

A CRITICAL ASSESSMENT OF MR. BIG OPERATIONS BY CANADA'S POLICE

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Abstract

The Canadian law enforcement Mr. Big operation continues to pose the risk of producing false confessions and, therefore, miscarriages of justice. Some case law protections available to prevent suspects from making incriminating statements are explicitly inapplicable to confessions elicited from Mr. Big stings. The *R v Hart* (2014) common law rules have adequately helped to address this by further analyzing the particular circumstances of a Mr. Big operation in the pursuit of justice. The application of the *R v Hart* regulations has led to the inadmissibility of several confessions and one exoneration. However, it did not exhaustively address all of the collective grievances associated with the Canadian technique. The manner in which the *R v Hart* common law rule is applied varies between cases. Several cases are compared to Hart's personal drastic circumstance, which by contrast reduces the perceived abuse of process. With increasing police accountability, the use of violent inducements have decreased, and financial inducements prevail. The possibility of injustice derived from this operation is still troubling. Canadians need more applicable legal protections.

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A Critical Assessment of Mr. Big Operations by Canada's Police

The Canadian Mr. Big interrogation technique is an undercover policing, confession-producing technique where the suspect is not cognizant that they are providing self-incriminating evidence (Smith, Stinson, & Patry, 2010, p. 39; Holmgren, 2017, p. 148). This tactic has been subjected to controversy. The risk of inducing false confessions and the deception aspect of the technique is found morally reprehensible by members of the public (Puddister & Riddell, 2012, p. 386). It is illegal in some countries (United States, England, and Germany), and disapproved of by wrongful conviction advocates, civil rights groups, academics, and defense attorneys; yet is highly commended by the Royal Canadian Mounted Police (RCMP) for its efficacy in producing confessions (*R v MM*, 2015, p. 2; Puddister & Riddell, 2012, p. 386-387). The lack of legal protections available to subjects of Mr. Big interrogations led the Supreme Court of Canada, within the *R v Hart* (2014) case, to create a new common law, two-pronged confession rule (*R v Hart*, 2014, p. 580-581).

Research Question

This literature review seeks to identify the characteristics of Mr. Big operations in Canada before the 2014 *R v Hart* decision, classify any concerns and benefits of the technique, identify case law precedents and the legal protections available to individuals who are subjected to this type of investigation, describe the implementation of the *R v Hart* decision and critique its impact and application to post-*R v Hart* cases.

Methodology

By way of inductive and unobtrusive secondary data collection, a combination of pre-existing research, precedent cases, news articles, a dictionary, and an autobiography, the topic was examined to provide a clear illustration of the tactic and identify any trends (van den

Hoonaard, 2019, p. 145-146). This is a qualitative case analysis that sought to describe and clarify (University of Southern California, 2019, para. 11). Case precedents that have altered the legal standing of the covert operation were then systematically explored and summarised to demonstrate the development of these investigations and to establish the current protections available to its subjects. The legal protections were then scrutinized with regards to specific cases in conjunction with the secondary research findings. The combination of explorative, case-study, and historical analysis research designs were used to complete a comprehensive comparative analysis of the undercover investigation before and after the implementation of case laws (University of Southern California, 2019, para. 11 & 33).

Limitations. The majority of post-2014 cases are appeals from cases that were originally tried pre-*R v Hart*. At this time, there are very few documented post-*R v Hart* Mr. Big operations. In this research, *R v Buckley* (2018) is the only post-*R v Hart* Mr. Big operation that was analyzed, any comparisons made to *R v Buckley* cannot represent all post-*R v Hart* Mr. Big operations. The degree to which the logic of a decision is discussed varies between cases. When a guilty plea is entered, the case is rarely included in public databases (Keenan & Brockman, 2010, p. 28). Guilty pleas derived from plea bargains are generally unavailable for review. The research did not exhaustively analyze all Mr. Big cases available and no two operations are identical. Cases that are tried by a jury have not been formally written up, thus the case facts that led to the decision are unavailable. Cases labeled as something other than “Mr. Big”, such as “l’opération d’infiltration” or simply “undercover police operation” may have been overlooked (Keenan & Brockman, 2010, p. 27). Reverse undercover sting operations whereby police officers pose as an individual trying to purchase narcotics from a potential drug trafficker is beyond the scope of this thesis and was not discussed (*c R Busner*, 2010, p. 1).

PART ONE – Case Summaries

What is Mr. Big?

Mr. Big stings are operationalized as a Canadian undercover investigation technique fashioned to elicit confessions from a person highly suspected of having committed a crime, when forensic evidence is or is almost unavailable (Puddister & Riddell, 2012, p. 385-386; Smith, Stinson, & Patry, 2009, p. 169; Keenan & Brockman, 2010, p. 12 & 15). To begin, undercover operatives will observe their suspect for weeks, even months, until they feel they have gathered enough information about the suspect's routines, how the suspect operates, the suspect's financial and social situation, and personality (Murphy & Anderson, 2016, p. 31; Connors, Archibald, Smith, & Patry, 2017, p. 27; Keenan & Brockman, 2010, p. 19). At times, the police will further explore the personality of their suspect by conferring with psychologists and behavioral profilers (Keenan & Brockman, 2010, p. 19). Then, an undercover police officer will befriend the suspect (Smith, Stinson, & Patry, 2010, p. 39). The initial encounter between the suspect and the operative occurs through an activity or venue the suspect frequents (*R v MM*, 2012, p. 26; Connors et al., 2017, p. 27). The operative may frequent the venue regularly prior to approaching the suspect (Connors et al., 2017, p.27). The operative may also wait until approached by the suspect (Connors et al., 2017, p. 27). If attempts to befriend the suspect fails, police may pose as a recruiter, offering the suspect a high-paying job (*R v Buckley*, 2018, p. 5). Officers have also attempted to engage with the suspect through a judicially approved vehicle break-in; whereby, both the suspect's vehicle and an undercover operative's vehicle, parked near one another, have their windows smashed and belongings stolen (*R v Yakimchuk*, 2017, p. 2).

Over the course of several months, the operative will spend a substantial amount of time with the suspect, establishing a genuine relationship of trust and friendship (Moore, Copeland, &

Schuller, 2009, p. 348; Smith et al., 2010, p. 39). The undercover operative will lucratively treat the suspect to nights out to night clubs, strip clubs, comedy clubs, casinos, and/or bars, gradually exposing the subject to a staged glamorous lifestyle (Murphy & Anderson, 2016, p. 31; Bates, 2018, p. 122; Smith et al., 2010, p. 39; *R v Magoon*, 2015, p. 9). The pair may also travel together, within Canada, with paid hotel and meal accommodations (Murphy & Anderson, 2016, p. 31). A female suspect may be treated to spa nights (*R v Magoon*, 2015, p. 9). Male suspects may be lured in by undercover women (Puddister and Riddell, 2012, p. 386).

Luring and Recruiting

The officer will eventually disclose that there is a darker side to his prosperous business (Holmgren, 2017, p. 148; Smith et al., 2009, p. 169-170). They will introduce the suspect to multiple officers posing as high-ranking members of a criminal organization (Puddister & Riddell, 2012, p. 385-386; Smith et al., 2010, p. 39). The suspect will be exposed to vast amounts of cash and hired as a bodyguard, and/or to complete simple jobs, such as counting money, cashing in casino chips, picking up and delivering packages, or collecting people's license plate numbers (Bates, 2018, p. 121; Smith et al., 2010, p. 39; Keenan & Brockman, 2010, p. 20; Moore, 2019, p. 4). An underage suspect may be recruited into fabricated videogame fraud (*R v NRR*, 2014, p. 2). The suspect will be generously compensated for their work, up to several thousand dollars per week (Smith et al., 2010, p. 39). The fictitious criminal organization will expose the suspect to, and will involve the suspect in a series of fabricated pseudo-crimes such as drug trafficking, money laundering, credit-card fraud, kidnappings, assaults, and mafia-like murder to depict an authentic sense of corruption (Holmgren, 2017, p. 148; Puddister & Riddell, 2012, p. 386; Keenan & Brockman, 2010, p. 20). As the suspect's responsibilities increase, their financial rewards increase (*R v Ledesma*, 2020, p. 4). Recurring themes of loyalty and honesty

are repeated by members and clearly presented as valuable assets to the syndicate (Keenan & Brockman, 2010, p. 13). The suspect is informed that those who breach this unwritten rule are physically punished (Murphy & Anderson, 2016, p. 31). The organization will perform simulated acts of violence against persons who betray their trust and/or to “snitches” (*R v Hart*, 2014, p. 571). The goal is to educate the suspect that betrayal of trust is unacceptable; yet criminal activity is tolerated (*R v Magoon*, 2015, p. 8).

Enticing the Suspect to Confess

To generate a reaction out of the suspect, the police may present, to the target, a fake police document illustrating that they are the primary suspect of a grave crime (*R v Yakimchuk*, 2017, p. 4; Keenan & Brockman, 2010, p. 21). The intention here is to first instill fear, then to initiate a conversation about the crime in question between the undercover operative and the suspect. To accomplish this, the police may also release details to the media pertaining to the suspect’s involvement in the crime, such as a sketch from a fake witness, or video footage of the suspect in a convenience store (*R v Yakimchuk*, 2017, p. 4; *R v Ledesma*, 2020, p. 5). This often initiates the first confession (*R v MM*, 2012, p. 32; *R v Yakimchuk*, 2017, p.4). If not, it encourages the suspect to open up about the topic.

Meeting Mr. Big

For police to build their case against the suspect, they strive to produce another, but filmed, confession. The suspect is informed that to move up in the organization, or to become a full-fledged member, he must first meet the head of the organization, colloquially known as “Mr. Big” (Puddister & Riddell, 2012, p. 386; Schleichkorn, 2013, p. 389). The suspect’s meeting with Mr. Big is conducted as a job interview of sorts (Keenan & Brockman, 2010, p. 20; *R v Hart*, 2014, p. 545). Mr. Big is portrayed as a well-connected, confident, yet menacing,

omnipotent person (Keenan & Brockman, 2010, p. 20). Mr. Big requests that the suspect reveal any past criminality to him to establish trust and prevent any eventual quandaries (Puddister & Riddell, 2012, p. 386; Schleichkorn, 2013, p. 389). He explains to the suspect that in case the suspect tries to inform the police, or deliberately put the “criminal organization” at risk of exposure, he needs “dirt” against the suspect for the organization’s personal protection (Smith et al., 2010, p. 39-40). To secure the suspect’s promotion, and to prove his loyalty to the organization, the suspect must provide a detailed, oral and/or written, confession to the crime in question (Schleichkorn, 2013, p. 390; Smith et al., 2010, p. 40). The suspect’s meeting with Mr. Big is covertly videotaped by police (Smith et al., 2010, p. 40).

Obtaining the Filmed Confession

Throughout the interview with Mr. Big, Mr. Big will often disclose the crime at hand, and demand a confession to it (*R v Hart*, 2014, p. 545). It is made palpable to the suspect, by Mr. Big, that a confession to this specific crime will grant the suspect acceptance into the organization (*R v Hart*, 2014, p. 571). Depending on whether the first attempt to obtain a confession was successful, Mr. Big will often inform the suspect that he has access to compelling evidence against the suspect and refusing to confess will demonstrate dishonesty and disloyalty (*R v Hart*, 2014, p. 571-572). Mr. Big dismisses all denials of guilt as lies (*R v Hart*, 2014, p. 572).

Mr. Big may then offer the suspect legal help for any prior crimes through the organization’s “contacts” (Smith et al., 2010, p. 40). More specifically, Mr. Big may offer to help sue the police for harassment (Connors, et al., 2017, p. 27). Mr. Big may also suggest to the suspect that they know someone who is willing to confess to the suspect’s crime(s), on the suspect’s behalf, for a price, either fiscal or procedural (Smith et al., 2010, p. 40). To lend

credibility, Mr. Big may also say that they know someone, dying of cancer in prison, who owes them a favor, willing to confess on the suspect's behalf (Connors et al., 2017, p. 27). In some instances, Mr. Big has promised the suspect that they would help destroy any evidence of the crime, or that Mr. Big knows 'crooked' police officers willing to get rid of the evidence (Smith et al., 2010, p. 40; Connors et al., 2017, p. 27). The suspect is informed of the repercussions of not confessing: the loss of a high-paying and accommodating livelihood (Smith et al., 2010, p. 40). The beating, and perhaps even murder, of another member of the organization may be staged—as a result of the other member refusing to confess (Smith et al., 2010, p. 40; Schleichkorn, 2013, p. 397). Undercover officers normally simulate the brutal, bloody assault of a person who had lied to or otherwise betrayed the organization (*R v Hart*, 2014, p. 571; Murphy & Anderson, 2016, p. 31). A confession is elicited through subordination. The degree of violent threats varies from case to case, but it is not uncommon for a suspect to fear for their life as a result of not confessing (Holmgren, 2017, p. 155).

Mr. Big investigations have lasted several months and can even take multiple years (Holmgren, 2017, p. 149). Up to 50 undercover officers may be hired for a Mr. Big operation (Smith et al., 2010, p. 40). Each individual investigation can cost taxpayers hundreds of thousands, and even millions of dollars (Schleichkorn, 2013, p. 389; Keenan & Brockman, 2010, p. 23-24). The costs and time-consuming aspects of undercover work results in it only being used for very serious offences like murder, terrorism, drug offences, sex offences, serious acts of violence, and cold cases (Parent & Parent, 2018, p. 80; *R v Hart*, 2014, p. 579). Hundreds of cases have been solved using the Mr. Big technique (*R v Hart*, p. 570; Puddister & Riddell, 2012, p. 386). Between 1990 and 2008, the technique was used at least 350 times (*R v Hart*, 2014, p. 570).

Cody Bates' Story from his Perspective

Cody Bates was a drug-trafficker and severe drug addict with a relatively extensive criminal record in Calgary, Alberta (*R v Bates*, 2009, p. 3-4; Bates, 2018, p. 68, 73, 79-85 & 105). In 2006, Bates and Justin Gittens planned the robbery of Ali Khamis, another known drug-trafficker in the area (*R v Bates*, 2009, p. 2). There were rumors that Khamis was planning on robbing Bates and Gittens, so they decided to “defend their turf” (Bates, 2018, p. 87; *R v Bates*, 2009, p. 2). Bates offered Jason Woods, a crack-cocaine user, a generous amount of cocaine to help him with the robbery (*R v Bates*, 2009, p. 2; Bates, 2018, p. 87). Woods called Khamis from a payphone to purchase drugs (Bates, 2018, p. 87). Then Bates and Gittens pulled up to the meeting point and Gittens slipped the gun up his sleeve (Bates, 2018, p. 87). Woods, according to plan, did not have enough money for the drugs (Bates, 2018, p. 87; *R v Bates*, 2009, p. 2). Bates and Gittens approached Khamis' vehicle to rob him, whereby suddenly, Gittens shot and killed Khamis, at close range (Bates, 2018, p. 87). Things did not go according to plan and Gittens was in tears (Bates, 2018, p. 88). They ran away in shock, buried the gun, and went their separate ways (Bates, 2018, p. 88).

