2019

# Mr.Big: The Undercover Breach of the Right against Self-Incrimination

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# Chapter 2

# Mr. Big: The Undercover Breach of the Right Against Self-Incrimination

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## I. Introduction

At common law, the privilege against self-incrimination protects the accused solely against compelled testimony in formal proceedings. Under the *Canadian Charter of Rights and Freedoms*,[1] the privilege received constitutional protection[2] and a pre-trial right against self-incrimination was subsequently created. The Supreme Court of Canada (SCC) stated in the early 1990s that the principle against self-incrimination is a principle of fundamental justice under s. 7,[3] "perhaps the single, most important organizing principle of criminal justice".[4] This allowed for the protection of the accused against compelled confessions outside of the narrow context of formal proceedings.

Despite the significant developments of the protection against self-incrimination, limitations to its application remain.[5] The present chapter will address one of these limits: the exclusion of individuals subjected to Mr.

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1 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

2 *Ibid.*, ss. 11(c), 13.

3 *Ibid.*, s. 7.

4 *R. v. P. (M.B.)*, [1994] 1 S.C.R. 555 (S.C.C.) at para. 37 [*P(MB)*].

5 For commentary on the limits of the rights against self-incrimination see Lisa Dufraimont, "The Interrogation Trilogy and the Protections for Interrogated Suspects in Canadian Law" (2011), 54 SCLR (2d) 309; Lisa Dufraimont, "The Patchwork Principle against Self-Incrimination under the Charter" (2012), 57 SCLR (2d) 241 [Dufraimont, "The

Big undercover operations from the protection of the right against self-incrimination under s. 7, on the basis that its application is limited to confessions obtained while the individual was in state detention.[6] In order to assess whether a legal protection should apply to a certain situation, one ought to look at the rationales for which the protection exists and how that pairs with the situations at issue.[7] I will argue that, despite the suspect not being in physical state detention, the very basis on which Mr. Big operations function violates all rationales behind the right against self-incrimination.

In fact, as others have argued earlier on, Mr. Big has been consciously designed "to violate the spirit of so many rules without ever quite violating the letter of them".[8] Thus, despite efforts in the latter years to create a new evidentiary rule in *Hart*[9] and *Mack*[10] to regulate these operations, the very design of the operations is based on violating *Charter* values, while evading any stated procedural rules that may uphold them. Refusal to subject confessions obtained through such tactics to constitutional scrutiny, on the basis that this operation does not fall under the literal proscription for the current framework for s. 7, means that the state continues to be allowed to use its resources to coerce and manipulate the individual into contributing to his or her own prosecution. This significantly undermines core values of our justice system.

In Part II of this chapter I will provide an overview of the development, scope and rationale of the right against self-incrimination. This right, stemming from the common-law privilege against self-incrimination, is foundational to the coherence of the adversarial justice system. I will also address the importance the protection has in ensuring the reliability of evidence, preventing abuse of process, and upholding normative concepts related to free will, autonomy and dignity. While the latter rationales are controversial, they are essential to the understanding of choice and coercion, which have jurisprudentially been deemed to be the heart of the right against self-incrimination.

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Patchwork Principle"]; Hamish Stewart, "The Grant Trilogy and the Right Against Self-Incrimination" (2009), 66 CR (6th) 97 [Stewart, "The Grant Trilogy"]; Paul Calarco, "R v Nedelcu: Whatever Happened to a Large and Liberal Interpretation of the Charter?" (2012), 96 CR 438; Dale E Ives & Christopher Sherrin, "*R v Singh* — A Meaningless Right to Silence with Dangerous Consequences" (2007), 51 CR (6th) 250.

6 For detention as a requirement for the application of the pre-trial right against self-incrimination see *R. v. Hebert*, [1990] 2 S.C.R. 151 (S.C.C.) at 131 [*Hebert*].

