be able to use a balance of probabilities for their defense of due diligence or lack of negligence which can be challenging (Sharpe, & Roach, 2017, p.332). Furthermore, the vital role played by judicial independence in the constitution and the charter values has also been demonstrated by the SCC that the standard application of section 1 test could not alone justify a reasonable infringement of an individual's independence (Department of Justice, 2021a, *Section 1 Considerations*). Section 11 also holds some structure of internal tests, in which only in the direst circumstances could a government present convincing evidence to justify an infringement on someone's judicial independence. The SCC continues to interpret the presumption of innocence in a broad sense so that regardless of the existence of a reasonable doubt as to guilt, the individual's right could still be infringed whenever a person may be convicted (Sharpe, & Roach, 2017, p. 332).

R. v. Hart [2014]

The *R v Hart* [2014] case is the most recent SCC landmark case where a two-pronged framework for assessing the admissibility of Mr. Big confessions was created. This case brought attention to interaction of the Charter and the confessions rule, in light of a complex undercover

technique. As mentioned in earlier discussion, Mr. Hart was a father of two young twin daughters who drowned at a park under his supervision in 2002 (*R v Hart*, [2014] 2 SCR 544, p.17). Three-year old Karen and Krista Hart went with their father to a neighbourhood park to play, which also had a lake adjacent to it (*R v Hart*, [2014] 2 SCR 544, p.16). Mr. Hart and the girls were gone for roughly 30-45 minutes until he returned home without his daughters, telling his wife that Krista had fallen into the water and he had forgotten Karen at the park (*R v Hart*, [2014] 2 SCR 544, p. 17). Moments later Mr. Hart and his wife were back at the park with an ambulance where Krista and Karen were found floating several meters apart from each other, they were pronounced dead (*R v Hart*, [2014] 2 SCR 544, p. 18).

Mr. Hart was immediately suspected to be responsible for their deaths due to his “unusual behavior” (*R v Hart*, [2014] 2 SCR 544, p. 19). It was suspicious that he did not call anyone or stop anywhere closer for help, yet he denied any accusations that he had drowned the girls (*R v Hart*, [2014] 2 SCR 544, p.19). However, there was very little information available with no witnesses and no other evidence beyond Hart’s statements (Murphy, & Anderson, 2016, p.30). Two weeks following the initial questioning, Mr. Hart volunteered that he had not been truthful in his previous statements, saying he had a medical seizure at the park and when he “came to” his daughters were laying in the water. Although, the police were convinced he was guilty but there was a lack of evidence to charge him, and the case went cold.

Two years following the drownings, the RCMP began a Mr. Big operation targeting Mr. Hart in order to collect evidence for the case. The officers began their surveillance in December 2004 and made their first move to recruit him into their fictitious criminal organization by February 2005 (*R v Hart*, [2014] 2 SCR 544, p. 23). Mr. Hart was unemployed, receiving social assistance, was antisocial and was a rather socially isolated person; thus, it was not a challenge

for the undercover officers to weave themselves into his life and get him to participate in numerous simulated criminal activities with the officers while he received financial rewards and travelled around Canada. By April 2005, Mr. Hart was hooked and admitted he felt he had “brothers” within this friendship he had built with the operatives (*R v Hart*, [2014] 2 SCR 544, p.26-28,38). By May 2005, the operatives began working towards Mr. Hart meeting Mr. Big, they told him that there was a “big deal” coming in that would “set [Mr. Hart] up financially” but only if he was approved to participate in the deal by Mr. Big who recognized a past criminal problem and needed to meet with him to resolve it (*R v Hart*, [2014] 2 SCR 544, p. 32).

When Mr. Hart met Mr. Big, he was asked about the death of his daughters and why he had killed them, Mr. Hart admitted he had suffered a seizure in which their deaths were an accident, but he denied killing them (*R v Hart*, [2014] 2 SCR 544, p. 34). Mr. Big pushed further, using various interrogation tactics such as reassuring the respondent not to “lie”, prodding in the events further, along with having the incentive of monetary gain and legal assistance; by the end of the meeting Mr. Hart confessed to drowning his daughters (Hunt, & Rankin, 2014, p.323). He rationalized that he killed the girls out of fear that he would lose them to the province’s child welfare agency, he said the girls “fell” over the dock, but when pressing further he also revealed he had “struck his daughters” (*R v Hart*, [2014] 2 SCR 544, p.35-36). Two days after this confession Mr. Hart went to the location of the crime and re-enacted how the drowning occurred, Mr. Hart was then shortly charged with two counts of first-degree murder for the death of his two daughters, Krista and Karen. In total there were three confessions made from Mr. Hart during this investigation.