Months later, Bates was on his way to deliver drugs in Marda Loop, a neighborhood in Calgary, when police tackled him to the ground (Bates, 2018, p. 106). The police found his cocaine, poured it out, and told him that they had done him a favor, now they needed a favor in return (Bates, 2018, p. 106). They wanted to know who his provider was (Bates, 2018, p. 106). Bates gave them a false answer, was released, then subsequently arrested later that day on an old transit ticket warrant (Bates, 2018, p. 106). He was placed in a holding cell where he met a man named Rob (Bates, 2018, p. 106).

Weeks later, when Bates was walking out of a convenience store in High River, Alberta, he came across Rob (Bates, 2018, p. 118). Rob was accompanied by Brad and Walker, some

biker-gang looking fellows, and invited Bates to join them to a bar (Bates, 2018, p. 118). They spent the evening drinking, laughing, and telling stories (Bates, 2018, p. 118). Bates felt like these guys really liked him (Bates, 2018, p. 118). When Rob payed the bill, Bates noticed his large stack of hundred-dollar bills, as well as the 50 percent tip he gave the waitress (Bates, 2018, p. 118).

Later, once Bates had returned to his Calgary drug operation routine, managing several drug runners, he received a call from Walker, Rob's biker friend (Bates, 2018, p. 99 & 119). Walker needed a favor (Bates, 2018, p. 119). Bates agreed, and Walker picked him up (Bates, 2018, p. 119). Bates felt like he was starting to get close with his new friend (Bates, 2018, p. 119). He enjoyed Walker's company, and felt like he could trust him (Bates, 2018, p. 119). Walker drove Bates to a mall and requested that he discreetly pick up a briefcase from a locker, refrain from looking inside the briefcase, and deliver it to him (Bates, 2018, p. 119). Walker could not be seen on camera (Bates, 2018, p. 119). Bates felt that, through this, he had an in with some reputable gangsters (Bates, 2018, p. 119). Bates admired Walker (Bates, 2018, p. 119). He obliged, picked up the briefcase, and wondered whether he was carrying body parts, drugs, or money (Bates, 2018, p. 119). He did not check (Bates, 2018, p. 119).

Once the task was complete, Walker invited Bates out to drink where he whispered into Bates' ear that this was a test and that he had passed because he had abstained from asking any questions (Bates, 2018, p. 120). Walker then informed Bates that Rob wanted to connect with him the following day to negotiate a work opportunity and placed a large stack of hundred-dollar bills in Bates' hand (Bates, 2018, p. 120). Bates held himself together but was bursting with excitement on the inside (Bates, 2018, p. 120). This was the easiest money he had ever made (Bates, 2018, p. 120).

Rob treated Bates to lunch where he explained to Bates that he was going to meet someone at a bar later, and needed Bates to observe and acquire the vehicle make, model, and license plate number of this person (Bates, 2018, p. 121). Bates later entered the bar in question (Bates, 2018, p. 121). He saw Rob walk in several minutes later and sit at a different table where he was later joined by the said individual (Bates, 2018, p. 121). Bates felt like he was becoming a part of something big like the Mafia and he had to play the part, act cool (Bates, 2018, p. 121). He waited for the right moment, headed to the parking lot, and memorized the license plate number (Bates, 2018, p. 121). Later, Rob handed him another handful of hundred-dollar bills (Bates, 2018, p. 121). Bates was baffled at how easily he had just secured several thousands of dollars (Bates, 2018, p. 121).

Bates believed these men were part of an extremely sophisticated criminal organization (Bates, 2018, p. 122). Over the course of several months these men involved Bates in gun-running, robberies, and immeasurable unlawful projects and tasks (Bates, 2018, p. 122). Bates' friendship with Rob and his team grew stronger (Bates, 2018, p. 122). He was using cocaine consistently throughout this time (Bates, 2018, p. 122). Rob and his friends expressed a genuine concern about his addiction (Bates, 2018, p. 122). Bates felt that these men truly cared about his well-being (Bates, 2018, p. 122). He was thrilled whenever he was tasked with another assignment (Bates, 2018, p. 122). Bates was well-off, living glamorously, drinking at strip clubs with Rob and friends every other day (Bates, 2018, p. 122).

Eventually, the criminal organization disclosed to Bates that he was the suspect in a murder and that this was attracting too much attention to the organization (Bates, 2018, p. 122). Bates was distraught (Bates, 2018, p. 122). These men were his family, he told them he would do anything for them, even kill (Bates, 2018, p. 122). Bates was directed to speak to a man referred

to as a “clean-up man” who specialized in disposing of evidence (Bates, 2018, p. 122). Upon meeting the clean-up man, Bates felt he needed to boast to secure his high paying job (Bates, 2018, p. 122). Bates proceeded to lie and tell the clean-up man that he had meticulously planned the homicide, and that he had pulled the trigger (*R v Hart*, 2014, p. 572; Bates, 2018, p. 122). The clean-up man was impressed (Bates, 2018, p. 122). Bates was being promoted to a hitman (Bates, 2018, p. 123). He was in over his head; his life had reached a new level (Bates, 2018, p. 123).

One morning, Bates was woken by a phone call from Rob asking him where he was (Bates, 2018, p. 125). Suddenly, a loud bang broke his door open (Bates, 2018, p. 125). It was the Calgary SWAT team ordering him to get on the ground (Bates, 2018, p. 125). They executed a search warrant for which Bates felt relief knowing they would not find anything (Bates, 2018, p. 125). He kept his drugs and weapons at a different location (Bates, 2018, p. 125). A couple dozen police officers were in his house (Bates, 2018, p. 126). He recognized the police officer who had dumped out his cocaine in hopes of finding Bates’ provider, the preceding year (Bates, 2018, p. 126). Bates was placed under arrest for first degree murder (Bates, 2018, p. 126).

As he sat in a police interrogation room trying to determine how the police could possibly think he had committed a premeditated murder, it dawned on him (Bates, 2018, p. 127). Rob and all his associates were undercover police officers (Bates, 2018, p. 127). He suddenly felt sick (Bates, 2018, p. 127). Men he had come to consider as brothers, his family, had betrayed him (Bates, 2018, p. 127). The past several months replayed in his head (Bates, 2018, p. 127). Obeying an unwritten code; Bates could not inform the police that Gittens had pulled the trigger (Bates, 2018, p. 127). Bates knew he was culpable, but not of this exact charge (Bates, 2018, p. 127). Exhausted after two days of interrogation, he was later placed in a holding cell with

Woods, his crack-cocaine addicted accomplice (Bates, 2018, p. 127). Woods had not seen who shot the gun but confided in Bates that he had mentioned the incident to his Alcoholics Anonymous sponsor (Bates, 2018, p. 128). Bates instantly assumed Woods' sponsor was also a police officer, which would solidify the case against him (Bates, 2018, p. 128).

When Bates was in custody, he was informed that he had succumbed to a Mr. Big operation (Bates, 2018, p. 131). He quickly learned that countless accused murderers had been the subject of this type of investigation in the past, which immediately lead him to wonder how many more of these convicted murderers had also falsely confessed (Bates, 2018, p. 131).

Bates had a general understanding of prison politics and quickly joined a gang and followed their rules for personal protection (Bates, 2018, p. 132). The gang he joined had a well-known rival-group and each group was known for the deaths and frequent acts of violence against the other (Bates, 2018, p. 137). To establish his tough-guy reputation in prison and to prevent becoming the victim of violent crime, Bates became a frequent perpetrator of violent acts against enemies of his gang (Bates, 2018, p. 136-140). Bates was eventually transferred to Edmonton Remand (Bates, 2018, p. 140). He maintained his tough and violent reputation and was frequently placed in solitary confinement for months at a time (Bates, 2018, p. 142-143). Believing he would be spending a life sentence in prison, Bates carelessly took part in violent murder plots in prison alongside his new gang (Bates, 2018, p. 147-148).

Eventually, Bates' lawyer visited him in prison (Bates, 2018, p. 156). Gittens had turned himself in as the trigger man in the robbery (Bates, 2018, p. 156). Later, the Alberta court assessed Bates' *mens rea*, and the shooting was deemed accidental (*R v Bates*, 2009, p. 5). Bates' excessive criminal history and role in the robbery were aggravating factors, yet his young age and guilty plea were deemed mitigating (*R v Bates*, 2009, p. 5-6). He was convicted of

manslaughter and sentenced to eight years (Bates, 2018, p. 162). Given his time served and the two-for-one time in solitary confinement, he would serve the next five years in an Edmonton maximum security prison (Bates, 2018, p. 163).

Interrogation Trilogy

R v Oickle, *R v Singh*, and *R v Sinclair* constitute the three Supreme Court of Canada cases that make up the Interrogation Trilogy (Dufraimont, 2011, p. 310). Together, these cases outline the legal protections available to suspects when subjected to a police interrogation (Dufraimont, 2011, p. 310).

***R v Oickle* - The Confession Rule**

Oickle, after many hours of interrogation, eventually confessed to setting seven out of eight fires (Dufraimont, 2011, p. 311). The tactic employed by interrogating officers, which was to repeatedly accuse him of guilt based on his failed polygraph test, resulted in his confession, even as the unreliability of the polygraph test was not made known to the suspect (Dufraimont, 2011, p. 311).

The original common law confession rule, dating back a couple of centuries, states that any statement made outside of court by an accused to an evident person of authority must be omitted from evidence unless the Crown can prove that the statement was made voluntarily, beyond a reasonable doubt (Dufraimont, 2011, p. 311). *R v Oickle* led to the creation of guidelines when exploring the “voluntariness” of a confession (Dufraimont, 2011, p. 311). When considering “voluntariness,” oppression, subtle threats or promises, and police trickery must be carefully examined (*R v Oickle*, 2000, p. 5). The police may induce a confession. The mere incidence of police inducements is not problematic, as very little confessions are given impromptu (*R v Oickle*, 2000, p. 37). The inducement becomes questionable when it raises

reasonable doubt that it may have overborne the will of the interrogatee (*R v Oickle*, 2000, p. 37). Whether it be in the form of a threat or a promise, the offer of a *quid pro quo*, by interrogators, should be explored (*R v Oickle*, 2000, p. 5). Depriving a suspect of necessities such as: access to counsel, medical attention, food, water, clothing, sleep, questioning for an extensive period of time, or presenting one with fabricated evidence is considered oppressive and affects the voluntariness of the confession (*R v Oickle*, 2000, p. 5). If the suspect's mind is not operating properly, the confession is deemed involuntary (Dufraimont, 2011, p. 312).

When considering whether a confession was made voluntarily or not, the use of police trickery must be explored (*R v Oickle*, 2011, p. 6). Some confessions obtained through police trickery may not undermine the voluntariness or right to silence of the suspect, but must be excluded for its circumstances would be disapproved of by the community (*R v Oickle*, 2000, p. 6; Dufraimont, 2011, p. 312). The confession rule applies whether the suspect is or is not detained (*R v Singh*, 2007, p. 423).

***R v Hebert* – The Right to Silence**

Although the right to silence is not explicitly mentioned in the Canadian Charter of Rights and Freedoms, the Supreme Court of Canada acknowledges that Section 7 of the Charter protects this right (Dufraimont, 2011, p. 313). *R v Hebert* objectively defines the right to silence as: the right to choose to speak with authorities; however, the subjective component is ensuring the suspect is not deprived of an operating mind (1990, p. 181-182 & 184).

R v Hebert was a case about a suspect who chose to exercise his right to silence, but was duped, by an undercover officer in his jail cell, into making incriminating statements (Dufraimont, 2011, p. 313). *R v Hebert* established the four following rules for the right to silence:

(1) Police are permitted to question an accused when counsel is not present (1990, p. 183). So long as the police is not undercover and the accused voluntarily provides information, the Charter is not infringed (*R v Hebert*, 1990, p. 183). This is because an accused has the right to waive his or her right to silence; however, had they not known they were speaking with an officer, they would have been denied this right (*R v Hebert*, 1990, p. 183). This applies to undercover officer interrogations, information heard through mechanical devices, and overheard information and conversations between others (eg. in prison cells) (*R v Hebert*, 1990, p. 183).

(2) The right to silence only applies after the suspect has been formally detained (*R v Hebert*, 1990, p. 184). The Charter does not extend the right to counsel nor the right to silence pre-detention (*R v Hebert*, 1990, p. 184). Thus, statements made by a suspect during undercover operations, or pre-detention police tricks are accepted as evidence (*R v Hebert*, 1990, p. 184).

(3) Regardless of whether the police obtained information through a jailhouse informant or an undercover operative, a violation of the right to silence only occurs when police have overthrown the accused's right to choose to remain silent (*R v Hebert*, 1990, p. 184). For instance, a violation would occur had the accused professed his desire to remain silent and the police engaged in subterfuge to prompt a statement (*R v Hebert*, 1990, p. 185). The police have then deprived the accused of his right to choose freely whether to make a statement (*R v Hebert*, 1990, p. 185).

(4) It is important to distinguish between undercover operatives observing a suspect versus undercover operatives eliciting information from a suspect in contravention to his or her right to choose to remain silent (*R v Hebert*, 1990, p. 184-185). A violation to this rule would be if the police elicited information from a suspect by bluffing and engaging in dishonesty (*R v Hebert*, 1990, p. 184-185). However, an officer and/or informant merely listening is not an

infringement (*R v Hebert*, 1990, p. 184). It must be demonstrated that action was taken to deceitfully elicit information (*R v Hebert*, 1990, p. 183-185; Dufraimont, 2011, p. 313). It is assumed that the suspect has acknowledged the risks associated with statements made to non-police officers (*R v Hebert*, 1990, p. 185).

Accordingly, Hebert professing his right to silence in police detention, then police proceeding to trick him into incriminating himself to an undercover operative in his cell was an infringement of his right to silence (*R v Hebert*, 1990, p. 181-185; Dufraimont, 2011, p. 313). The link between the right to silence and the *R v Oickle* confession rule's "voluntariness" was unclear until *R v Singh* (Dufraimont, 2011, p. 314).

R v Singh. A stray bullet killed an innocent bystander outside of a pub, for which Singh was arrested (*R v Singh*, 2007, p. 405). While being interrogated for second degree murder, the accused professed his right to silence eighteen times (Dufraimont, 2011, p. 314; *R v Singh*, 2007, p. 415). The officer began placing evidence before Singh (*R v Singh*, 2007, p. 411). Police proceeded with the interrogation while acknowledging, yet dismissing, Singh's desire to remain silent, which eventually prompted him into making some incriminating statements (Dufraimont, 2011, p. 314). He did not confess to the crime but identified himself in pictures taken from the video surveillance camera of the pub where the homicide occurred (*R v Singh*, 2007, p. 411). The judge ruled that Singh's statements were voluntary, and that their probative value outweighed any prejudicial effects (*R v Singh*, 2007, p. 411). Hence, he was convicted (*R v Singh*, 2007, p. 411).

Singh's case was appealed to determine whether the statements he made after he professed his right to silence were voluntary beyond a reasonable doubt, and if this was a breach of his section 7 right to silence (*R v Singh*, 2007, p. 415). The court emphasized that when one

knows he or she is speaking to an officer, an operating mind is imperative (*R v Singh*, 2007, p. 420). An officer may use the following phrase, in simple wording, to inform an accused of their right to silence: “You are charged with ... do you wish to say anything? You are not obligated to, and anything you say could be used in court” (*R v Singh*, 2007, p. 423). The lack of a warning, or the presence of one does not determine the admissibility of a statement, but it is an important consideration when determining voluntariness (*R v Singh*, 2007, p. 423). If the detainee has exercised his right to counsel, he will have been informed of his right to silence (*R v Singh*, 2007, p. 424). However, if he has not spoken with counsel, whether the police inform the detainee of his or her right to silence will, to a greater extent, be used to determine the voluntariness of a confession (*R v Singh*, 2007, p. 424).