7 James Sprague, "Good Cop/Bad Cop: Charter Rights Against Self-Incrimination and Unreasonable Search and Seizure in the Context of Investigations in Support of a Regulatory Scheme" (2003), 16 Can J Admin L & Prac 161; See also *Hebert*, *ibid.* at para. 118.

8 Steve Coughlan, "Threading Together Abuse of Process and Exclusion of Evidence: How it Became Possible to Rebuke Mr. Big" (2017), 71 SCLR (2d) 415 at 416; See also *R. v. Hart*, 2012 NLCA 61 (N.L. C.A.) at para. 154, affirmed 2014 CarswellNfld 215, 2014 CarswellNfld 216 (S.C.C.) [*Hart* NLCA].

9 *Hart* NLCA, *ibid.*

10 *R. v. Mack*, 2014 SCC 58 (S.C.C.) [*Mack*].

In Part III I will first provide an overview of how Mr. Big operations function, as well as of the current legal framework and point out some of this framework's shortcomings. Second, I will discuss how each rationale mentioned in Part II is violated by Mr. Big operations. By using post-*Hart* examples, I argue that, despite its new regulation, the right against self-incrimination continues to be breached by this technique.

I conclude by arguing that the *Hart* framework did not satisfactorily protect *Charter* values and failed to consider many concerns that are at the forefront of the protection against self-incrimination. I maintain that it is unlikely that any regulatory framework could efficiently bring this sting, created to circumvent rules, within the legal realm. The technique impacts so many core principles of our legal system, that despite any of its perceived benefits, it may be better for it to be outlawed.

## II. Development, Scope and Rationales of the Protection against Self-Incrimination

The privilege against self-incrimination developed at common law in the second half of the 18th century, as an essential component of the adversarial criminal trial system,[11] according to which the accused cannot be compelled to assist in her own prosecution. At common law, the privilege extended solely to the prohibition against compelling the accused to speak in formal proceedings. While this privilege received statutory protection under the *Evidence Act*,[12] it remained restricted to protecting the accused against having to testify in formal settings.

Under the *Charter of Rights and Freedoms*, the privilege was constitutionalized under s. 11 (c): "any person charged with an offence has the right not to be a witness in proceedings against that person in respect of the offence".[13] Section 13 guarantees that a witness testifying in a proceeding has the right not to have incriminating evidence given in that proceeding used against him in another proceeding (use immunity).[14] These two specific provisions added little to the existing common-law protection, as their application is limited to compelled testimonial self-incrimination in court. The privilege, under these provisions, like at common law, applies to the accused *qua witness* and not *qua accused*.[15] That is to say, it does not protect the accused against being forced to speak during investigations, prior to formal proceedings.

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11 John H. Langbein, "The Historical Origins of the Right against Self-Incrimination at Common Law" (1994), 92:5 Mich L Rev 1047 at 1047, 1066, 1084.

12 *Canada Evidence Act*, R.S.C. 1985, c. C-5, s. 5.

13 *Charter*, *supra* note 1, s. 11(c).

14 *Ibid.*, s. 13.

15 David M. Paciocco, "Self-Incrimination and the Case to Meet: The Legacy of Chief Justice Lamer" (2000), 5 Can Crim L Rev 63 at 66 [Paciocco, "Case to Meet"].

In the decade following the entrenchment of the *Charter*, the Supreme Court of Canada, working with the privilege, applied a purposive interpretation of the *Charter* that allowed for the gradual development of the law of self-incrimination beyond the narrow confines of formal testimony.[16] As Paciocco describes, Justice Lamer weeded out the concepts of choice and case to meet[17] (meaning that it is on the prosecution to build a case that disproves the accused's innocence) behind the privilege. This led to an understanding that police actions before formal proceedings can frustrate the ability to exercise real choice, by allowing police to obtain indirectly before trial, that which the *Charter* prohibits the Crown from obtaining directly at trial.[18] Building the theory of choice into the law of self-incrimination allowed the court to establish the principle against self-incrimination as a principle of fundamental justice under s. 7,[19] extending the protection against self-incrimination outside the formal settings, with the right to silence as its central manifestation.[20]