Mr. Hart was convicted at trial level and then appealed his conviction holding the operation was oppressive and led to a breach of his fundamental rights under section 7 of the

Charter, and that his confessions should then be inadmissible (*R v Hart*, [2014] 2 SCR 544, p. 40). This forced the judges to consider the admissibility of confessions and his defense of entrapment as Mr. Hart was arguing that he was exploited and was led into his ‘confession’. His appeal to the Newfoundland Court of Appeal was dismissed as the appeal court did not feel Mr. Hart was threatened and had the operating mind to leave at his will throughout the operation (*R v Hart*, [2014] 2 SCR 544, p.41). When appealed again, the SCC had to address if the confessions made by Mr. Hart during the Mr. Big operation should be admissible, and if it breached his section 7 right to silence.

As seen in the interrogation trilogy, the SCC in the past held that Mr. Big undercover operations simply do not engage the right to silence because the accused is not detained by the police at the time in which they confessed. Further, the confession rule requires a confession to be ‘voluntary’ it becomes an inoperative standard because the accused is not aware they are talking to an authority or in the presence of the state when they confess (*R v Hart*, [2014] 2 SCR 544, p. 64). This can alternatively be viewed that the accused does not have an operating mind to leave because they are not yet detained and thus do not know they are confessing to an authority. Mr. Big confessions could be challenged through the abuse of process doctrine or upon the discretion of a judge to determine its probative value; however, infringing challenged Mr. Big confessions is not a common finding in the common law (*R v Hart*, [2014] 2 SCR 544, p. 65). Furthermore, the SCC found that the threshold in which this previously described framework protects the rights of the individual was inadequate in protecting them in Mr. Big investigations. They agreed that Mr. Big confessions do present unique dangers that must be addressed “by placing a filter on their admissibility”; the past law provided insufficient protection to an accused

due to the danger of unreliable confessions, the prejudicial effect of Mr. Big confessions and the risk of police misconduct (*R v Hart*, [2014] 2 SCR 544, p.66).

The New Common Law Rule

In his decision on behalf of the Court, Supreme Court Justice Moldaver brought attention to the fact there is considerable danger in confessions obtained by Mr. Big in terms of reliability. As the very purpose of the operation is to induce a confession, there is risk in the various tactics used on the pretense that a suspect will confess about the crime being investigated because they are under the impression such confession could result in a consequence free escape and allow them to join an organization and all its appealing rewards (*R v Hart*, [2014] 2 SCR 544, p. 68). Another concern was that there are considerable prejudicial facts present when dealing with the accused's character in court of law. This means the jury may negatively interpret that the target as a person because he or she was willing or wanted to join a criminal organization and participated in crime they thought believed was real; this could unintentionally convey bad character of the accused (*R v Hart*, [2014] 2 SCR 544, p. 73). Furthermore, the SCC advanced that Mr. Big confessional evidence that is unreliable and prejudicial presented before the jury would invite miscarriages of justice. Lastly, limiting police misconduct is of large concern due to the nature of the operation. These investigations create a risk that an officer may resort to unacceptable or unethical tactics in obtaining the confession as they are working under pressure, with an alternative identity, in an environment of violence and stress which can perpetuate threats or violence resulting in the police going "too far" in their investigation of the suspect (*R v Hart*, [2014] 2 SCR 544, p. 78).

The confession rule or the right to silence did not address the uniqueness of Mr. Big operations and did not afford an accused of all their legal rights under the Charter in these

situations which puts them at a disadvantage (*R v Hart*, [2014] 2 SCR 544, p. 79). The SCC decided that there was not an effective mechanism for monitoring police conduct when undercover and that there needed to be a ‘better’ law to protect individuals. To remedy this the Court outlined a new common law rule for Mr. Big investigations. Created with the intention of balancing the dangers posed by Mr. Big operations while ensuring police have the tools they need to investigate, Justice Moldaver outlined a new common law rule to determine the admissibility of Mr. Big confessions and if such confessions should be excluded in court. (*R. v Hart*, [2014] 2 SCR 544, p. 84).