One’s right to remain silent is not synonymous with a right not to be spoken to (*R v Singh*, 2007, p. 421). Trying to elicit information from a suspect is not problematic as it is an investigator’s job to uncover information about a crime (*R v Singh*, 2007, p. 421). *R v Oickle*’s confession rule protects against reprehensible interrogation techniques that could prompt false confessions (*R v Singh*, 2007, p. 421). This case linked *R v Oickle*’s confession rule with *R v Herbert*’s pre-trial right to silence (*R v Singh*, 2007, p. 410-411).

The principle against self-incrimination. The confession rule and the right to silence are dominant components of the principle against self-incrimination (*R v Singh*, 2007, p. 418). These two rules can compliment one another but must remain distinct, as the common law confession rule is applied both before and after detention, and section 7 of the Charters’ right to silence only applies after detention (*R v Singh*, 2007, p. 444). One has the free will to choose to speak or not to speak to police; however, the reception of a statement must be guaranteed to be fair and must honor the administration of justice (*R v Singh*, 2007, p. 425). Any minor doubt in

the accused's free will in violation to the confession rule is sufficient to exclude the confession (*R v Singh*, 2007, p. 427-428). Any action, by the authorities, that unfairly influences the accused's decision to speak to authorities is an infringement of this right (*R v Singh*, 2007, p. 440). The judge ruled that the statements made were voluntary and did not violate the confession rule (*R v Singh*, 2007, p. 444). However, the insistency of the police officer to continue interrogating after the eighteen assertions to silence, overborne his choice of whether to speak to authorities, and constitutes an infringement of the right to silence (*R v Singh*, 2007, p. 445). Other participating components of the principle against self-incrimination includes s. 13 the right to use immunity, s. 11(c) the right to non-compellability, and s. 10(b) the right to counsel (*R v Singh*, 2007, p. 418).

***R v Sinclair* – The Right to Counsel**

Sinclair was arrested for murder (Dufraimont, 2011, p. 316). He was informed of his right to counsel and spoke with a lawyer of his choice, twice, via telephone (*R v Sinclair*, 2010, p. 310). He was subsequently interviewed by police for five hours (Dufraimont, 2011, p. 316). Sinclair stated several times that he had nothing to say on the matter and asked to speak with his lawyer once more (*R v Sinclair*, 2010, p. 310). The officer acknowledged Sinclair's right to silence yet declined his request to consult with his lawyer (*R v Sinclair*, 2010, p. 310-311). Over the course of the interview, Sinclair requested to speak to his lawyer and/or to have him present six more times (*R v Sinclair*, 2010, p. 396). The officer declined, and Sinclair was informed that his lawyer could not be present during questioning (*R v Sinclair*, 2010, p. 311). In time, police successfully persuaded Sinclair that they had enough evidence to convict him (Dufraimont, 2011, p. 316). The officer falsely claimed that they had DNA evidence linking him to the murder (Dufraimont, 2011, p. 316). Eventually, Sinclair made incriminating statements (*R v Sinclair*,

2010, p. 311). He was later placed in a holding cell where he was accompanied by an undercover officer, to whom he further incriminated himself (*R v Sinclair*, 2010, p. 311). He later re-enacted the murder, with police, at the scene of the crime (*R v Sinclair*, 2010, p. 311). The trial judge, and appeal court deemed the statements voluntary beyond a reasonable doubt and Sinclair was convicted (*R v Sinclair*, 2010, p. 311).

The previous courts determined that s.10(b) is twofold (*R v Sinclair*, 2010, p. 311). It grants detainees access to legal advice on their current case through which police officers must first inform them of this right, and second, provide them with the necessary channels to do so (*R v Sinclair*, 2010, p. 311). The Court of Appeal ruled that s.10(b) can only guarantee additional consult with counsel if developments in the investigation illustrate a need (Dufraimont, 2011, p. 316). These objective developments include, but are not limited to changes in the accused's potential consequences, engaging a suspect in a lineup, or if the initial counsel information was faulty or unclear to the accused (*R v Singh*, 2010, p. 312; Dufraimont, 2011, p. 317).

The Supreme Court of Canada disapproved of the Court of Appeal's conditions and later established that a guarantee of access to counsel means more than once (*R v Singh*, 2010, p. 397). Notably, when the detainee is being interrogated by a skilled interviewer (*R v Singh*, 2010, p. 397). The police deliberately withholding Sinclair's access to counsel despite his constant requests consisted an infringement of his s.10(b) of the Charter access to counsel (*R v Sinclair*, 2010, p. 397). Since Sinclair's original statements were directly linked to the statements made to the undercover officer and during the re-enactment, they were excluded because they constituted an infringement of section 10(b) (*R v Sinclair*, 2010, p. 398).

R v Hart (2014) – The Landmark Case

In 2002, Nelson Hart was suspected of having drowned his two three-year-old twins, Karen and Krista (*R v Hart*, 2014, p. 545). When questioned by the police, Hart claimed that Krista had fallen into the lake; unable to swim, he left, leaving Karen behind (Murphy & Anderson, 2016, p. 30). He claimed to have driven eleven kilometers to find his wife for help (Murphy & Anderson, 2016, p. 30; *R v Hart*, 2014, p. 560-561). Police, confused as to why he failed to make a call or stop at a nearby restaurant for help, were convinced of his guilt (*R v Hart*, 2014, p. 561). Two weeks later, Hart contacted police to change his story (*R v Hart*, 2014, p. 561). He alleged to have had an epileptic seizure, a detail he omitted for fear of losing his driver's license (Murphy & Anderson, 2016, p. 30).

In December of 2004, Hart was subjected to a Mr. Big operation as the police lacked sufficient evidence to take him into custody (*R v Hart*, 2014, p. 545 & 562). Police observed his routines, and he was gradually recruited into a fictitious syndicate (Murphy & Anderson, 2016, p. 31). Hart, an unemployed, intermittently homeless, lonely individual, was paid several thousand dollars by undercover officers posing as a criminal organization to complete simple tasks (Moore, 2019, p. 7; *R v Hart*, 2014, p. 545; Murphy & Anderson, 2016, p. 30). During this time, Hart was treated to fine dining, to nights out to the casino, and to trips across Canada (*R v Hart*, 2014, p. 545; Murphy & Anderson, 2016, p. 31). Hart would state that the undercover officers were his best friends, whom he would eventually refer to as his brothers (*R v Hart*, 2014, p. 545). Hart would frequently tell Jim, the primary undercover operative, that he loved him (*R v Hart*, 2014, p. 563). His relationship with these men had lifted him out of poverty (Moore, 2019, p. 8). Unexpectedly, Hart disclosed to Jim that he had drowned his twin daughters (*R v Hart*, 2014, p. 545).

Hart was offered a position in the criminal organization for which he first had to be job-interviewed by Mr. Big (*R v Hart*, 2014, p. 545). If Hart's interview with Mr. Big was successful, Hart would be paid \$20,000 to \$25,000 for his next job (*R v Hart*, 2014, p. 563). He was subsequently shown \$175,000 in cash (*R v Hart*, 2014, p. 563-564). Later, Jim informed Hart that there was a problem with his track record for which Mr. Big would need to speak to him (*R v Hart*, 2014, p. 545).

Hart was questioned by Mr. Big about the death of his daughters; to which he denied responsibility (*R v Hart*, 2014, p. 545). When asked why he had murdered his daughters, Hart insisted it was an accident and clarified that he had had a seizure (Moore, 2019, p. 8; *R v Hart*, 2014, p. 564). Mr. Big, accusing Hart of dishonesty, persuaded Hart into confessing to killing his daughters out of fear that they would be placed in the custody of his brother (Moore, 2019, p. 8; *R v Hart*, 2014, p. 564). Once Hart admitted to motive-driven culpability, he was brought to the location where he described to an undercover officer how he had pushed his daughters into the water with his knee (*R v Hart*, 2014, p. 545 & 565). The details did not mirror his admission to Mr. Big (Moore, 2019, p. 8). Hart told Mr. Big that he had "struck his daughters with his shoulder" (*R v Hart*, 2014, p. 564). Hart's confessions were taken into evidence and he was charged and convicted of two counts of first-degree murder (Holmgren, 2017, p. 149; Moore, 2019, p. 8; *R v Hart*, 2014, p. 565). Once detained, Hart was permitted to make a phone call; he called Jim (*R v Hart*, 2014, p. 565).

New Common Law Rule of Evidence

Hart's case was appealed to the Supreme Court of Canada on the basis that his confessions constituted an infringement of the Canadian Charter of Rights and Freedoms,

specifically, the right to silence (*R v Hart*, 2014, p. 569-570; Moore, 2019, p. 9). The Supreme Court of Canada expressed three concerns associated with Mr. Big operations:

- (1) The risk of false confessions (*R v Hart*, 2014, p. 574-575).
- (2) The prejudicial effects of Mr. Big confessions; exposing a jury to an admission of guilt, followed by information that the accused wanted to join a criminal organization and participated in pseudo-crimes runs a risk of creating prejudice (*R v Hart*, 2014, p. 576). The trier of fact (Judge or a jury) may engage in “moral prejudice” or “propensity reasoning” by wrongly assuming the accused is guilty because of his or her willingness to participate in the criminal organization; or, “reasoning prejudice” which would serve to distract the judge or jury from the crime in question and falsely focus their attention on the moral character of the accused taken out of context (Holmgren, 2017, p. 156; *R v Yakimchuk*, 2017, p. 8; *R v Hart*, 2014, p. 576).
- (3) Police misconduct; violence and threatening behavior are a prevalent themes throughout these operations which risks generating excessive unethical police behavior (*R v Hart*, 2014, p. 578).

Two-pronged test. The Supreme Court of Canada in *R v Hart* determined there were not enough legal protections available to those subjected to Mr. Big operations and created a new common law rule of evidence required for Mr. Big cases (Murphy & Anderson, 2016, p. 30).

This common law rule called for a two-pronged test to determine the admissibility of confessions elicited through Mr. Big investigations (Parent & Parent, 2018, p. 82). The first prong renders any confession obtained via Mr. Big operations inadmissible unless the Crown can prove, on a balance of probabilities, that the prejudicial effects of the confession have been prevailed by its value (*R v Hart*, 2014, p. 580; Murphy & Anderson, 2016, p. 46). Determining the value of the confession serves to assess its reliability (*R v Hart*, 2014, p. 580). To do so, the

court must engage in an extensive cost-benefit analysis, evaluating the threshold of reliability of a statement to determine its trustworthiness (*R v Hart*, 2014, p. 583-585). The court may inspect the relationship between the officer and the accused, the presence of any threats, maturity levels, and mental health of the suspect (*R v Hart*, 2014, p. 585).

Prejudicial effects are evidence that portray the accused as an immoral individual yet must be included to place the confession into context (*R v Ledesma*, 2017, p. 6). When determining the prejudicial effects of a confession, the court should consider whether the accused was involved in any simulated acts of violence, as this may increase the prejudicial effects (*R v Magoon*, 2015, p. 8). Addressing the prejudicial effects of evidence is further clarified in *R v Mack*, 2014.

The second prong serves to identify any abuse of process (*R v Hart*, 2014, p. 580-581). According to the current doctrine, the onus is on the accused to demonstrate that an abuse of process has occurred (*R v Hart*, 2014, p. 589). An abuse of process could occur if the confession is coerced, threats of violence are instilled, there are awards of monetary gains, and if the investigation preys on one's substance addiction, mental health, level of intellect, or young age (*R v Hart*, 2014, p. 581 & 590 & 628; Connors et al., 2017). This list is not an exhaustive one (*R v Hart*, 2014, p. 591). The conduct of the officers must be scrutinized to determine whether police disproportionately manipulated the suspect (*R v Hart*, 2014, p. 620).

Additionally, the principle against self-incrimination may be applied, not to determine the reliability of the confession, but to protect one from the way it was elicited (*R v Hart*, 2014, p. 619). To determine if this principle was violated, courts must diligently analyze any coercion, the reliability based on incentives, and abuse of power (*R v Hart*, 2014, p. 628).

New Common Law Rule Application to *R v Hart*

The addition of the new common law rules created in the *R v Hart* case, prompted the court to first analyze the probative value of Hart's confessions (*R v Hart*, 2014, p. 596). Hart's initial lonely, impoverished state generated doubt on the reliability of his confession made to his newfound friends and employers (*R v Hart*, 2014, p. 596). The doubt coupled with the inconsistency of his confessions failed the test of reliability and were deemed inadmissible (*R v Hart*, 2014, p. 598).

Given that the first test failed, the test for abuse of process was not required; however, that did not prevent the Supreme Court from acknowledging that preying on Hart's mental health, poverty, and social isolation constituted an abuse of process (*R v Hart*, 2014, p. 600-601). For instance, the operation continued despite awareness of Hart's severe disposition to seizures (*R v Hart*, 2014, p. 600-601). Taking advantage of Hart's vulnerabilities in combination with the sophisticated manipulation of this particular operation was deemed an infringement of Hart's s.7 right to life, liberty, and security of the person, as Hart's autonomy was violated (*R v Hart*, 2014, p. 630). The admission of Hart's statements was thus deemed unconstitutional (*R v Hart*, 2014, p. 631).

***R v Mack* (2014)**

Dax Richard Mack's roommate was reported missing and a Mr. Big operation was initiated (*R v Mack*, 2014, p. 3). Throughout the Mr. Big operation, Mack eventually confessed, twice, to shooting the victim and later burning his body (*R v Mack*, 2014, p. 3). The police later identified the victims bone fragments in a firepit (*R v Mack*, 2014, p. 3). Mack was charged and convicted of first-degree murder (*R v Mack*, 2014, p. 3).

In *R v Mack*, as opposed to in the *R v Hart* case, the court found that the Crown had met its onus and demonstrated that the threshold of reliability of the Mr. Big confession outweighed its prejudicial effects (*R v Kelly*, 2017, para. 50). Although *R v Hart* and *R v Mack* were tried on the same day, the *R v Mack* decision was released roughly two months after the *R v Hart* decision (*R v Kelly*, 2017, para. 50). The *R v Mack* case established that the jury must be clearly and strictly instructed on the risks of prejudice and of reliability issues associated with Mr. Big cases (*R v Kelly*, 2017, para. 51). Since there is no script nor perfect way to instruct the jury, the steps taken to instruct are up to interpretation and will vary from case to case (*R v Kelly*, 2017, para. 51). However, the jury must be informed that they are to decide on the reliability of the confession (*R v Kelly*, 2017, para. 51). Then, they must be informed of the circumstances under which the Mr. Big confession(s) was made (*R v Mack*, 2014, p. 27; *R v Kelly*, 2017, para. 52).

Afterwards, to determine the reliability of the confession, the jury must be told to consider the following factors: the degree of detail, any additional evidence, components of the crime that were not public, and details that only a perpetrator would know (*R v Kelly*, 2017, para. 53; *R v Hart*, 2014, para. 105). The jury must be reminded that the context of the admission in the confession alone does not substantiate guilt, and that any criminal activity committed by the accused during the sting operation was fabricated and should thus be disregarded (*R v Kelly*, 2017, para. 55).