Placed in its systemic context, the law of self-incrimination has developed organically. The expansion of this protection has often been correlated with the adversarial nature of criminal trials and the concomitant development of other rules of evidence grounded in the law of self-incrimination:[21] the presumption of innocence, the burden of proof, the case to meet,[22] as well as subsequent rules such as the duty of the Crown to disclose its case,[23] the lack of a concomitant obligation of the defence to disclose,[24] prohibition on the Crown to reopen its case once it closed it,[25] etc. Furthermore, under s. 7, the principle against self-incrimination has led to the creation of rules that expand the law against self-conscription.[26] For instance, the use immunity covered by s. 13 has been extended under s. 7 to physical evidence obtained as a result of compelled testimony.[27] Furthermore, s. 7 has been deemed to protect against individuals being legislatively compelled,[28] and to protect witnesses from testifying where the main

16 For a full account of the development of the law of self-incrimination under Chief Justice Lamer, see *ibid*.

17 Paciocco, "Case to Meet", *supra* note 15 at 67.

18 *Ibid*. at 75.

19 *Ibid*. at 66; *Hebert*, *supra* note 6; See also Fariborz Davoudi, "The Privilege Against Self-Incrimination (V)" (2017), RegQuest 10-06-02 [Davoudi, "(V)"].

20 Dufraimont, "The Patchwork Principle", *supra* note 5 at 247; *R. v. S. (R.J.)*, [1995] 1 S.C.R. 451 (S.C.C.) at para. 93 [*S(RJ)*]; Paciocco, "Case to Meet", *supra* note 15 at 68.

21 Dufraimont, "The Patchwork Principle", *supra* note 5 at 245-250.

22 *Ibid*. at 250; Don Stuart, "Chief Justice Antonio Lamer: An Extraordinary Judicial Record of Reform of the Canadian Criminal Justice System" 5 Can Crim L Rev 51 at 53.

23 *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 (S.C.C.) at 333 [*Stinchcombe*].

24 *Ibid*.

25 *P(MB)*, *supra* note 4 at para. 42.

26 For a description see Dufraimont, "The Patchwork Principle", *supra* note 5 at 247.

27 *British Columbia (Securities Commission) v. Branch*, [1995] 2 S.C.R. 3 (S.C.C.) at para. 5 [*Branch*].

28 *R. v. White*, [1999] 2 S.C.R. 417 (S.C.C.) at paras. 44-45 [*White*].

purpose of the compelled testimony is to obtain evidence against that witness.[29] Thus, the principle against self-incrimination, descending from the much narrower privilege against self-incrimination, has evolved in the Canadian jurisprudence as an overarching umbrella tying together discreet rules of evidence.[30]

In the context of this system of procedural rules, the right against self-incrimination recognizes the accused's right to choose,[31] which is key in upholding the adversarial principles of the criminal trial. The adversarial system presupposes that there are two autonomous entities opposing each other.[32] That means that the individual's interests will not always coincide with those of the State, and she can choose to protect her own interests. Fair treatment requires that the State be restrained from coercing the individual to provide evidence against themselves in order to build the State's case.[33] Compelling an individual to provide information would mean taking control away.[34] In the same vein, removing choice means that the defence is denied an opportunity to test the case of the prosecution, which is one of the purposes of the trial.[35] As Paciocco argues, the principle against self-incrimination "is an indispensable corollary of the principle of a case to meet which helps to define the accusatorial system which, in turn, exists in order to vindicate the rule of law".[36]

The above systemic[37] explanations of the existence of the right against self-incrimination are intertwined with pragmatic and normative rationales for the existence of the right. It is settled that the Canadian law of self-incrimination, like other common-law jurisdictions, is built around the idea of choice and the absence of coercion (defined as "free and informed consent"[38]) in the suspect's decision to engage with authorities[39] Choice

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29 *Branch*, *supra* note 27 at para. 7.