This rule is a two-pronged approach that recognizes a new common law rule of evidence and relies on a more robust conception of the doctrine of abuse process to address reliability, prejudice, and to address police misconduct (*R v Hart*, [2014] 2 SCR 544, p. 119). The new rule determined that confessions obtained in the course of Mr. Big operations are to be presumptively inadmissible. They can be admitted but the Crown must establish on a balance of probability that the probative value of the confessions should outweigh its prejudicial effect (Hunt, & Rankin, 2014, p.322). This approach is consistent with the demands of self-incrimination and other Charter legal rights that uphold protecting against abusive state conduct and unreliable confessions (*R v Hart*, [2014] 2 SCR 544, p.123). The first prong of the test to determine reliability of the confession in Mr. Big operations concerns the probative value, in which the circumstances surrounding a confession need to be assessed whether they would influence the reliability of the confession made (*R v Hart*, [2014] 2 SCR 544, p.132). Factors that are now considered by judges include the number of interactions between the target and police, the nature of the relationship between undercover operatives and target, the extent and nature of the inducements presented to the target, if there were any threats, the interrogation itself, and the

personality and mental characteristics of the target such as their age, mental disorders, sophistication, etc. (Hunt, & Rankin, 2014, p.325). The prejudicial effect of the matter refers to the prejudice that could result based on the targets desire to join the organization or their participation in the simulated crimes that could dampen his other character in the fair trial (Hunt, & Rankin, 2014, p.322).

In the second prong of the new evidentiary test, Moldaver acknowledged the abuse of process doctrine had provided little protection for the accused in Mr. Big investigations because it would be nearly impossible to determine a threshold for when such operation could become abusive, especially given its secretive properties (Hunt, & Rankin, 2014, p.325). The SCC then suggested that signs of abusive practice within the context of these operations included behavior such as threatened or actual physical violence, psychological coercion that overcomes the will of the accused, or operations preying or targeting on vulnerabilities such a substance abuse, youthfulness, mental health issues, etc. which would be highly problematic for the confession to be reliable in this context (Hunt, & Rankin, 2014, p.325) (Murphy, & Anderson, 2016, p.38).

Regarding the admissibility of Mr. Hart's confession itself, the SCC considered that he had confessed on three separate occasions but the justices also considered those crucial factors that he was isolated, unemployed, and living on welfare, in which the operation had "transformed" his life for the better; he was heavily involved in scenarios and had daily contact with these officers during the course of the investigation making this a "lengthy and intense operation" (*R v Hart*, [2014] 2 SCR 544, p.133). Mr. Hart was also exposed to powerful inducements, Mr. Big claimed he could offer Mr. Hart a financial gain that would bring him out of poverty if he was admitted into this organization, in which the respondent would want to tell the crime boss what he wanted to hear. The circumstances at play left Mr. Hart with the choice of

confessing to Mr. Big or be deemed an untrusting liar by the very organization he wanted to join (*R v Hart*, [2014] 2 SCR 544, p. 140).

Given all these circumstances in light of the new rule and the overwhelming incentive to confess, with the lack of consistency and confirmatory evidence the Court found the reliability of Mr. Hart's confessions in serious doubt in which the probative value of them was low (*R v Hart*, [2014] 2 SCR 544, p. 144). In such situations, the crown would likely be unable to demonstrate the confession to be admissible, resulting in the remaining evidence surrounding the Mr. Big operation becoming irrelevant and thus inadmissible (Murphy & Anderson, 2016, p.38). Mr. Hart's confession should be excluded and ruled inadmissible, the justices also did not focus on the police misconduct specifically because they do not think the conduct amounted to an abuse of process; however, they acknowledge that behavior such as preying on the respondent's status of poverty, his social isolation, and his poor health put the respondent at risk and warranted excluding the confessions (*R v Hart*, [2014] 2 SCR 544, p. 148). This SCC decision allowed for multiple factors to be considered within this new two-pronged test that supports the rights and freedoms of the accused, while adapting to the unique circumstances of these undercover operations.

Legal Implications and Discussion

The Mr. Big investigation is incredibly interesting for its complexity and use by Canadian police since the 1990s with claims of effectiveness for solving cold and unsolved cases (*R v Hart*, [2014] 2 SCR 544, p.56). This investigative technique is not used without criticism due to the secretive nature of this undercover operation and that police discretion is heavily relied on. Misconduct is often an issue at the forefront of these investigations as prejudice, unethical tactics, and the intrusion of an accused's Charter rights may easily occur in such settings. The

concerns and criticisms of Mr. Big operations are crucial to examine and discuss as such instances can create Charter infringements of the accused's rights. Principles of reliability and prejudice are fundamentally evidentiary issues. Canada being a free and democratic society with a constitutionally enshrined Charter must uphold the values and principles of fundamental justice.