Post-*R v Hart* Appeal

R v MM (2012) Youth Case – Wrongly but not Wrongfully Convicted

Note: To protect the identity of the underage accused, every individual named in this case has been provided with an alias.

In 2007, the victim identified as “Dave” was shot and killed through the basement window of his home while hosting a house party (*R v MM*, 2012, p. 2). “Kevin,” who drove the underaged accused “Tom,” “Carl,” and another individual to the deceased’s home, initially informed the police that shortly after Tom and Carl exited his vehicle, he heard a gunshot, and upon returning to the vehicle, Tom had pointed a gun to his head, ordering him to drive (*R v MM*, 2012, p. 3). Kevin also told the police that Tom had later admitted to shooting Dave (*R v MM*, 2012, p. 3). However, in court, Kevin subsequently testified that Tom had **not** pointed a gun to his head, nor had he admitted to shooting Dave (*R v MM*, 2012, p. 17). Shortly after the shooting, “Hunter” called Tom to purchase crack-cocaine—a regular occurrence (*R v MM*, 2012, p. 24). Hunter informed police that Tom, Carl, and another unknown male had visited his home, and that Tom had removed a gun from his bag (*R v MM*, 2012, p. 24). The police were satisfied that Tom and Carl were responsible for this crime and the matter was turned over to Calgary’s Priority Crimes Unit and a Mr. Big sting titled “Operation Malibu” was launched on Tom (*R v MM*, 2012, p. 3 & 24).

The police intentionally did not reveal details to the public that only a perpetrator would know (hold-back evidence) (*R v MM*, 2012, p. 26). Undercover officers observed that Tom frequently trained in Mixed Martial Arts (MMA) (*R v MM*, 2012, p. 26). His first encounter with an undercover operative would be through this activity (*R v MM*, 2012, p. 26). “Brad,” an undercover operative started to regularly train at the same gym as Tom (*R v MM*, 2012, p. 27). Tom eventually became close with Brad, whose alias was a wealthy security guard (*R v MM*, 2012, p. 27-28). Tom, father of two young children, asked Brad for a job (*R v MM*, 2012, p. 28). Brad handed him a fake business card and later hired him as a bodyguard (*R v MM*, 2012, p. 28). Tom was flown across Canada to work for various strip clubs (*R v MM*, 2015, p. 5).

The officers had planned to have Brad be pulled over by police on warrants, with Tom present, to gradually expose Tom to Brad's secret criminal livelihood (*R v MM*, 2012, p. 28). Once pulled over, Brad, ensuring Tom was watching, pulled a gun out of his jacket and hid it under the car seat before the police arrived to the window (*R v MM*, 2012, p. 28). Brad later informed Tom that there was an illicit and much more lucrative side to his security company, and offered Tom an in (*R v MM*, 2015, p. 2; *R v MM*, 2012, p. 28).

Over the course of nine months, Tom was exposed to several falsified bloody beatings, a sex worker ring, kidnappings, and deaths (*R v MM*, 2012, p. 26-30; *R v MM*, 2015, p. 5). He was also introduced to an undercover officer who specialized in "mortgage fraud" (*R v MM*, 2015, p. 5). Officers were paying Tom \$1,000 cash per week and believed they had convinced him that their relationship had become one of genuine friendship (*R v MM*, 2012, p. 29). Tom became more open about his drug trafficking business (*R v MM*, 2012, p. 30). One day, Tom told Brad that his friend Carl had spent time in youth jail for shooting someone (*R v MM*, 2012, p. 28).

Brad, in an attempt to unnerve Tom, and hopefully get him to talk, mentioned that one of his "contacts" had information that the police were investigating him for the murder of Dave (*R v MM*, 2012, p. 31). Tom, duly frightened, stated that he had "taken care of a guy" who had stabbed his friend (*R v MM*, 2012, p. 32). Tom later confessed that Carl had been stabbed, and so "... I shot him in the head" (*R v MM*, 2012, p. 32). During Tom's meeting with Mr. Big, \$80,000 cash was placed on the table as an incentive to confess (*R v MM*, 2012, p. 34). Tom then divulged some of the hold-back evidence such as the type of gun, and was subsequently arrested (*R v MM*, 2012, p. 32). During Tom's cross-examination, he stated that Carl had shot the gun (*R v MM*, 2012, p. 38).

An RCMP officer later testified that he had received information from two sources that Carl had shot Dave (*R v MM*, 2012, p. 40). Carl had since fled to Venezuela (*R v MM*, 2012, p. 4). When asked to return to Canada for the trial, Carl, a Canadian, refused to ever set foot in Canada again (*R v MM*, 2012, p. 5). A Calgary police officer with the Forensic Crime Scenes Unit, identified two clear sets of footprints walking towards, then leaving Dave's family home window from which he was shot (*R v MM*, 2012, p. 8-9). Dave had gang ties and had previously stabbed Carl in the chest for which he served time in a youth facility (*R v MM*, 2012, p. 7, 18 & 47). Carl had threatened Dave because of this (*R v MM*, 2012, p. 14) Two party attendees mentioned that Carl harbored drug-trafficking related animosity towards Dave (*R v MM*, 2012, p. 11 & 14). Tom had never known the deceased personally, and had only previously heard his name through his friend Carl (*R v MM*, 2012, p. 42). The police were aware that Carl had indisputable motives to kill Dave and that Tom did not; however, Kevin and Hunter's statements prompted the launch of the Mr. Big operation on Tom and not Carl (*R v MM*, 2012, p. 25).

Tom's testimony confirmed that Kevin had driven Carl, the unknown male, and himself to Dave's home where Carl and he then exited the vehicle (*R v MM*, 2012, p. 42). He testified that they had initially planned to beat Dave up, but because the open window provided a perfect view of Dave, Carl shot the gun through the window (*R v MM*, 2012, p. 42). Tom also testified that when he told the undercover officers that he had shot Dave, he was lying (*R v MM*, 2012, p. 44). He shamefully admitted that he had lied to guarantee his position in the "criminal organization," and since the undercover officers had informed him that they had resources (fake passports, etc.) that could free him of any possible responsibility, he believed that refraining to confess to shooting the gun would deprive him of these resources (*R v MM*, 2015, p. 21; *R v MM*, 2012, p. 44-46). Tom also said that he told them he shot Dave in the head because they were

“bosses” and he wanted to impress them (*R v MM*, 2012, p. 45). The undercover officer bribed Tom, with money and protection, into confessing (*R v MM*, 2012, p. 34). Tom did however admit to drug-trafficking to provide a life for his two young children (*R v MM*, 2012, p. 45). He also stated that he sincerely thought Brad was a good friend (*R v MM*, 2012, p. 45). Tom affirmed that he had no antipathy towards Dave and that he had simply accompanied his friend, Carl, to support him (*R v MM*, 2012, p. 46). Tom also stated that he had spoken to Carl on the phone from custody several times, and Carl was confused as to why Tom was being blamed for shooting the gun, emphasizing that he cannot be apprehended from Venezuela, which is why he had fled (*R v MM*, 2012, p. 47-48).

The trial judge later emphasized the confession and the hold-back evidence (*R v MM*, 2012, p. 52-55). He also stated that Tom’s defense did not create reasonable doubt, and that despite the inconsistencies in Kevin and Hunter’s statements, they had been “believable” (*R v MM*, 2012, p. 55). Tom had made several statements during the Mr. Big operation that implied he knew how to dispose of evidence (*R v MM*, 2012, p. 58). The plausibility that Tom might have offered to dispose of the gun, which would explain both the police tips and the comments Tom had made to officers about melting the gun, was not contemplated (*R v MM*, 2012, p. 24 & 58). The judge concluded that he was convinced beyond a reasonable doubt that the accused, Tom, had fired the gun (*R v MM*, 2012, p. 59). Tom and Carl’s plan to beat Dave up deemed it pre-meditated, and he was convicted of first-degree murder (*R v MM*, 2012, p. 60 & 64). Tom was a youth at the time of the murder and was charged under the Youth Criminal Justice Act (*R v MM*, 2012, p. 65).

***R v MM* (2015).** A new trial was ordered following the *R v Hart* decision (*R v MM*, 2015, p. 2). Since the operation occurred pre-*R v Hart*, Tom requested the police disclosure of

Operation Malibu to properly analyze whether the conditions under which his statements were made affected the reliability of his confession, and whether Operation Malibu amounted to an abuse of process (*R v MM*, 2015, p. 2-3). His request for disclosure was denied (*R v MM*, 2016, p. 20).

***R v MM* (2015) Appeal – New Evidence**

In October of 2015, Carl's girlfriend informed police in a detailed interview that Carl had told her that he had shot the gun and that Tom had not (*R v MM*, 2015, p. 14). She stated that during a road-trip with Carl, she persistently questioned Carl about the shooting of Dave until, finally, Carl broke down crying and admitted that he had shot Dave and felt awful that Tom had been held responsible for pulling the trigger (*R v MM*, 2015, p. 27-28).

The Application of *R v Hart*

Analysis. Operation Malibu lasted eight months, Tom was involved in 65 scenarios, and met 25 different officers with varying, complex roles (*R v MM*, 2015, p. 15). Tom was in direct contact with Brad (the lead undercover officer) for 327 hours (*R v MM*, 2015, p. 15). This was considered an extensive and lengthy operation (*R v MM*, 2015, p. 16).

Nature of the relationship between Tom and the undercover operatives. Brad agreed that he and Tom had a very close friendship (*R v MM*, 2015, p. 16). The two exercised, trained in MMA, socialized, and completed assignments together (*R v MM*, 2015, p. 16). They grew close and shared personal information about their childhood with each other (*R v MM*, 2015, p. 16). Tom introduced Brad to both Carl and his father, important figures in his life (*R v MM*, 2015, p. 16). The accused trusted the operative with very personal information, and frequently looked to him for guidance (*R v MM*, 2015, p. 16). However, in comparison to the Hart case, and the level

of dependency Hart had on the officers, Tom's case is deemed significantly less dependent, who, as opposed to Hart, had other meaningful relationships in his life (*R v MM* 2015, p. 17).

Extent of the inducements. Tom was paid \$150 plus tips per "legitimate" security job, which drastically increased when his tasks became "unlawful" (*R v MM*, 2015, p. 17). Tom—a cocaine dealer—did not appear to be in any significant financial distress (*R v MM*, 2015, p. 17). He was exposed to \$40,000, \$50,000, and \$100,000 cash on separate occasions (*R v MM*, 2015, p. 17). Brad was painted to live in an expensive condo and drive a glamorous vehicle, a lifestyle that was portrayed to be available to Tom if he complied (*R v MM*, 2015, p. 17-18). Tom was informed that the organization had once made \$70 million from mortgage fraud (*R v MM*, 2015, p. 17-18). He was treated to trips, hotels, and tickets to an Ultimate Fighting Championship (UFC) (*R v MM*, 2015, p. 18). It was highlighted that Tom's need for financial assistance was deemed significantly less than Hart's (*R v MM*, 2015, p. 18).

Threats and violence. Brad physically assaulted someone who had failed to properly complete a favor (*R v MM*, 2015, p. 18). A janitor who had seen something he should not have was offered "hush-money," kidnapped, beaten, and later "died" of his injuries (*R v MM*, 2015, p. 18-19). Tom was included in conversations discussing killing someone (*R v MM*, 2015, p. 19). This case differed from Hart's in that Hart was made clearly aware that members within the organization who betrayed the trust of the organization were violently punished (*R v MM*, 2015, p. 19). This was considered inequivalent as, in Tom's case, only members outside of the organization were threatened or assaulted (*R v MM*, 2015, p. 19).

Mr. Big's conduct. The recorded Mr. Big interrogation was held by both Brad and "John," Brad's "boss," of whom Brad had spoken very highly of (*R v MM*, 2015, p. 20). John and the undercover operative who had acquired the information that Tom was a suspect were

perceived as having powerful resources to legally help Tom and/or to help him escape retribution (*R v MM*, 2015, p. 19-20). The meeting did not appear to be very forceful (*R v MM*, 2015, p. 20). Tom willingly stated his part in the murder of Dave (*R v MM*, 2015, p. 20). His confession differed from that of a conspicuously coercive one, as it did not begin with denial of involvement that eventually resulted in a confession (*R v MM*, 2015, p. 20-21). John did however state that Tom's involvement in this murder was drawing unwanted attention to the organization (*R v MM*, 2015, p. 21). Tom's Mr. Big interview significantly differed from Hart's, as Hart was directly accused of killing his daughters (*R v MM*, 2015, p. 21).

The accused. At the time of the murder, Tom was 17 years old (*R v MM*, 2015, p. 21). Throughout Operation Malibu, Tom was 19 and 20 years old (*R v MM*, 2015, p. 21). The court acknowledged that confessions made by youth are at a greater risk of unreliability and should be given special consideration (*R v MM*, 2015, p. 14 & 22). Although Tom was young, he was deemed mature for his age as he had two children whom he actively cared for, with two different women with whom he maintained a civil relationship (*R v MM*, 2015, p. 22). Mental health or addiction did not factor in (*R v MM*, 2015, p. 22). Tom seemed adequately competent to run a relatively successful drug trafficking business (*R v MM*, 2015, p. 22). The accused had multiple close friends and appeared to have a meaningful relationship with his family (*R v MM*, 2015, p. 22). As opposed to Hart who had no valuable relationships other than the undercover officers, had a deteriorating mental health, and a grade five education (*R v MM*, 2015, p. 22-23).

The accused did not appear to be taken aback by any violence that occurred throughout the operation as he had been exposed to severe violence throughout the course of his young life and had general knowledge about crime and ridding of evidence (*R v MM*, 2015, p. 23). This was

used against him. Although the accused was young, his insight into the world of crime, due to his background, increased his level of sophistication according to this court (*R v MM*, 2015, p. 23).

Although young age is presumed to be a risk factor, Tom's maturity level allegedly surpassed that of an adult and was thus disregarded (*R v MM*, 2015, p. 24). Tom's unconcerned composure with regards to violence deemed the falsified assaults as noncoercive (*R v MM*, 2015, p. 24). His willingness to confess and non-requirement for the operatives to forcefully elicit a confession also lowered the perceived coerciveness of the operation (*R v MM*, 2015, p. 24).

Confirmatory evidence. The accused provided a detailed confession which corresponded with what the investigators knew, including the type of gun, what he wore, and how Dave was killed (*R v MM*, 2015, p. 25-26). Note that some of this information was available through the media (*R v MM*, 2015, p. 27). His confession did not lead to the discovery of additional evidence (*R v MM*, 2015, p. 27). Throughout his confession, Tom appeared very confident that police would not have any DNA evidence linking him to the shooting (*R v MM*, 2015, p. 27). Despite the new evidence that Carl's girlfriend provided about Carl identifying himself as the shooter to her, Tom's confession was deemed reliable ratifying its probative value (*R v MM*, 2015, p. 29).