30 Dufraimont, "The Patchwork Principle", *supra* note 5 at 246; Paciocco, "Case to Meet", *supra* note 15 at 64.

31 *Hebert*, *supra* note 6 at para. 137; *R. v. Broyles*, [1991] 3 S.C.R. 595 (S.C.C.) at para. 23 [*Broyles*]; *White*, *supra* note 28 at para. 55; *S(RJ)*, *supra* note 20 at para. 238.

32 Davoudi, "(V)", *supra* note 19.

33 Michael Plaxton, "Seizing What's Bred in the Bone: The Unconstitutionality of Canada's DNA Warrant Provisions" (2000-2001), 12 Nat'l J Const L 227 at 237.

34 Davoudi, "(V)", *supra* note 19.

35 See generally Paciocco, "Case to Meet", *supra* note 15.

36 David Paciocco, "Self-Incrimination: Removing the Coffin Nails" (1990), 35 McGill LJ 73 at 103 [Paciocco, "Self-Incrimination"]. On the relationship between the privilege against self-incrimination and the adversarial system see Langbein, *supra* note 11.

37 The terminology of "systemic" versus "individual" rationales is borrowed from Davoudi, "(V)", *supra* note 19, who uses systemic to refer to rationales that uphold the coherence of the procedural system, and individual to refer to rationales independent from procedure (such as pragmatic and normative rationales).

38 *R. v. Jones*, [1994] 2 S.C.R. 229 (S.C.C.) at para. 31, Lamer CJC dissenting [*Jones*], cited with approval by the majority in *R. v. B. (S.A.)*, 2003 SCC 60 (S.C.C.) at para. 59 [*B(SA)*] and *R. v. Brown*, 2002 SCC 32 (S.C.C.) at para. 92.

39 *Hebert*, *supra* note 6 at paras. 103-104; *Jones*, *ibid.* at para. 42; *R. v. Noble*, [1997] 1 S.C.R. 874 (S.C.C.) at paras. 73-74; *White*, *supra* note 28; *R. v. Dubois*, [1985] 2 S.C.R. 350 (S.C.C.)

guides the protection against self-incrimination for reasons that go beyond simply upholding the procedural structure of the adversarial trial and providing coherence within the system of evidentiary rules. Most scholars agree that the requirements of choice and absence of coercion confirm three individual pillars of the law of self-incrimination: reliability of evidence; prevention of abuse of process; and upholding individual autonomy, sovereignty, dignity, and privacy interests.[40]

Reliability, the concern that compelled confessions can be false and lead to wrongful convictions, is widely recognized as a rationale for protection under s. 7.[41] Abuse of process is also accepted as a basis of the right against self-incrimination. This rationale is built on the idea that there is an inherent imbalance of resources between the State and the accused. To maintain the fairness of the adversarial process and to protect the justice system, the State is not allowed to use its resources to intimidate or trick the accused into contributing to his own prosecution.[42] Under this rationale, the privilege against self-incrimination is about counterbalancing the State's overwhelming position of power in relation to the individual.[43]

Some believe that these two are the only relevant rationales that should be considered when assessing the extent of the right against self-incrimination, because they protect against abusive police tactics and wrongful convictions without interfering too much with the state's interest in protecting the community.[44] Nonetheless, as the law currently stands, reliable evidence which was obtained in violation of s. 7, even when the persuasion appears to be mild (falling short of abuse of process) is still generally excluded.[45] In other words, reliability and abuse of process cannot by themselves justify the existing law.[46] This may be because the concepts of

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at para. 6; *P(MB)*, *supra* note 4; *S(RJ)*, *supra* note 20 at para. 227. See also Dufraimont, "The Patchwork Principle", *supra* note 5 at 252; Hamish Stewart, "The Confession Rule and the Charter" (2009), 54 McGill LJ 517 at 521 [Stewart, "The Confessions Rule"].