It cannot be denied that the Mr. Big technique has been beneficial to the Canadian justice system in collecting evidence and leading to solving many cases that would have otherwise gone cold. The search for truth is paramount to police investigations but the procedures being used must also be conducted in a manner that properly operates within the context of legislation and constitutional authorities, such as protecting the Canadian Charter of Rights and Freedoms in respect to the 'target' (Poloz, 2015, p.235).

There is a foundational need on the basis of the principles of justice for the courts to strive for an appropriate balance between crime control and the protection of society. Nonetheless, courts must also focus on the balance of providing fairness to the accused persons and preventing abuse of police powers on the other (Sharpe, & Roach, 2017, p.295).

Involuntary or False Confessions

There are significant ethical and legal issues raised by Mr. Big operations. These concern the right to silence, applicability of law on the voluntariness of confessions, deciding if the tactics used during the investigation are tantamount to an abuse of process, if the admission from the accused is considered reliable, and the risk of a false confession (Keenan, 2010, p.65). To further explain, psychological science has also made it clear that in planning and conducting law enforcement interrogations, such as those conducted by Mr. Big in the final evidence gather stage, interviewers must be cognizant of and concerned about the risk of an accused's memory distortion, possibility of a false confession and accurately interpreting the 'deception' (Porter, et

al., 2016, p.36). These characteristics could present themselves, become heightened, or be misinterpreted by officers given the context of the unique undercover operations. The occurrence of these risks could result in many involuntary confessions which would likely create unreliable evidence, if these issues commonly arise during these investigations, it reasonably could damage the effectiveness and legality of the operation.

Undeniably, it is an advantageous opportunity in undercover policing for a probable suspect to be unaware that they are speaking to an officer or informant. This covert tactic has been proven to be reasonable; similar to probing, open ended questions, and other interrogation approaches. Although the argument with Mr. Big operations does not lie in the secretive or undercover nature but rather the influence of officer conduct, enticements, and the overall complete alteration of reality that may unfairly disadvantage the individual. As it is, ‘targets’ of Mr. Big operations are different at a foundational legal level as they miss out on many of the protections and familiarity that a standard custodial interrogation offers.

Accusatory Interview Style

To further explain the impact of interrogation style, using Canadian police interrogation transcripts, it has been shown that there is a clear presence of an accusatory interview style used among the RCMP and other Canadian police agencies. Research shows that fewer than 1% of the questions asked to a suspect during interrogations were open-ended, where 40% and 30% of the police questions asked were shown to be yes/no and probing questions (Porter, et al., 2016, p.37). Such questions even in “normal” interrogation settings demonstrate the police take advantage of tactics that could ultimately impact the truthfulness and the effectiveness of the evidence (Porter, et al., 2016, p.37). Canadian police will do so with accusatory strategies and approaches in which they confront the target with direct accusations, continuous probing, or verbal threats. This more aggressive approach is possible through the lack of oversight and

potentially poor officer discretion that could go beyond a reasonable threshold of tactics, subjecting the accused to unreasonable treatment or foster unreliable evidence.

Aura of Violence

The success of a Mr. Big operation often depends on the very environment and relationship to which the undercover operatives expose the target. This means that the investigation is perceived to create an aura of violence deliberately cultivated to reinforce the supposed organization's values of honesty, trust, and loyalty (*R v Hart*, [2014] 2 SCR 544, p. 59). These values can function as an inducement to confess as they are critically important to Mr. Big and impact the accused's future "membership". This aura can be seen through the simulated acts of violence that the operatives may involve the target in. These violent acts can influence a target's perception of the situation and the reliability of their confession. For instance, many targets may confess in order to brag or impress Mr. Big, in doing so, they are seeking acceptance in which they may falsify the information presented (Sukkau, & Brockman, 2015, 70). However, the issue is not so black and white, police report that creating a coercive atmosphere during interviews has been useful in collecting information from a suspect as some pressure is necessary (Achenefotos, 2010, para.2). Loosely built off the principle of "bad cop, good cop", the goal of an interviewee should be to approach the interview in such a way that the suspect would willingly volunteer a confession. This requires the police to balance the interests of their interrogation while protecting the individual from unreasonable intrusion. This is often easier said than done as evident in appeals to the SCC and the evolution of common law in addressing these unique interrogations (Achenefotos, 2010, para.6). For not only can the environment of non-custodial interrogations and the aura of violence impact an accused's behavior and potentially reliability of their confession, but the tactics specifically used by operatives during the interrogation can

borderline an unreasonable degree of police trickery or engage the abuse of process doctrine in which directly engage the Charter of Rights and Freedoms.