Measuring prejudicial effects. Do the prejudicial effects outweigh its probative value? Throughout the operation, the accused was involved in pseudo assaults, break and enters, robbery, domestic violence, drug offences, and sexist and racist conversations with the undercover officers (*R v MM*, 2015, p. 29). Particularly, he was involved in the kidnapping of, and conversation of killing, a janitor (*R v MM*, 2015, p. 29). The confession cannot be admitted into evidence without including the aforementioned details, to provide a jury with context under which the confession was made. The defense argued that including these details would render a

jury prejudiced about the accused's moral character, which may render an explanation as to why his confession was a lie unbelievable to an unsuspecting judge (*R v MM*, 2015, p. 31-32). The Crown, however, argued that the value and accuracy of the confession outweighed these prejudicial effects (*R v MM*, 2015, p. 32). This court favored the Crown's argument (*R v MM*, 2015, p. 32).

Abuse of process. It was concluded that the operation did not prey on Tom's young age, mental health, or substance addiction (*R v MM*, 2015, p. 33). Despite the fact that the level of violence included in this operation was classified as high, the violence was not directed towards the accused and did not amount to an abuse of process (*R v MM*, 2015, p. 33). Therefore, Tom's confession was deemed admissible (*R v MM*, 2015, p. 37).

Post-*R v Hart* Mr. Big Operation – *R v Buckley* (2018)

Note: a publication ban has been instilled on the identity of the undercover officers and they have each been assigned an alias.

In October of 2015 Operation Hackman was launched on John Buckley, who was eighteen years-old when his mother, Victoria Rae Brauns-Buckley, was found killed in her family home (*R v Buckley*, 2018, p. 2). Police gathered almost 1000 hours of audio recordings and involved Buckley in 77 incidents (*R v Buckley*, 2018, p. 2). Over time, police observed that Buckley lived in Montreal, was collecting welfare cheques, worked at a coffee shop, had a girlfriend, had a small social circle, and did not appear to have any hobbies (*R v Buckley*, 2018, p. 4-5). Attempts to befriend Buckley were unsuccessful (*R v Buckley*, 2018, p. 5). Undercover operatives, therefore, approached him and offered him a job at \$20 per hour (*R v Buckley*, 2018, p. 5). This organization treated him lavishly (*R v Buckley*, 2018, p.5). He was frequently flown across Canada with paid restaurant and hotel accommodations (*R v Buckley*, 2018, p. 5). He

would be invited to open-bar events hosted by the organization, where he would meet various members of the company, such as Vice Presidents and even Mr. Big (*R v Buckley*, 2018, p. 5).

Buckley would become close to “Mark” his direct supervisor (*R v Buckley*, 2018, p. 5-6). The organization would frequently refer to themselves as a family (*R v Bukley*, 2018, p. 6). All members of the organization were painted as living upscale lifestyles with early retirement options, recreational vehicles, and vacation homes (*R v Buckley*, 2018, p. 6). The organization took him to National Hockey League (NHL) games, helped him pay his rent, bought him various items, such as an NHL Jersey (*R v Buckley*, 2018, p. 10). Buckley was made directly aware that the organization was involved in non-violent crime such as illegal gold transactions and insurance fraud (*R v Buckley*, 2018, p. 6). However, Buckley would gradually learn that the organization had ties to the Italian Mafia and “bikers” (*R v Buckley*, 2018, p. 6). To instill fear, officers would often imply that they had previously engaged in violent acts (*R v Buckley*, 2018, p. 6).

Buckley was involved in several simulated crimes such as: blackmailing a police officer who they had caught on camera having sex with a sex worker, creating a false alibi to police for another member of the organization, forging hospital records, smuggling cell-phones into jail for a biker (*R v Buckley*, 2018, p. 7 & 9).

Throughout this operation, Buckley was described as extremely grateful for his new friendships, and would frequently break down emotionally (*R v Buckley*, 2018, p. 10). Buckley was thoroughly informed that if he wanted, he was free to leave the organization, and that lying would result in dismissal, and that no additional repercussions would be suffered (*R v Buckley*, 2018, p. 12)

Dylan, one of the organization's Vice Presidents, would eventually inform Buckley that his background check tied him to his mother's death and that he received information that Buckley's arrest was imminent; Buckley cried (*R v Buckley*, 2018, p. 10 & 12). He said that if he went to prison, he would kill himself (*R v Buckley*, 2018, p. 12). Dylan informed Buckley that if he confessed, in detail, he would have a biker, who owed him a favor and who was serving a life sentence, falsely confess on his behalf (*R v Buckley*, 2018, p. 12). Buckley's professed innocence was to no avail, Dylan insisted on needing every detail for the biker's confession to be accurate (*R v Buckley*, 2018, p. 12). To persuade Buckley to confess, Dylan implied that he had murdered someone before (*R v Buckley*, 2018, p. 13).

Buckley's options were displayed as follows: If Buckley did not confess, he would be fired, and charged with his mother's murder (*R v Buckley*, 2018, p. 12). If he did confess, he would not be sent to prison, could continue to work for the organization, and would collect his mother's insurance money (*R v Buckley*, 2018, p. 12-13).

Buckley said he found his mother's body, and was afraid that he would be pinned to the murder, so omitted calling the police within a reasonable time (*R v Buckley*, 2018, p. 14). Dylan, implying that without the organization's help, Buckley would be pinned to the murder anyhow, managed to convince Buckley into saying "I did it" (*R v Buckley*, 2018, p. 15). Buckley said he killed his mother with a hammer (*R v Buckley*, 2018, p. 15). Note that Buckley had previously been given disclosure of various case details including that his mother had been killed by blunt force trauma to the head, resembling what is typically caused by a hammer (*R v Buckley*, 2018, p. 16 & 22). There was no hold-back evidence that only the murderer would know (*R v Buckley*, 2018, p. 21). Buckley's answers about what he did with his clothes, the shoes he was wearing, and the type of hammer he used were inconsistent (*R v Buckley*, 2018, p. 16-18). The hammer

was not found where he said he placed it (*R v Buckley*, 2018, p. 22). He said he struck his mother a maximum of three times; while forensics suggested it was at least eight times (*R v Buckley*, 2018, p. 22).

Application of *R v Hart*

To comply with *R v Hart*, the Mr. Big operation Hackman deliberately used less physical violence and instilled less fear of imminent danger to the suspect (*R v Buckley*, 2018, p. 24). All “scenarios” were also audio recorded (*R v Buckley*, 2018, p. 24). As there was no abuse of process, this case solely relied on the first prong devised from *R v Hart* (*R v Buckley*, 2018, p. 27). Thus, the onus was on the Crown to prove that the probative value of the confession outweighed its prejudicial effects (*R v Buckley*, 2018, p. 26). To determine the reliability, the circumstances of the operation to consider, as outlined in *R v Hart*, were analyzed: the operation lasted six months; he participated in 77 scenarios; he spent approximately 700 hours with Mark; he was exposed to excessive amounts of cash and glamour; refusing to confess was not associated with physical retribution; the Mr. Big interrogation was not overly oppressive; Buckley did not appear to have any prominent mental health problems; and he was in his early twenties at the time of the operation (*R v Hart*, 2014, p. 585-586; *R v Buckley*, 2018, p. 27-30).

Next, the court must seek reliability indicators within the confession (*R v Buckley*, 2018, p. 30). The confession was relatively detailed, did not lead to the discovery of additional evidence, and did not uncover any hold-back evidence (*R v Buckley*, 2018, p. 30-34). Hence, the confession was deemed unreliable and was made inadmissible because its reliability did not outweigh its prejudicial effects (*R v Buckley*, 2018, p. 35-37).

PART TWO – Critical Analyses of Mr. Big Operations

Section 25 of the Canadian Criminal Code provides legal protection for law enforcement to engage in deceptive behavior to solve serious crime. This section condones police lies, tricks, and undercover work when police are dealing with sophisticated criminals (Parent & Parent, 2018, p. 79).

Case Law Precedents

R v Campeau (2016) & R v Worme (2016) – admissibility of third party evidence.

Allegedly, Sheldon Worme invited Derek Campeau, and Aaron Stevens to Daniel Levesque house, where the three proceeded to rob, then torture Levesque to death while demanding his bank PIN (*R v Campeau*, 2016, p. 1). Campeau and Stevens later stabbed Worme nearly causing his death (*R v Campeau*, 2016, p. 1 & 14). A Mr. Big operation was launched on Worme (*R v Worme*, 2016, p. 1-2). His first confession excluded himself from Levesque's murder as an innocent bystander; whereas his second suggested that he had caused Levesque's death (*R v Worme*, 2016, p. 14). Worme, tried separately, was convicted of first degree murder; Campeau and Stevens were convicted of manslaughter (*R v Worme*, 2016, p. 1; *R v Campeau*, 2016, p. 1). When Campeau appealed the admissibility of Worme's confession toward his conviction, new case law was created to allow the admission of third-party Mr. Big evidence that implicates a co-accused's *actus reus* of an offence, so long as it abides by the *R v Khelawon* necessity and reliability hearsay rule (*R v Campeau*, 2016, p. 1 & 8-9).

R v Yakimchuk (2017) – threshold of reliability. In 2017, the Alberta Court of Appeal in *R v Yakimchuk* established a threshold between acceptable and unacceptable interrogation tactics in Mr. Big operations (p. 1 & 12; *R v Ledesma*, 2020, p. 19). It was established that the event where the crime is initially brought to question by the primary undercover operative and an

offer is made to help make the problem disappear, is considered significantly less coercive and less inducive of a false confessions than when the suspect is made to prove to Mr. Big that he is qualified to be a member of the organization (*R v Yakimchuk*, 2017, p. 12; *R v Ledesma*, 2020, p. 23-24).

***R v Magoon* (2015) – confirmatory evidence.** Spencer Jordan and Marie-Eve Magoon were suspected of having caused the disturbing, gradual death of 6-year-old Meika Jordan (*R v Magoon*, 2018, p. 310). Undercover officers posing as a couple set out to befriend the two and a confession was elicited (*R v Magoon*, 2015, p. 9). When determining the probative value of the confession as laid out in *R v Hart*, *R v Magoon* resolved that confirmatory evidence, though not essential, is a strong indicator of reliability (*R v Magoon*, 2015, p. 7-8).

Inapplicable protections. Through careful wording, the Interrogation Trilogy legal protections available to individuals subjected to police interrogation points to the exclusion of Mr. Big interrogations. *R v Oickle*'s confession rule protects against reprehensible interrogation techniques that could prompt false confessions by addressing the voluntariness of a confession (*R v Oickle*, 2000, p. 5-6; *R v Singh*, 2007, p. 421-422). Determining the voluntariness of a confession is crucial because a confession is so influential that it can singlehandedly warrant a conviction (*R v Singh*, 2007, p. 422). Within the framework of the confession rule, if an interviewee believed that making a statement would result in favorable treatment, this would pose a risk to the reliability of the confession (*R v Singh*, 2007, p. 430). He or she may be inclined to provide a false statement to influence or control what course of action that person may take (*R v Singh*, 2007, p. 430-431). However, it only applies when one is speaking to a *known* person of authority (Dufrainmont, 2011, p. 311; *R.v Hart*, 2014, p. 573). Moore (2019) argues that the police's power does not diminish when they are impersonating a non-police

officer (p. 9). Undercover officers who take part in Mr. Big operations are highly skilled actors. One may argue that Mr. Big's persona constitutes, though illegitimate, an equally dominant authority figure. In *R v Hart*'s initial appeal, the court disputed whether Hart was speaking with a person of authority and whether he was under "state control" when he confessed (*R v Hart*, 2014, p. 567; Moore, 2019, p. 8). This court believed he was (Moore, 2019, p. 8).

The *R v Herbert* rules for the Section 7 right to silence highlights how conversations with undercover officers, or information obtained through mechanical devices are an infringement of this right (*R v Hebert*, 1990, p. 183). However, it only applies once the individual has been formally detained; thus, inapplicable to Mr. Big operations (*R v Hebert*, 1990, p. 184; *R v Hart*, 2014, p. 573). However, psychologists argue that six to eight months of orchestrated social deceit can be far more controlling than formal detainment (Moore, 2019, p. 3). The lack of one being given the opportunity or a forewarning to exercise one's right to counsel or right to silence does not determine the admissibility of a statement (*R v Singh*, 2007, p. 423-424). However, if one has not spoken to counsel nor exercised their right to silence, the voluntariness of the confession is required to be explored in greater detail (*R v Singh*, 2007, p. 424).

Advantage of Mr. Big Operations

The technique is a well-developed, extremely sophisticated manner of eliciting confessions (Holmgren, 2017, p. 155). It is an effective way of addressing murder cases that have gone cold (Holmgren, 2017, p. 155). These operations have successfully led investigators to missing evidence, such as the murder weapon or the body of the deceased (*R v Hart*, 2014, p. 572; Holmgren, 2017, p. 155). Timothy Moore (2019) an expert on Mr. Big operations describes the tactic as "ingenious" (p. 2). The technique has clearly been a contributing factor in solving cases (Holmgren, 2017, p. 155). In *R v Yakimchuk*, following murder-related discussions with the

primary undercover operative, Yakimchuk disclosed to the undercover operative that he had previously been involved in a murder (*R v Yakimchuk*, 2017, p. 4). To the police's surprise, this confession was not of the homicide that launched the Mr. Big operation but of a different murder in Saskatoon from earlier years (*R v Yakimchuk*, 2017, p. 4). This Mr. Big operation re-opened a case that had gone cold. Additionally, the confession acquired from the Mr. Big operation in the tragic *R v Magoon* child torture, murder case was vital for the prosecution to convict the two accused (*R v Magoon*, 2018, p. 320). As well, had it not been for the launch of a Mr. Big operation on Micheal Bridges, the body of teenage Erin Chorney would not have been found and she would still be considered a missing person (Keenan & Brockman, 2010, p. 15).

These operations effectively produce confessions 75 percent of the time (Holmgren, 2017, p. 155). The RCMP states that the technique guarantees the correct individual is brought to justice, which they attribute to the recurring themes of trust and honesty (Keenan & Brockman, 2010, p. 16; Holmgren, 2017, p. 155). The aura of criminality portrayed by the operation has a strong potential to encourage an individual to be honest about their own criminality (Holmgren, 2017, p. 156). However, it has equal potential to induce one to lie. In an interview with Dr. Janne Holmgren, Kouri Keenan, author of *Mr. Big – Exposing Undercover Investigations in Canada* states that “suspects might very well be telling the truth. They might also be lying. There's no way to tell” (Holmgren, 2017, p. 156).

Potential Injustices of Mr. Big Operations

Coercion

In Mr. Big operations, the suspect is given an ultimatum, confess and receive a consequence-free ticket into a profitable organization or refuse to confess and lose every benefit the operatives have laid-out (*R v Kelly*, 2017, para. 12; *R v MM*, 2015, p. 24). As opposed to

other undercover work where officers painstakingly gather information, Mr. Big operations' manner of inducing a confession is designed to obtrusively coerce (*R v Hart*, 2014, p. 623). *R v Hart* defines coercion as depriving a suspect of a reasonable alternative to confessing (2014, p. 615). Examples of a coercive police tactics declared unacceptable in *R v Hart* include violent threats and threats of violence (2014, p. 590-591). However, *R v Hart* states that the structure of Mr. Big operations is in and of itself coercive, which does not automatically deem a confession inadmissible (*R v Hart*, 2014, p. 623). All aspects of the operation must be thoroughly and diligently scrutinized to formulate a holistic conclusion (*R v Hart*, 2014, p. 623).