40 Dufraimont, "The Patchwork Principle", *supra* note 5 at 250; Davioudi, "(V)", *supra* note 19; David M. Paciocco & Lee Stuesser, *The Law of Evidence,* 7th ed. (Toronto: Irwin Law Inc, 2015) at 306; Steven Penney, "Compelled Communications, the Admissibility of Defendants' Previous Testimony, and Inferences from Defendants' Silence" (2004), 48 CLQ 474 at 492 [Penney, "Compelled Communications"].

41 See e.g. *White*, *supra* note 28 at para. 43; Paciocco, "Self-Incrimination", *supra* note 36 at 86-87; Steven Penney, "The Continuing Evolution of the s. 7 Self-Incrimination Principle: R v White" (1999), 24 CR 247.

42 Paciocco, "Case to Meet", *supra* note 15 at 67.

43 Stuart, *supra* note 22 at 52; Benissa Yau, "Making the Right to Silence a Meaningful One" (2006), 38 CR 226 at 228.

44 See e.g. Steven Penney, "What's Wrong with Self-Incrimination: The Wayward Path of Self-Incrimination Law in the Post-Charter Era - Part I: Justifications for Rules Preventing Self-Incrimination" (2003), 48 Crim LQ 249 at 249 [Penney, "The Wayward Path"].

45 Imagine the following scenario: an undercover officer is planted in the same cell as a suspect, and he simply asks, "what are you here for?" The suspect, prompted by the question, gives a detailed account of what he has done, and his account leads to the finding of corroborative evidence which confirms the reliability of his confession. Applying *Hebert*, *supra* note 6 at para. 181, s. 7 is triggered and the confession is excluded.

choice and freedom from coercion are built on a normative understanding that the State has an obligation to preserve human dignity and autonomy.[47]

Paciocco and Stuesser have argued that privacy and inherent dignity are as important to the law of self-incrimination as reliability and abuse of process,[48] and that "there is something reprehensible about seizing information stored in the memory of the accused".[49] Compulsion to make statements is an invasion of privacy with legal, psychological, social, and political consequences, an assault on personhood that impacts freedom and dignity.[50] Conscription strips people of selfhood and the dignity that flows from being an independent, moral agent.[51] Stewart maintains that human dignity is a normative benchmark for *Charter* rights, which at the minimum means that an individual should be treated as an end and not as a means to an end.[52] Compelling testimony is a way of treating someone as a means to obtaining a confession, frustrating the presumption of innocence[53] and removing the burden of the Crown from building a case against the accused who only then needs to respond.[54] Thus, normative concerns flowing from choice as the core of the protection against self-incrimination also contribute to ensuring the systemic coherence of the rules of evidence and procedure.

Normative interpretations are essential for the understanding of the right against self-incrimination, as long as choice remains a key concept at the heart of this right.[55] Canadian courts have confirmed in their rulings that the protection against self-incrimination, with its two facets (the privilege against self-incrimination in formal proceedings, and the pre-trial right against self-incrimination under s. 7) operates around the notion of choice and absence of coercion, building on procedural, pragmatic, and normative rationales. In *Hebert*, where the SCC embraced the principle against self-incrimination as a principle of fundamental justice and affirmed the accused's pre-trial right to silence when questioned by authorities, the Court

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46 Paciocco, "Case to Meet", *supra* note 15 at 69; Paciocco, "Self-Incrimination", *supra* note 36 at 84-85; Penney, "The Wayward Path", *supra* note 44 at 256-257; Penney, "Compelled Communications", *supra* note 40 at 250.

47 See especially Stewart, "The Grant Trilogy", *supra* note 5 at 99; see also Plaxton, *supra* note 33 at 238; Paciocco, "Self-Incrimination", *supra* note 36 at 88-89.