Inducements for a False Confession

In the addressing the possibility of false confessions under the operation of Mr. Big the possible suspect would become a “coerced-compliant”; an innocent individual who confesses “in exchange for a promised incentive, or to escape mistreatment by law enforcement all why knowing [they are] innocent (Porter, et al., 2016, p.37). The promises of legal protection, monetary gains, friendship, a scapegoat, job, etc. that Mr. Big offers to the target could be interpreted as considerable incentives for an individual to confess. The potential for a false confession to occur can increase in proportion to the nature and the extent of the inducements being held out to the target (*R v Hart*, [2014] 2 SCR 544, p. 69). The danger of a false confession during a Mr. Big interview can pose a greater risk than custodial interrogations because of their emphasis on costs and benefits being significantly misrepresented to the suspect as their entire environment is altered (Hunt, & Rankin, 2014, p.328). Furthermore, the target may even be told that Mr. Big has “conclusive evidence of their guilt”. Denying the offense would just prove to Mr. Big that they lack trustworthiness and thus cannot join the organization they desperately want to be a member (*R v Hart*, [2014] 2 SCR 544, p. 60). This puts a different type of pressure on the accused to produce a statement.

Psychological Stress

The significant role of the intimidating environment perpetuated by Mr. Big during the meeting and the tactics employed during could make the suspect feel an unreasonable amount of psychological or physical stress. This calculated addition of stress in these circumstances begins to threaten the target’s right to security. As Keenan (2010) explains, self-incriminating statements alone are induced when life changing promises of wealth, professional advancement,

and the avoidance of penal sanction are being held, they may even mis portray themselves to show that they are a worthy candidate to Mr. Big (p.47). It is in these circumstances that one can begin to question if the investigation would undermine the reliability and value of the evidence, and potentially create further unnecessary risk of wrongful convictions.

Police Officer Discretion

In light of the significant role police discretion plays in conducting these investigations, it is conceivable that officers may struggle with bias toward labelling suspects as guilty and deceptive simply based on demeanor, behaviour, or questionable evidence, rather than remaining objective. The SCC recognized the “moral prejudice in these circumstances [to be] significant (*R v Hart*, [2014] 2 SCR 544, p.145). Given the extensive work and information building required from the undercover operatives, there is a greater sense of pressure on maintaining the presumption of the target’s innocence (Smith, et al., 2009, p.181). However, if police are also investigating with the belief that the suspect is guilty of the offense, the balance of the interests between securing evidence for a conviction and the target’s legal rights may become a blurred line (Smith, et al., 2009, p.181). One of the largest criticisms of this technique is officers who hold a guilty-presumptive frame of mind which can negatively influence the operation and infringe the suspects s.11(d) Charter rights by not presuming them innocent until proven guilty in a court of law. With that being said, section 7 of the Charter is also engaged and is necessary to consider in determining if the target has a right to silence as protected by the common law and the Charter in these investigations.

Engagement of the Charter of Rights and Freedoms

The Charter’s section 7 principles against self-incrimination and the rule of law are two fundamental organizing values of the Charter that are relevant to Mr. Big investigations (Keenan et al., 2010, p.32). Section 7 of the Charter established the legal protections that are afforded to

everyone are intended to put reasonable limits on police conduct. In Mr. Big operations, a section 7 infringement can occur as a result of the officers depriving the target of their right to life, liberty, and security. This can happen through coercing confessions, entrapment, or using unjust tactics that do not respect the right to silence. This potential infringing behavior or tactics alongside the principles of section 7 of the Charter have been discussed at length earlier. It is also crucial to understand the moment in which these protections are engaged in Mr. Big operations to fully understand the influence the Charter has on Mr. Big operations in its role to ensure a fair and reliable investigation to ensure a fair administration of justice.