Entrapment

A widespread misconception of Mr. Big operations is that they are a form of entrapment (Puddister & Riddell, 2012, p. 397). *R v Mack* (1988), the leading precedent for the defense of entrapment, defines its two prongs as (a) When persons of authority have no reasonable suspicion that a suspect is involved in crime, and then provide a suspect with an opportunity to commit a crime; or (b) going beyond providing an opportunity of inducing one into committing an offence of whom they have reasonable suspicion (para. 3). Since the crimes that the subject of a Mr. Big operation is required to execute are falsified, and the suspect is not later charged with these offences, Mr. Big operations do not constitute entrapment (Puddister & Riddell, 2012, p. 397). Entrapment is not a traditional defense, but it is recognized as a part of the Charter's Section 7 abuse of process doctrine (*R v Mack*, 1988, para. 37).

However, given the particulars of a case, this defense has been used in certain Mr. Big cases. For instance, in *R v Ledesma*, since throughout the course of the Mr. Big operation, the organization indirectly encouraged criminal behavior by committing a series of pseudo-crimes, the appellant argued that permitting Ledesma to flee an encounter with undercover officers with

a gun in his possession was a form of entrapment, placed the public at risk, and thus constituted an abuse of process (*R v Ledesma*, 2017, p. 5).

Also, in *R v NRR* (2014), throughout the Mr. Big interview with the 16-year-old youth, whereby Mr. Big questioned him about a double homicide, the suspect changed the subject from his past criminality to stating that he was planning on murdering the husband of his 34-year-old girlfriend and sought advice from Mr. Big (*R v NRR*, 2014, p. 3). The woman worked at a youth center that the suspect had attended and had had an intimate relationship with the underage accused (*R v NRR*, 2014, p. 2). The goal of the operation was then modified into discovering whether the youth was sincere about his plan to kill her husband (*R v NRR*, 2014, p. 6). Mr. Big requested all the information the suspect had on his target and then arranged for the suspect to meet an undercover officer described as a “hitman” near the target’s home (*R v NRR*, 2014, p. 7). The suspect then actively counseled the hitman into the murder and provided him with all the information he had (*R v NRR*, 2014, p. 7). Counselling one to commit an indictable offence that is not committed is an indictable offence under section 464(a) of the Canadian Criminal Code. The suspect did not request a hitman, nor for the undercover officers to participate; the inclusion of the hitman was introduced by the undercover officers (*R v NRR*, 2014, p. 11). The Alberta Court of Appeal then concluded that on a balance of probabilities, the police had, in fact, entrapped the suspect (*R v NRR*, 2014, p. 12).

International Mr. Big Operations

The coercive nature of Mr. Big operations is deemed an infringement of the constitutional rights of people living in the United States; hence why it has been prohibited (Keenan & Brockman, 2010, p. 24). Police deception is only acceptable after the suspect has been read their *Miranda Rights*, which is the right to remain silent when one is being interrogated by police in

the United States (Holmgren, 2017, p. 62; Keenan & Brockman, 2010, p. 24). Undercover sting operations were banned in England after a Mr. Big-like undercover operation involving an attractive female officer tricking a suspect into speaking about his violent sexual fantasies was deemed the grossest kind of deception by the judge (Keenan & Brockman, 2010, p. 24). Though, the Canadian Mr. Big operation has been brought to and performed in the Netherlands, New Zealand, and Australia (Moore, 2019, p. 2).

Secrecy & Costs

The cost of individual Mr. Big operations is inconsistent, it can range from thousands to millions (Keenan & Brockman, 2010, p. 23-24). Ledesma's case is considered inexpensive and cost roughly \$37,000 (*R v Ledesma*, 2020, p. 16). Whereas, among the more expensive ones include the \$2 million that the government spent on a three-year Mr. Big operation to find those responsible for the murder of four RCMP officers in Alberta in 2005, and the \$4 million spent eliciting a confession from Salvatore Ciancio for the murder of seven separate individuals (Keenan & Brockman, 2010, p. 24). Hart's Mr. Big operation cost Canadian taxpayers over \$400,000 and the *R v Buckley* Mr. Big operation that took place after the *R v Hart* decision, exceeded \$300,000 in costs (*R v Buckley*, 2018, p. 2; Murphy & Anderson, 2016, p. 31).

These operations absorb a large portion of police resources, and does not even address all violent crimes (Keenan & Brockman, 2010, p. 28). Canadian tax-payers are paying an expensive price for an investigation they receive very little information (Keenan & Brockman, 2010, p. 23). These cases frequently have publication bans to protect the identity of undercover officers, thereby making the type of questions and interviewing methods used by the officers difficult to scrutinize (Holmgren, 2017, p. 148 & 274). C.E.S. Franks, emeritus political studies professor at Queen's University, claims that "Secrecy in any government is an invitation to an abuse of

power” (Keenan & Brockman, 2010, p. 21). Yet, the cornerstone of Mr. Big operations’ very success is its confidential nature (Keenan & Brockman, 2010, p. 21).

Lack of oversight. The extreme secrecy associated with undercover operations makes it challenging to analyze, which has led to the suggestion that the entire investigation be documented (Moore et al., 2009, p.348; Smith et al., 2010). When researching police independence with regards to the Canadian Mr. Big operation, Puddister and Riddell (2012) concluded that the Mr. Big operation need not be abolished yet requires more police accountability and oversight (p. 387). Videotaping the entire investigation, and interaction would provide a court, and researchers with greater context that led to the confession (Smith et al., 2010, p. 40). The *Hawthorne effect* is when one changes his or her behavior for fear that they are being observed (Schwartz, Fischhoff, Krishnamurti, Sowell, 2013, p. 15242). One may anticipate that implementing further Mr. Big operation oversight would positively affect these operations, in that officers would consciously reduce their use of potentially shocking behavior.

However, reviewing all recorded information about a case, may be too time-consuming and infringe on one’s Charter of Rights and Freedoms s.11(b) right to a speedy trial as further clarified in *R v Jordan* (2016, p. 1). This implementation was predicted to increase the already extensive costs associated with these investigations, which was later demonstrated in the relatively expensive and significantly less violent *R v Buckley* post-*R v Hart* operation that yielded 1000 hours of police video and audio recordings (Schleichkorn, 2013, p. 389; *R v Buckley*, 2018, p. 2).

When determining the characteristics of the suspect that serve to render a confession more or less reliable—as required by *R v Hart*—without police oversight, the undercover officers’ views are used to draw conclusions about the suspect’s confession (*R v MM*, 2015, p.

22). Though the officer(s) may be genuine, the RCMP disproportionately supports the use of Mr. Big operations which could potentially thwart a trial (Keenan & Brockman, 2010, p. 16). For instance, when the Mr. Big officer from the *R v Worme* case was cross examined, he was asked by the defense attorney: “Would I be fair in saying that, in your experience, despite all of that building of truth scenarios, there have still been false confessions given to you as Mr. Big?” To which the officer responded: “No, there hasn’t.” (*R v Worme*, 2016, p. 13). This was the same officer that participated in Cody Bates Mr. Big investigation, a known false confession (*R v Worme*, 2016, p. 3).

Justice for victims. On August 8, 2014, the Winnipeg Police Service pulled over a drunk driver (Manitoba Advocate, 2019, p. 46). Fifteen-year-old Tina Fontaine was the passenger (Manitoba Advocate, 2019, p. 46). Officers let Tina go with the driver despite her missing person status (Manitoba Advocate, 2019, p. 46). Later that day, Tina was found in an alley, unconscious, and naked from the waist down (Manitoba Advocate, 2019, p. 46). She tested positive for methamphetamines, cocaine, alcohol, and cannabis, by paramedics (Manitoba Advocate, 2019, p. 46). Tina was later seen entering johns’ vehicles and would spend time with men known for their sexual exploitation of young girls (Manitoba Advocate, 2019, p. 49-50).

On August 17, 2014, police found Tina’s body in a river (Manitoba Advocate, 2019, p. 50). Her cause of death remains undetermined (Manitoba Advocate, 2019, p. 51). Tina Fontaine’s murder created public outrage because it sadly resembles that of so many other Indigenous people who have been failed by both the police and the Canadian Child Welfare System (Manitoba Advocate, 2019, p. 8 & 46; Navia, Henderson, & Charger, 2018, p. 146).

Tina's death prompted a Mr. Big operation on Raymond Cormier (Puddister, 2018, para. 3). In February, 2018, Cormier was found not guilty by a jury (MacLean, 2018, para. 1). As of March, 2019, Tina's case remains unsolved (Lodge, para. 4).

Puddister (2018) expresses concern for victim's rights with regards to Mr. Big operations (para. 25-26). She insists that the families of victims deserve a thorough police investigation that explores all potential suspects (Puddister, 2018, para. 26). These controversial Mr. Big investigations are compromising the community's confidence in police and the justice system (Puddister, 2018, para. 27). Tina was, once again, failed by a broken system.

Tunnel Vision

Mr. Big operations take place when there is little to no forensic evidence about a crime; yet, the confession acquired through the sting operation has often been the only—and deemed sufficient—evidence presented by police to close a case (Puddister & Riddell, 2012, p. 385-386; Schleichkorn, 2013, p. 392; Keenan & Brockman, 2010, p. 15). Police relied solely on informants to spark the Mr. Big operation on MM from Operation Malibu, and failed to pursue other suspects (*R v MM*, 2012, p. 56). Prior to launching the Mr. Big operation on Allgood, his fingerprints and DNA did not match any found at the scene (*R v Allgood*, 2015, p. 3). Tunnel vision occurs when members of the system build a case against a subject, whilst unconsciously undermining any contradictory evidence (FPT, 2018, p. 7). Confirmation bias is linked to tunnel vision as it causes individuals to prefer information that supports their conclusion (FPT, 2018, p. 7). Hindsight bias (knew-it all-along-bias) leads individuals to trust that their believed outcome is inevitable (FPT, 2018, p. 7). Psychologists say that even highly intelligent people use mental shortcuts to make decisions (FPT, 2018, p. 8). In the *R v Yakimchuk* (2017) case, the confession was the only evidence (p. 6). Police had retrieved no murder weapon, DNA evidence, footprints,

nor fingerprints (*R v Yakimchuk*, 2017, p. 6). Police informants, an anonymous tip, or a simple police hunch may be enough to prompt a Mr. Big operation on the wrong individual (*R v MM*, 2016, p. 25; *R v Yakimchuk*, 2017, p. 6).

When alleged crimes are violent or attract media attention, police agencies are pressured by both the public and their colleagues to promptly solve a case, especially in cases where the offender is at large and poses a risk to the public (FPT, 2018, p. 10). Within police forces, the culture may promote competition to solve a case, which can result in a lack of properly shared information (FPT, 2018, p. 10). Officers should be discouraged from instantly pursuing the best lead (FPT, 2018, p. 10-11).

Lucifer effect. Introducing an individual to the gang politics of a criminal organization can effectively be a forerunner to committing violent acts (Bates, 2018, p. 132). Although many, such as Bates, Ledesma, and Yakimchuk had a history of crime, one may conceivably conclude that the glorification of criminal acts—the *modus operandi* of undercover police operatives—has a degenerating effect, solidifying the criminal prestige portrayed in films, thereby convincing the subject that violence commends respect (*R v Bates*, 2009, p. 5-6, *R v Ledesma*, 2019, p. 13; *R v Yakimchuk*, 2017, p. 6). Philip Zimbardo wrote the book “How good people turn evil” where he highlights how dramatic situational changes in someone life have the power to affect the morality and compassion of that individual (Holmgren, 2017, p. 158). These findings were the result of Zimbardo’s controversial Stanford Prison Experiment (Manso-Pinto, 2011, p. 135). In *R v Hart* (2014) it was mentioned that the extremely manipulative nature of these types of investigations can compromise the sense of freedom and the morality of the suspect (*R v Hart*, 2014, p. 606). Notably in cases of impressionable youth who tend to repeat behavior they are exposed to (Holmgren, 2017, p. 164).

Mr. Big on Youth

There is consistently strong sociological evidence that youth are much more susceptible to false confessions as they tend to be highly submissive, exceptionally suggestible, and, compared to adults, tend to comply with authority figures (Haney-Caron, Goldstein, & Mesiarik, 2018, p. 1955; Holmgren, 2017, p. 164). Out of every exonerated youth in the United States, between 1985 and 2003, 44 percent had falsely confessed (Haney-Caron et al., 2018, p. 1956).

Unger, aged 19, though not legally a youth in Canada, told reporters after being exonerated that he had falsely confessed to Mr. Big because he was “young, naïve, and desperate for money” (Grabish, 2019, para. 11). The primary undercover operative in *R v MM*, being ten years older than the suspect, stated he felt like his mentor and frequently witnessed the suspect mimicking him (*R v MM*, 2015, p. 16). The undercover operative was an adult figure that the suspect admired (*R v MM*, 2015, p. 16). Youth may be more inclined than adults to want to impress others.

Was *R v Hart* Effective?

1. The Probative Value of the Confession

Suspect relationships. In both *R v MM* and *R v Ledesma*’s application of *R v Hart*, it was highlighted that they had a relatively large social circle in contrast to Hart who would lose his only source of friendship if he failed to comply (*R v Ledesma*, 2020, p. 13; *R v MM*, 2015, p. 22). This characteristic was used to deem both individuals as less attached to the undercover officers and reduce the perceived level of police manipulation. But can one accurately conclude that because one has other sources of friendship, that the level at which that person values their relationship with the undercover officers is, in all cases, lower than that of one who was more

introverted or antisocial? Also, is it not conceivable that having a larger social circle might increase the risk that the suspect had obtained the hold-back evidence through word of mouth?

In *R v Allgood*, when determining the reliability of the confession, an officer testified that he felt like he was Allgood's best friend (2015, p. 15). Ledesma and the undercover operative's relationship was very close, they frequently hugged and expressed their love for one another (*R v Ledesma*, 2020, p. 15). Ledesma once kissed the officer on the cheek (*R v Ledesma*, 2020, p. 15).

Maturity and level of vulnerability. In *R v Yakimchuk*, *R v Ledesma*, *R v West*, and *R v MM*'s cases, their "street-smarts," sophistication-level, and outgoing personalities were characterized as signs of maturity which, when applying the *R v Hart* rules, served to increase the reliability of their confessions, decrease the perceived potential coercion of the Mr. Big operation, and decrease any abuse of process (*R v Ledesma*, 2020, p. 18; *R v MM*, 2015, p. 22; *R v Yakimchuk*, 2017, p. 13; *R v West*, 2015, p. 27). In *R v Yakimchuk* (2017), when discussing the appellant's level of intelligence, the Alberta appeal court stated, "...there is nothing to suggest that [Yakimchuk] was weak or vulnerable to manipulation" (p. 13). Ledesma expressed that he was concerned about his addiction to drugs and alcohol, yet this did not stop officers from encouraging him to drink and providing him with the means to do so (*R v Ledesma*, 2020, p. 13). The court acknowledged that MM's young age was a risk factor, though decided that his level of sophistication was far beyond his age (*R v MM*, 2015, p. 23-24). In comparison to Hart—an exceptional case—who had a grade five education and evident mental health issues, if one's vulnerability isn't as visible and as severe as Hart's was, it tends to be overlooked under the *R v Hart* framework (*R v MM*, 2015, p. 22-23).

Accuracy of hold-back evidence. Although the accuracy and thus the reliability of the confession in "Tom's" *R v MM* (2015) case was rather high as he uncovered the "hold-back

evidence,” the Alberta court failed to acknowledge that those specific details would be known to both the shooter and he who accompanied the shooter, the risk being further elevated because the two had a close friendship. Given this, without thoroughly and successfully eliminating “Carl” as a suspect, one cannot, beyond a reasonable doubt, predicate that he had pulled the trigger. A suggestion would be to ensure every known person that was present at the scene of the crime, and potential perpetrator, is thoroughly eliminated as a suspect prior to establishing that one of two or more known persons present is guilty. Within the *R v Hart* framework, the value of the confession does not decrease if the details that are made available to the public mirror the details in the suspect’s confession (*R v Randle*, 2016, p. 28-29; *R v Yakimchuk*, 2017, p. 13).

Consistency between confessions. Frequently, the police create an event that is intended to induce the discussion of the crime with the primary undercover operative (*R v Yakimchuk*, 2017, p. 4). This event aims to unnerve the suspect, and often leads to the first confession (*R v Yakimchuk*, 2017, p. 4). Undercover operatives may share with a suspect a falsified police document illustrating that he or she is the primary suspect of a crime (Keenan & Brockman, 2010, p. 21). For instance, in *R v Worme*, uniformed police officers contacted his loved ones and implicated him in murder, assuming this interaction would later be shared with Worme; the police in *R v Yakimchuk* released a sketch, from a fake witness, of Yakimchuk’s face, to the news linking him to the murder; in Ledesma’s case, the police released the video footage of him in a nearby Mac’s the night of the murder to the media; in *R v MM*, the operative received a phone call from one of his “contacts” informing him that MM was a suspect for murder (*R v Worme*, 2016, p. 11-12; *R v Yakimchuk*, 2017, p. 4; *R v Ledesma*, 2020, p. 5; *R v MM*, 2012, p. 31). Though inapplicable to Mr. Big confessions, *R v Oickle*’s confession rule protects suspects who are presented with fabricated evidence, to cue a reaction, when interrogated by police (*R v*

Oickle, 2000, p. 5). After they have been caught off guard and confessed or discussed the crime in question with the primary undercover operative, the suspect is later required to confess again to Mr. Big—who, at the time, may be accompanied by the original undercover operative—who persistently reinforces the importance of honesty (*R v MM*, 2015, p. 20). Yakimchuk stated that this strict requirement for honesty motivated him, not to be honest, but to ensure that both his first, and second confessions were indistinguishable (*R v Yakimchuk*, 2017, p. 12). Which, within the framework of *R v Hart*, reinforces the reliability of the confession.

2. Abuse of Process

Violence. In recent years, to reduce the perceived degree of threats and prevent operations from amounting to an abuse of process, Mr. Big operations have decreased the use of intra-organizational violence (violence against members within the same organization), and have begun to solely commit violent acts against those outside of the organization (*R v MM*, 2015, p. 19; *R v Yakimchuk*, 2017, p. 11). Nonetheless, Ledesma argues that although the violence was not openly directed towards him, he still felt indirectly and incidentally threatened (*R v Ledesma*, 2020, p. 21-22). It is important to mention that Ledesma was tasked with spying on another member of the same organization, finding “dirt” on this member, and subsequently having that member discharged (*R v Ledesma*, 2020, p. 5). Though the member was not treated with violence, this demonstrates that members of your own organization cannot be trusted.

Ledesma testified that although he originally felt paranoid that “Jason” was a police officer, he later came to believe that Jason was actually a gangster, and that, according to him, a gangster is a person who is not afraid to take part in violent acts (*R v Ledesma*, 2020. P. 21). Given this, he stated that his confessions were lies because he thought that for the organization to accept him and to consider him to also be a gangster, he had to prove himself by seeming to have

taken part in violent acts (*R v Ledesma*, 2020, p. 21). He acknowledged that he was never personally threatened, but emphasized that through the criminal organization's involvement in a series of extremely violent acts, he knew that these gangsters were inherently capable of inflicting violence on him if they wanted to (*R v Ledesma*, 2020, p. 21). He also stated that he personally believed that if he messed up he would be subjected to violence; although other members of the organization were not subjected to violence, he assumed that they that had earned their positions because of their loyalty, and they had never "screwed up" (*R v Ledesma*, 2020, p. 21). Even though Jason once stated "we don't hurt our own," Ledesma respectfully responded that he did not believe him (*R v Ledesma*, 2020, p. 21). He compared the operation to what is portrayed in the movies, in that it is common knowledge that in any criminal organization, anyone who betrays the trust of the criminal organization is punished with violence (*R v Ledesma*, 2020, p. 21). Ledesma stated that in his life, and having been to jail, he has seen people be treated with extreme violence after getting expelled from a gang, so even though he was not directly threatened, its implicitness was palpable, and one should not realistically expect anything less from any criminal organization (*R v Ledesma*, 2020, p. 21-22). The violence against individual's outside of the organization is indirectly threatening.

Suspect demeanor. In *R v MM*, *R v Yakimchuk*, and *R v Ledesma*, the Alberta court testimony emphasized that throughout the execution of violent pseudo-crimes the suspects' demeanors were "calm" or "appeared unbothered" (*R v Ledesma*, 2020, p. 21; *R v Yakimchuk*, 2017, p. 3; *R v MM*, 2015, p. 24). This argument was used against them, and, under the *R v Hart* framework, lowered the perceived police "abuse of process" (*R v Ledesma*, 2020, p. 21; *R v Yakimchuk*, 2017, p. 3; *R v MM*, 2015, p. 24). In Bates' autobiography, *The Devil's Pupil*, he draws attention to the fact that he felt he needed to "act cool" while he was among legitimate

gangsters (Bates, 2018, p. 121). In another scenario involving Bates and undercover officers, Bates highlights how he felt it necessary to behave ruthlessly (Bates, 2018, p. 122). This “ruthless” behavior played in the Crown’s favor. Ledesma’s defense claimed that he was merely “playing along out of fear” (*R v Ledesma*, 2020, p. 7). While in the presence of an assault, to prevent drawing attention to oneself and out of fear of having the violence turned towards oneself, an individual is likely to be very inclined to appear to remain calm to prove to the “gangsters” that he is trustworthy and unbothered by violence. Although this normalization could very well indicate a level of comfort around violent acts, it could also (1) simply signify that the individual has been exposed to violence in their life; or (2) be an indication of a survival skill or coping mechanism. Remember, in the world of crime, being perceived as a potential “rat” is the fundamental “what *not* to be.” Thus, when in the presence of violent crime, anyone with basic survival instincts will display indifference to the violence, to prove to the perpetrator that they approve of, or even commend their conduct, to assure to the others that they are not a “snitch,” regardless of how uncomfortable they may feel.

Mental health and vulnerability. Psychologist, Dr. Timothy Moore, asserts that Mr. Big operations are extremely psychologically manipulative (Moore, 2019, p. 2). According to *R v Hart*, if the suspect suffers from addiction, mental health disorders, or is relatively young, an operative’s coercive behavior amounts to an abuse of process, by preying on one’s vulnerabilities (*R v Hart*, 2014, p. 590-591). Bates was diagnosed with substance use disorder, attention deficit hyperactivity disorder, and anti-social personality disorder (*R v Bates*, 2009, p. 3-5). Bates’ mental health suffered as he became more paranoid after the Mr. Big operation, unable to distinguish police from non-police (Bates, 2018, p. 128; *R v Bates*, 2009, p. 6).

When interviewed by Mr. Big, Andy Rose sternly and consistently asserted his innocence as the officer stated that without his confession, he would not be able to help him (Keenan & Brockman, 2010, p. 9-10). Mr. Big ordered Rose to go to the lounge, have a beer, and think his story over (Keenan & Brockman, 2010, p. 10). Rose insisted that he was telling the truth and a beer would not change his story (Keenan & Brockman, 2010, p. 10). Rose's lawyer argued that Rose was an alcoholic (Keenan & Brockman, 2010, p. 10). After hours of drinking, Rose eventually complied with the two officers' request and stated: "We'll go with I did it, okay?" (Keenan & Brockman, 2010, p. 10).

In *R v Ledesma*, throughout the course of the operation, Ledesma stated that he was addicted to alcohol and cannabis and used both substances daily (*R v Ledesma*, 2020, p. 13). His mother was a crack-cocaine user, for which she had been incarcerated, and his father, who also suffered from addiction, had attended residential schools (*R v Ledesma*, 2020, p. 12). Undercover officers frequently brought Ledesma to liquor stores and provided him with money to purchase alcohol (*R v Ledesma*, 2020, p. 13). Ledesma was highly intoxicated on numerous undercover scenarios (*R v Ledesma*, 2020, p. 13). In fact, Ledesma was provided with so much alcohol by undercover officers prior to his meeting with Mr. Big that he vomited twice before arriving to the location of his Mr. Big interrogation, where he was given even more alcohol by Mr. Big (*R v Ledesma*, 2020, p. 13). Though inapplicable, *R v Singh* (2007) requires an individual to have an operating mind when being interrogated by police (*R v Singh*, 2007, p. 420). This was tantamount to preying on one's vulnerabilities and should have amounted to an abuse of process. Those who suffer from mental health are at a much higher risk of falsely confessing (*R v Hart*, 2014, p. 586). Substance use disorder is a valid mental health concern.

False Confession

A confession is considered to be very powerful evidence of guilt (*R v Ledesma*, 2020, p. 10). Given all of the contributing factors of a Mr. Big operation, the suspect is given little choice but to confess (*R v Hart*, 2014, p. 611). Of all wrongful convictions, 16 percent are attributed to false confessions (Larmour, Bergström, Christopher, Gillen, & Forth, 2014, p. 94). A trier of fact is more susceptible to believing a video admission of guilt than an explanation that the circumstances under which the confession was provided were coercive (Schleichkorn, 2013, p. 394).

Of the 75 percent of Mr. Big operations that produce confessions, 95 percent result in a conviction (Holmgren, 2017, p. 155). The “are you tough enough” attitude of Mr. Big operations induces embellishment (*R v Yakimchuk*, 2017, p. 12). The nature of Mr. Big operations teaches suspects that a violent past is a boast-worthy achievement (*R v Hart*, 2014, p. 574). In *R v Beaulac* (1988), the accused testified that to be socially accepted by the fictitious syndicate, his confession was “pure bragging” (Keenan & Brockman, 2010, p. 18). The suspect may be prompted to please Mr. Big by saying what he thinks Mr. Big wants to hear, he may also confess to avoid aggravating the crime boss (Moore, 2019, p. 7; *R v MM*, 2015, p. 2).

Quid pro quo. Suspects are taught that providing a confession is (1) consequence-free, and (2) the ticket into a rewarding organization (*R v Hart*, 2014, p. 574). Suspects are offered a solution that will relieve them of any legal responsibility in exchange for a confession (*R v Wytshyn*, 2002, para. 6; *R v MM*, 2015, p. 21; *R v MM*, 2012, p. 44-46). A suspect, knowing he or she is facing potential apprehension, whether or not they have committed the crime, may accept the *quid pro quo* for fear that they will be found guilty anyhow; the same reason innocent people would settle for a plea bargain. Wytshyn (2002) argued that his confession video should

be inadmissible as he was given motives to lie, (1) to prove himself as worthy to the criminal organization and impress the undercover officers, and (2) the police offered to help frame another individual which would free him of any legal responsibility (*R v Wytshyn*, 2002, para. 6).

Leading questions. A leading question is one that indirectly encourages an interviewee to respond in a certain way regardless of the truth (Schulenberg, 2016, p. 423). In Mr. Big interviews, all denials of guilt are rejected as lies while the importance of trust between members is emphasized (*R v Hart*, 2014, p. 572). A forced-choice question is when the context in which the question is asked assumes that one answer is more correct than another (Holmgren, 2017, p. 285). This is a type of leading question that has the power to influence the confession and its use is discouraged by forensic interviewer, Dr. Holmgren (2017, p. 285). Mr. Big will frequently inform his interviewee that he has insider information of what occurred and for the suspect to prove his trustworthiness, he must produce the same information (*R v Hart*, 2014, p. 571-572). Suggestive questions are defined as questions that imply to the interviewee that there is a correct answer (Holmgren, 2017, p. 274). Dr. Holmgren (2017) advises that these type of questions must be avoided in forensic interviews (p. 274).

Confessing for Financial Reasons

All Mr. Big operations feature financial inducement (*R v Yakimchuk*, 2017, p. 11). Coercion would evidently occur if the suspect is so impoverished that they are obliged to make false self-incriminating statements as a survival mechanism. Moore (2019) describes Mr. Big operations as a “ticket out of poverty” (p. 8). In *R v Ledesma*, the accused sold crack cocaine, but was described as very poor, he was unable to pay for his cell-phone that would frequently run out of minutes, despite being paid \$6350 by officers, he had to borrow money from the primary

undercover officer (*R v Ledesma*, 2020, p. 15-17). In *R v MM*, \$80,000 was placed before of him during his Mr. Big interview (*R v MM*, 2012, p. 34). Allgood was bribed with the possibility of earning \$25,000 if he continued to work for the organization (*R v Allgood*, 2015, p. 15). One may have more financial reasons to confess than to not; such as MM who had two dependents with two separate mothers to support financially (Moore, 2019, p. 9; *R v MM*, 2012, p. 28; *R v MM*, 2015, p. 18). Unger, a proven wrongful conviction, stated that his confessions were lies because the officers glorified murder, so he felt that admitting to murdering someone would increase his chance of being accepted by the gang and receiving large sums of money (*R v Unger*, 1993, p. 11; Puddister and Riddell, 2012, p. 391).

The person may have become reliant on the new income, adapted to the glamorous lifestyle, or adopted some expensive habits. Yakimchuk said he felt that he had been preyed on financially, but this idea was rejected because he both had a job, and trafficked drugs on the side, from which he had profited (*R v Yakimchuk*, 2017, p. 11). In Yakimchuk's case, another member of the organization, was fired, free of violent punishment; yet he did endure economic punishment as he was required to return both his vehicle and house keys to the criminal organization (*R v Yakimchuk*, 2017, p. 3). When testifying about the confession, Yakimchuk stated that he lied to impress the operatives (*R v Yakimchuk*, 2017, p. 7). He knew that this opportunity with these operatives could potentially be extremely lucrative, so he wanted them to think he was intelligent (*R v Yakimchuk*, 2017, p. 7). To demonstrate his intelligence he claimed to have falsely described how he orchestrated, planned, and executed a murder all while successfully covering up his tracks (*R v Yakimchuk*, 2017, p. 7).