As seen in the confession rule, the right to silence applies any time a person interacts with a person of authority regardless of if they are detained or not. This allows an individual to exercise their personal freedom in choosing the extent to which they cooperate with police. The SCC has furthered this principle through new common law which established a recognition of the potential for coercive impacts from state authorities and the risk of individuals incriminating themselves (Keenan, 2010, p.65). As identified in section 7, the principle of moral blameworthiness requires evidence of the accused before holding them criminally responsible as this can lead to wrongful convictions (Barnhorst, & Barnhorst, 2013, p.48). This ability to produce evidence of moral blameworthiness in Mr. Big operations is a complex task in which the law enforcement methods could bring about inaccurate, coerced, or unreasonable evidence which brings the effectiveness and the ethics of this approach into question.

Furthermore, these Mr. Big operations do not usually have control over a target's movements. Depriving the target of their section 7 right to silence could occur by law enforcement by engaging in the various SCC explained abusive practices and behaviors that intrude on the individual's ability to exercise their operating mind (Sharpe, & Roach, 2017,

p.107). Such illegal tactics can threaten the liberty and security of the person and would not uphold the principles of fundamental justice, rendering any confessional evidence collected to be subjected a test of admissibility. To make a confession admissible when it does not pass the section 7 test would bring the principles of fundamental justice into disrepute. With that being said, under the new common law rule developed by the SCC, confessions obtained in the course of Mr. Big operations are to be presumptively inadmissible due to the very nature of the investigation and the risks associated. This is not to say the confessions cannot be admitted, but the Crown must establish using a balance of probability that the probative value of the confessions should outweigh its prejudicial effect.

This approach supports the section 11 right that emphasizes the plausibility of an accused to make a self-incriminating statement to an undercover officer. Some researchers argue that these statements should be excluded entirely because they were admissions made simply as a result of the circumstances of implied threats, psychological manipulation, and/or significant inducements held out by what the accused would have perceived as a person of authority in this criminal syndicate.

The alteration of reality unconsciously shapes the accused's behavior and perception, creating an opportunity for law enforcement officers to engage but also fosters unreliability due to 'set up'. These Mr. Big operations place a type of psychological control on the target as they are socialized into a life of crime and degradation which can become a powerful force in inducing false confessions and controlling the individual (Keenan, 2010, p.68). Undercover operatives are considered bypassing a suspect's right to silence when they persistently continue talking to the suspect, or if a confession is coerced. The right to silence would become infringed when police operatives go astray from the directed control and tactics that are deemed within

reason. Canadian's value and live in a free and democratic society where anyone is free to remain silent in the face of police questioning and should not feel compelled or left with no other choice but to confess (Keenan, 2010, p.32). In circumstances where the target is unaware of the authority or that they are undergoing a form of police questioning, the values and principles of section 7 must be upheld to protect the accused against self-incrimination or making a false confession.

Section 11 and the presumption of innocence is a requirement in law to be fair and interacts with the idea that Mr. Big operations target a suspect based on a *suspicion* of guilt. In the pursuit of a confession where law enforcement believes the target is guilty, there is opportunity for bias, pressure, and prejudices to interfere which can negatively impact state discretion in which s.11(d) could be violated in their pursuit of a confession. This can possibly happen as law enforcement may dismiss that the person is innocent until proven guilty beyond a reasonable doubt in court. This can happen because the police feel that the evidence, their intuition or other factors lead to different conclusions (Department of Justice, 2019, para. 4). Officers have both a common law and statutory duty to investigate crime and should be given all the necessary skills and tools to be able to uphold that duty. Nonetheless, they are not provided special authority above the law. They may reasonably exercise any authority given to them by the state. However, an officer is relied on to exercise their own discretion in exercising their authority. It is in this discretionary conduct that the Charter applies to and where infringements can easily occur (Stewart, 2012, p.37). If law enforcement strictly follows methods of intelligence-gathering or 'truth-seeking agenda' that is taught and enforced by trained psychologists, they would intuitively advise against using any physical or extreme psychological coercion that we see commonly occurring in Mr. Big operations (Porter, Rose, & Dilley, 2016,

p.36). Thus, police should be extra to these risks as it has been shown “predominantly generate misinformation” (Porter, et al., 2016, p.36).

This discussion is not to give the impression that Canadian police are consistently engaging in unethical practices, or that the Mr. Big investigative technique is ‘bad’. Rather, the challenges to the admissibility of Mr. Big confessions have commonly been dismissed in the courts, only occasionally have the courts or precedent shown to express reservations about the technique (Hunt, & Rankin, 2014, p.327). Although, there have been further advances by the SCC to encourage the Canadian police to transition to a nondeceptive, information-gathering model of police interrogation practice (PEACE) (Porter, et al., 2016, p.40). This represents the process and traits of preparation, planning, engagement, explanation, account, closure, and evaluation which has alienated some of the ethical stress that was previously ensuing in interrogations (Porter, et al., 2016, p.40).

However, some research suggests that even further and higher standards for Mr. Big operations are necessary due to their realistic and significant potential of these investigations to produce unreliable or false confessions that would bring the administration of justice into disrepute (Hunt, & Rankin, 2014, p.322). Other researchers have suggested that further safeguards of Mr. Big operations should consist of requiring the operations to be judicially preapproved. Further, Mr. Big operations should be corroborated by significant additional evidence where police should make their awareness and perceptiveness to the risk of infringing rights of the accused a primary concern (Sukkau, & Brockman, 2015, p. 76). Since the landmark case of *R v Hart* [2014], significant concerns have been addressed and further guidance has been given in regard to these unique undercover investigations. Nonetheless, there is still further

clarity needed on the issue of *how* reliable or truthful a confession may be at its core, regardless of the court's determinations of admissibility.

Recommendations and Conclusion

Despite the safeguards Canadian police and courts have put in place, there is still the fact that there is a substantial degree of unreliability of self-incriminating statements that are being obtained through Mr. Big operations. This unreliability is found when a target may confess to a crime he or she did not commit or was unreasonably induced into making a statement, thus creating room for false confessions leading to wrongful convictions that ultimately undermined the due process of the Canadian criminal justice system. It is clear that there is value in undercover investigations and that Mr. Big operations have been able to successfully solve many crimes in Canada. However, an individual's rights cannot be compromised in this pursuit, especially because it can pose a significant risk for wrongful convictions or Charter infringements of the suspect. Mr. Big Operations raise concerns about its sometimes-oppressive tactics and conduct. Within this context, the SCC has deemed legal prejudice, reliability of confessions, and police misconduct as primary areas of concern (Murphy, & Anderson, 2016, p. 47). Police misconduct in general has been addressed more recently, but still requires further common law limitation and refinement of conduct and duty. Pertaining to officer discretion in the advancement of Mr. Big operations, it is important to realize there is a crucial difference between law enforcement using character traits or situational opportunities to investigate and develop a rapport with someone and using tactics that coerce or prey on the target's vulnerabilities and induce them into confessing.

Recommendation One

To further advance the protection of individual rights and freedoms in light of undercover operations, Canadian courts should continue to take steps in creating common law rules for the collection of evidence (Hunt, & Rankin, 2014, p.335). Given the widespread movements demanding police accountability such as Black Lives Matter (BLM) and the negative climate surrounding law enforcement today such as #Defund the police, it is no secret that police misconduct is an ongoing concern. It is evident that this misconduct is more likely to occur ‘behind the scenes’ where the public is unable to hold law enforcement accountable. This would mimic the structure and environment of Mr. Big operations where it is reasonable to consider that the secretive strategically complex technique would create a similar breeding ground for misconduct.

Encouraging alternative approaches of legislative reform or legislative actions in the courts in the face of such controversial and risky tactics could further address and control the problems related to police misconduct we see today and aid in bringing back legitimacy and accountability to the public-police relationship (Hunt, & Rankin, 2014, p.335). This is to say that due to the very nature of the Mr. Big technique, it is predisposed to serious and sensitive issues that are readily available for the courts to scrutinize. It is also fair to ask the courts to create such a limitation protection through the establishment of a specific rule, as seen in *R v Hart* to help secure the limitations of law enforcement and an accused’s Charter rights (Murphy, & Anderson, 2016, p.47).

Recommendation Two

Legal rights in the Canadian Charter, specifically section 7 and section 11(d), interact with particular concepts of this investigation technique that truly call into question the seriousness of these risks that may interfere with a fair process of justice. It is therefore

important that police agencies establish guidelines to ensure that Mr. Big operations do not inadvertently infringe on a target's Charter rights. A target is afforded the right to silence and the right to security of the person, along with the presumption of innocence, any police tactics or conduct that would encroach on the Charter values such as autonomy, privacy, fairness, etc. that would disadvantage the target. Since the Charter is the supreme law of Canada, citizens are afforded the rights, freedoms, and protections under the Constitution. There must only be specific circumstances for any infringements to be justified. Infringements that likely cannot be justified under the circumstance of a Mr. Big investigation. Therefore, if undercover operatives are using harmful tactics, it places substantial pressure on the individual to the point it engages the Charter and could potentially constitute an unjustifiable Charter infringement. Thus, bringing the effective purpose and constitutionality of this technique into debate (Moore, et al., 2009, p.371).