The gradual increase of the suspect's wage as the tasks become illegal combined with the overtly glamorous wealthy depictions of the other members of the organization, and the

hundreds of thousands in cash that the suspect is exposed to—and often paid to count—would be an attractive trap to almost anyone (*R v Buckley*, 2018, p. 6; Smith et al., 2010, p. 39; *R v Yakimchuk*, 2017, p. 11; Keenan & Brockman, 2010, p. 20). Hart's case was egregious. One mustn't be intermittently homeless, or the definition of poor to be negatively motivated by money. Individuals who have money can still have inherently greedy traits, namely, wanting more money than they already have. The very fact that this operation lures its suspects by paying them is coercive in and of itself. However, not according to the *R v Hart* framework (*R v Yakimchuk*, 2017, p. 11). Under *R v Hart*, a suspect being unemployed does not suffice to render a confession unreliable (*R v Yakimchuk*, 2017, p. 11; *R v Allgood*, 2015). Allgood, Johnston, MM, Ledesma, and West were all unemployed at the time of the Mr. Big operation (*R v Allgood*, 2015, p. 15; *R v West*, 2015, p. 27 & 31; *Johnston*, 2016, p. 16). In all five of these cases, this fact was not used against the reliability of the confession, nor to deem the suspect vulnerable (*R v Allgood*, 2015, p. 15; *R v West*, 2015, p. 27 & 31; *R v Johnston*, 2016, p. 16 & 18).

The Mr. Big operation strategy is to have the suspect believe that the fictitious criminal organization is capable of solving any financial problems the suspect may have (Schleichkorn, 2013, p. 389). They then have the suspect begin to rely on the extravagant lifestyle and pay rate (Schleichkorn, 2013, p. 389). Once dependent, the loss of his or her valued job is threatened (Schleichkorn, 2013, p. 389). The suspect may keep his or her beneficial job so long as he or she provides a confession (Schleichkorn, 2013, p. 389). This should lead anyone to question the authenticity of a confession provided under this context.

Job interview. The filmed conversation between the suspect and Mr. Big has been described as a job interview (*R v Hart*, 2014, p. 545; Keenan & Brockman, 2010, p. 20). When being interviewed for a job, one is likely to emphasize the traits that would qualify them for the

position they are applying for. The interviewee is ultimately trying to impress their interviewer. Some may be prone to embellishment, exaggeration, or even blatantly lying about their work experience in order to ensure they are granted the position. In fact, studies find that 85 percent of people lie on their resumes (O'Donnell, 2017, para. 1). Canada, being a capitalistic, competitive society, most individuals are lucratively motivated to improve their quality of life. Even if an individual is currently employed, they may be unhappy with their current employment. If employment with undercover officers portrays promising opportunities for advancement, early retirement options, and overall extremely attractive working conditions, the suspect may be willing to say whatever it takes to secure this promotion (*R v Buckley*, 2018, p. 6). Note that the officers, unlike a normal job, have been intentionally, psychologically luring this specific individual (Keenan & Brockman, 2010, p. 19).

Wrongly Charged

Bates' story illustrates how easily an aspiring gangster can be duped into making false incriminating statements to impress what he thinks are members of a high ranking criminal organization, and to easily secure excessive amounts of money. Although Bates was culpable of other crimes and was by no means an innocent individual, his story is an example of how exceptionally expensive Mr. Big operations may, more frequently than known, be launched on the wrong perpetrator. Bates was fortunate to have Gittens, the trigger puller, come forward (Bates, 2018, p. 156). However, this leads anyone to wonder how many other Mr. Big interviewees have made false confessions and were not as lucky as Bates. The lack of reported cases of Mr. Big related wrongful convictions has been deemed extremely concerning by Supreme Court of Canada Judge Moldaver; however, Bates' case is one of few Mr. Big operations that resulted in a known false confession where the accused was initially wrongly

charged (*R v Hart*, 2014, p. 572-573; Holmgren, 2017, p. 156). Bates' case has been used in the defense of other cases such as *R v Worme*, to emphasize how Mr. Big interviewees are susceptible to exaggeration and boastful false confessions (*R v Worme*, 2016, p. 3 & 6).

Miscarriage of Justice

The Merriam-Webster (2020) dictionary defines a miscarriage of justice as an unjust outcome of a judicial hearing, particularly, an error that leads to either a guilty person being free or an innocent person being punished. The purpose of Mr. Big operations is to produce a confession. At times, the confession may be the only evidence. Though it is analyzed, if improperly interpreted, a false confession can autonomously wrongly or wrongfully convict an individual. When Mr. Big cases are tried, to explain why a suspect has confessed falsely, the accused is required to testify (*R v Hart*, 2014, p. 577). This is problematic because the trier of fact is initially presented with a dishonest depiction of the accused, an individual undeserving of being trusted (*R v Hart*, 2014, p. 577).

Wrongly Convicting

R v MM (2015) is an example of how the false confessions elicited from Mr. Big operations risk, not only wrongfully convicting, but wrongly convicting an individual. MM did participate in the murder of "Dave," he is not innocent. Yet, he had no motive, and had never met the deceased. Research finds that more frequently than not, victims know their murderer; one is less likely to be killed by a stranger (Cao, Hou, & Huang, 2007, p. 9).

There was substantially more situational evidence pointing towards "Carl." Yet, MM's Mr. Big confession alone persuaded both judges. Police had received information from several informants that "Carl" had pulled the trigger. The deceased, "Dave," had stabbed "Carl" the previous year. MM accompanied "Carl" to what he believed was to physically assault "Dave."

“Carl,” who had a very apparent motive to kill “Dave,” had fled to Venezuela from where he could not be extradited (*R v MM*, 2015, p. 23). MM had made several comments to undercover investigators about disposing of evidence (*R v MM*, 2015, p. 23). It is evident that MM had not pulled the trigger but had helped dispose of the weapon. A more accurate charge under the Canadian Criminal Code would have been Section 463, accessory after the fact. When applying the *R v Hart* rules to MM’s case, the active comparison between MM and Hart’s personal circumstance backfired. MM was failed by the manner in which this court applied the *R v Hart* rules to his appeal.

Wrongful Conviction

Supreme Court Justice Micheal Moldaver stated that the prejudicial effects that Mr. Big operations create in conjunction with the unreliability of a confession is a considerable concern (Holmgren, 2017, p. 156). Placing unreliable and prejudicial evidence before a jury is an invitation for a wrongful conviction (Holmgren, 2017, p. 156; *R v Hart*, 2014, p. 577). Judge Moldaver stated in his decision in *R v Hart*, that he finds the lack of proven miscarriages of justice linked to Mr. Big cases unsettling (*R v Hart*, 2014, p. 577). The law should take all possible precautions to prevent wrongful convictions as oppose to addressing them after they have already occurred (Kassin et al., 2010, p. 49; *R v Hart*, 2014, p. 577). Given the degree to which police-induced confessions have be chastised and the prevalence of confession-based wrongful convictions, the Mr. Big technique poses an immense risk of injustice (Larmour et al., 2014, p. 94). In 2009, Canadian officials stated that Unger’s 1992 conviction had been a miscarriage of justice (Puddister and Riddell, 2012, p. 391). However, the use of the Mr. Big tactic and the false confession was publicly suppressed and the error was alluded to the obsolete and flawed DNA evidence of the time (Puddister and Riddell, 2012, p. 391).

R v Unger (1993) - Mr. Big exoneration. In 1990, the body of 16-year-old Brigitte Grenier was found in a wooded area near a rock music festival (*R v Unger*, 1993, p. 2). She had been viciously sexually assaulted, sticks had been forced inside of her, she had been strangled, and suffered from multiple blows to the head (*R v Unger*, 1993, p. 3-4). Timothy Houlahan, age 17, was seen kissing and dancing with Grenier earlier in the evening (*R v Unger*, 1993, p. 2). Kyle Unger, age 19, knew Grenier and had made comments to others about wanting to sleep with her (*R v Unger*, 1993, p. 2). All three had attended the concert separately (*R v Unger*, 1993, p. 2).

Houlahan who was scratched up and covered in mud informed police that he had had consensual intercourse with Grenier; but later in the evening, was approached by a man, fitting the description of Unger, who attacked him and left him unconscious for some hours (*R v Unger*, 1993, p. 60). Unger had no dirt on his clothes, nor scratches, nor bruises (Innocence Canada, 2020, para. 4). Forensic scientists stated that hair fragments found on the deceased body matched both Unger and Houlahan (*R v Unger*, 1993, p. 5). Note that the DNA evidence used to draw these conclusions was outdated and this was later scientifically proven to be wrong (Innocence Canada, 2020, para. 22).

In 1991, the RCMP launched a Mr. Big operation on Unger (Innocence Canada, 2020, para. 14; *R v Unger*, 1993, p. 6). He met Officer 1 who offered him promising Mafia-like opportunities and spoke highly of Officer 2, Mr. Big (*R v Unger*, 1993, p. 9). Unger was described as nervous and eager to make a good first impression on Mr. Big (*R v Unger*, 1993, p. 9). When introduced to Unger, Mr. Big stated: “[Officer 1] tells me you whacked somebody. That’s fine with me. That’s fuckin’ excellent. It’s the kind of thing that, uh, know that I’m dealing with somebody that’s on my fuckin’ ...somebody that I can trust... that’s the kind of person I’m looking for [*sic*]” (*R v Unger*, 1993, p. 9). Unger then enthusiastically confessed to

the murder and was then brought to the scene of the crime where he contradicted himself (*R v Unger*, 1993, p. 9). In court, Unger argued that police encouraged him to confess to the murder regardless of whether it was true or false (*R v Unger*, 1993, p. 21).

RCMP interviewed more than twenty inmates in hopes of finding a jailhouse informant to testify that Unger had confessed to them (Innocence Canada, 2020, p. 12). For which they were successful, Jeffrey Cohen agreed (*R v Unger*, 1993, p. 7) Cohen was likely given an incentive to testify against Unger; Cohen later testified that he had originally lied (Innocence Canada, 2020, para. 13 & 27).

Unger and Houlahan were both charged and convicted with first degree murder (*R v Unger*, 1993, p. 6). Houlahan, was tried as an adult (*R v Unger*, 1993, p. 6) When appealing their convictions, Unger's request was denied and Houlahan was ordered a new trial (*R v Unger*, 2020, p. 72; Innocence Canada, 2020, para. 20). When released on bail, Houlahan committed suicide (Sherrer, n.d, p.1; Innocence Canada. 2020, para. 20). Houlahan was cleared in 1994 (Sherrer, n.d., p.1). In 2004, new scientific breakthroughs were discovered demonstrating the inaccuracy of prior forensics used to link hair to suspects (Innocence Canada, 2020, para. 21). Innocence Canada then filed a review of Unger's conviction and a new trial was ordered (Innocence Canada, 2020, para. 24). In 2005, Unger was granted bail (Innocence Canada, 2020, para. 25). He was later officially exonerated in 2009 (Innocence Canada, 2020, para. 25). Unger lost 14 years of his life.

He was wrongfully convicted because of police use of jailhouse informants, tunnel vision, bad science, and a false confession obtained through a Mr. Big operation (Innocence Canada, 2020, para. 25-38). Unger has since filed a \$14.5 million wrongful conviction lawsuit against the RCMP officers (Grabish, 2019, para. 1).

Post-*R v Hart* Exoneration – Wade Skiffington. On January 23, 2019 Wade Skiffington was found wrongfully convicted of the 1994 murder of his fiancée (*R v Skiffington*, 2019, p. 3). Skiffington was subjected to a Mr. Big operation in 1999, by which he was later charged of second degree murder and given a life sentence (*R v Skiffington*, 2019, p. 3). After the *R v Hart* decision, Skiffington's case was reopened, scrutinized with the *R v Hart* conditions, and he was exonerated (*R v Skiffington*, 2019, p. 4 & 12). Skiffington wrongfully spent more than 17 years of his life in prison (Innocence Canada, 2019, para. 5). Experts on wrongful conviction from Innocence Canada (2019) state that this was a "classic" case of police tunnel-vision, as there was no investigation into alternative suspects (para. 9).

PART THREE – Conclusion and Discussion

As opposed to thoroughly following the instructions outlined in *R v Hart* and analyzing cases at face value, cases are frequently compared to the severity of Hart's personal circumstance which, by contrast, leads courts to condone the Mr. Big operation. Every case must be analyzed based on its own facts (*R v Yakimchuk*, 2017, p. 9). Despite that the specific conditions of a case may not have been as severe as Hart's, the possibility that one embellished or exaggerated their confession in an attempt to make a good impression on people who appear to have powerful resources and who commend violent behavior, cannot be ruled out beyond a reasonable doubt. Anyone presented with a motivation (fiscal, fearful, or simply ego), not only an individual who is categorized as excessively vulnerable, is also at risk of being manipulated into making a false confession at the hand of highly skilled police officers conducting a Mr. Big operation.

The cost of Mr. Big operations continues to outweigh its benefits. Although the *R v Hart* decision thoroughly addressed multiple concerns and has filtered out several unreliable confessions, it does not exhaustively solve every grievance associated with the Canadian

technique. Some of this can be alluded to the many grievances that do not concern the court, but the police agencies conducting the operations. Police should be monitored, to a greater extent, by police oversight bodies.

Undercover police instructing a suspect to consume alcohol, then further questioning the individual once they are intoxicated is very concerning and leads one to question the reliability of a confession elicited from an inebriated person. More legal protections need to be placed on the use of alcohol as a tool for police to extract information.

An asset of Mr. Big operations is that they can address cold cases. However, after the police has exerted an excess of police resources over a course of several months and hired dozens of officers to elicit a confession out of one potential suspect for that confession to later be deemed inadmissible in court, the Mr. Big operation has now created a cold case. The offender is either still at large, or the police abuse of process in the Mr. Big operation has freed the guilty. The *R v Hart* decision did not address tunnel vision as it does not impose standards that the police are required to meet prior to launching a Mr. Big operation. All known persons present at the scene of the crime and potential suspects should be thoroughly eliminated prior to launching a Mr. Big operation.

Greater stringency should be placed on the admissibility of a confession. At trial, all undercover officer violence should be evaluated as a potential abuse of process, including exposing a suspect to violence towards persons outside of the criminal organization. Financial inducements must be scrutinized to a greater extent. The reduction of direct violence which led to the enhancement of economic prestige in the operation has likely decreased the degree to which one is confessing out of fear; yet the need to confess to make a good impression or as a form of following an employer's orders remains prevalent. Anyone's integrity should be

questioned when enticed with financial incentives by individuals encouraging an admission of guilt.

The lack of public access to recordings of the operation makes research in this area highly dependent on written cases. Some cases compose a comprehensive, detailed application of the *R v Hart* rules, such as the *R v Yakimchuk* (2017) and the *R v Ledesma* (2020) case. Others simply mention whether the prongs passed or failed such as the *R v RK* (2016) youth case (*R v RK*, 2016, p. 10-11).

This research does not conclude that Ledesma and Yakimchuk falsely confessed, it merely states that this very uncertainty as to whether or not they did, even after being analyzed through the *R v Hart* framework, is problematic. Each defense makes strong, realistic arguments that could occur to any other person in the same position. Though the courts did subjectively weight the probative value against its prejudicial effects, as well as any abuse of process. There continues to be a risk, which is unacceptable.

Most of the research was relatively case-based and did not consist of interactions with the public, but was rather an assembling of case information. The research conducted on Mr. Big is primarily contextual and explains the characteristics, and controversial aspects of Mr. Big operations by relating it to prior cases. It is almost completely qualitative with the exception of one quantitative survey.

The frequency of plea bargains used in Mr. Big cases should be further investigated. Lastly, the topic of Mr. Big requires more primary research. Canadian opinions that are representative of the population, personal accounts of RCMP and police officers' views, and a fulsome perspective of individual suspects targeted by Mr. Big operations should be studied.

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