Recommendation Three

In Canada, it is not unheard of to see offenders and the accused exonerated based on DNA evidence being retested years after a person has confessed (Moore, et al., 2009, p.400). This fact demonstrates that the possibility of false confessions and a miscarriage of justice is a legitimate plausible outcome to consider (Moore, et al., 2009, p.400). The personal, physical, and mental characteristics of the target of a Mr. Big investigation need to be considered throughout the investigation as their own perception and cognitive functioning will impact how police tactics are received. This further emphasizes the need for the Canadian justice system to distinguish all the methods of interrogations that are approved, and to place reasonable limitations on police conduct. With an explicit direction from SCC or legislation, it would reduce or eliminate the investigations reliance on false evidence or feeling the need to resort to police trickery and intruding tactics in order to "solve" the crime (Moore, et al., 2009, p.400). With that

being said, alternative extensive measures may involve videotaping the interrogations through body cameras or alternative technology which would change the reliability of the investigation for the better due to the availability of alternative physical evidence (Moore, et al., 2009, p.400).

Recommendation Four

Further safeguards such as more stringent procedures for evaluating evidence and sufficient consideration of vulnerable and high-risk populations are needed in Mr. Big operations (Smith, et al., 2009, p187). As law is always adapting and evolving, the new evidentiary rule put forth in *R v Hart* [2014] created the understanding around the limitation of Mr. Big operations and the link to Charter rights. Some criticize the SCC as they argue this approach would be better with a more “generally articulated” rule of evidence at a higher level that could have applied to all undercover investigations that occur rather than just Mr. Big operations specifically (Hunt, & Rankin, 2014, p.334). However, due to unique circumstances of the *R v Hart* [2014] case, and the characteristics of these operations as a whole, the Court did a positive job in clarifying section 7 and protecting individual rights. By determining all Mr. Big confessions are to be considered inadmissible until the Crown can demonstrate the accurate balance of probabilities and can weigh the probative and prejudicial value of the evidence, this ensures a target will be given a fair trial and the resulting confession would be reliable (Puddister et al, 2012, p.400).

Recommendation Five

To help further refine Mr. Big operations and ensure the protection of Charter rights, Parliament should put forth legislative guidelines to address all undercover operations along with the SCC common law. This does not have to be complicated but secured guidelines as simple as instructing judges to carefully consider the reliability of evidence by examining the presence of inducements or threats made by police undercover operatives would make a considerable difference (Puddister, et al., 2012, p.401). Some even suggest that police should provide “the

provincial solicitor general or minister of public safety with reports that evaluate the costs and benefits of the technique” so that there is a way to keep record and measure its effectiveness and use (Puddister, et al., 2012, p.401). It is important to note in this argument that there have not been many known cases where a wrongful conviction occurred from the use of a Mr. Big operation. However, there have been Mr. Big cases where confessional or forensic evidence that was used has been re-called into question in which trials have been thrown out, or instances of false confessions have occurred (*R v Hart*, 2014, 2 SCR 544, p. 62).

There is considerable value in Mr. Big operations. It is a complex and well-established technique that has advanced undercover policing and has become what the Canadian police call “effective” and “successful” in convicting criminals. Although, given the evidence of the plausible risks associated with the Mr. Big operations, there is reasonable need for concern in which legislative guidelines and further common law precedent should establish further thresholds and limitations. In Canada, the police should also continue to work to improve training with respect to undercover operations to raise awareness and sensitivity of psychological dimensions involved in false confessions and the risks involved in these investigations (Puddister, et al., 2012, p.402). Although a valuable investigative technique, Mr. Big operations require oversight and further judicial guidance. Mr. Big operations are a borderline Charter infringing technique and need to be used carefully. The operation itself may not infringe an individual’s Charter rights directly, however, the very nature of the operation exposes the accused to unique circumstances with an increased risk of opportunity for injustice. Any police conduct that engages the Charter in a way that threatens a target’s rights should be examined more closely and placed under legal scrutiny.

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