48 Paciocco & Streusser, *supra* note 40 at 306.

49 Paciocco, "Self-Incrimination", *supra* note 36 at 88.

50 Fariborz Davoudi, "The Privilege Against Self-Incrimination (VI)" (2017), RegQuest 10-07-01 [Davoudi, "(VI)"], citing *Brown v. Walker*, 161 U.S. 591 (1896).

51 Plaxton, *supra* note 33 at 238.

52 Stewart, "The Confessions Rule", *supra* note 39 at 519.

53 Hamish Stewart, "The Privilege Against Self-Incrimination: Reconsidering Redmayne's Rethinking" (2016), 20:2 Intl J Evidence & Proof 95 at 98-99 [Stewart, "The Privilege"].

54 Paciocco, "Self-Incrimination", *supra* note 36 at 89.

55 Even scholars who disagree with maintaining choice as the basis of the right against self-incrimination agree that choice cannot be dissociated from free will and autonomy. See Penney, "The Wayward Path", *supra* note 44.

emphasized the importance of choice, saying: "if the suspect chooses not to [make a statement], the state is not entitled to use its superior power to override the suspect's will; and negate his or her own choice,"[56] because:

> [t]o permit the authorities to trick the suspect into making a confession to them after he or she has exercised the right of conferring with counsel and declined to make a statement is to permit the authorities to do indirectly what the Charter does not permit them to do directly. This cannot be in accordance with the purpose of the Charter.[57]

Thus, statements extracted from the suspect during interrogation through methods that are oppressive are prohibited. Equally, information elicited from the accused by a police informant or an undercover officer while the accused is in police detention is a violation of s. 7.[58]

Nonetheless, the Court imposed some limitations on the application of the right to silence. Notably, the statement made to the undercover officer or the informant must have been "elicited"[59] (that is, there must be a causal link between the agent and the incriminating statement).[60] If the agent were to simply observe the accused and the accused spontaneously confessed, or if the accused voluntarily made statements to cellmates, s. 7 would not be infringed.[61] The Court also excluded "an undercover operation prior to detention"[62] from the application of the right. Curiously, in attempting to justify this exclusion, the Court sought to explain it through recourse to coercion, by alleging that an individual is significantly more vulnerable to persuasion when in detention: "[t]he individual from whom the information is sought is not under the control of the state. There is no need to protect him from the greater power of the state".[63]

The limits discussed in *Hebert*, as well as those introduced in subsequent cases that have directly or indirectly contributed to shrinking the right,[64] have been criticized for creating an incoherent regime that does not square well with the concept of freedom of choice.[65] For instance, while

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56 *Hebert*, *supra* note 6 at para. 122.
57 *Ibid.* at para. 123.
58 *Ibid.* at para. 132.
59 *Ibid.* at para. 129.
60 *Broyles*, *supra* note 31 at para. 37.
61 *Hebert*, *supra* note 6 at para. 133.
62 *Ibid.* at para. 131.
63 *Ibid.*
64 *R. v. B. (S.A.)*, *supra* note 38 (section 7 does not apply to DNA evidence); *R. v. Grant*, 2009 SCC 32 (S.C.C.) (removes the assumption that conscripted evidence renders the trial unfair); *R. v. Singh*, 2007 SCC 48 (S.C.C.) (the Court decided that while the accused has a right to silence during the interrogation, this right does not mean that the police have to stop asking him questions over a prolonged period of time); *R. v. Sinclair*, 2010 SCC 35 (S.C.C.) at para. 116; *R. v. Spencer*, 2007 SCC 11 (S.C.C.) (the latter three all apply a restrictive interpretation on what tactics supress voluntariness).
65 See Dufraimont, "The Patchwork Principle", *supra* note 5; Michael A. Johnston, "Why Did the Fat Lady Singh? A Case Comment on R v Grant" (2010), 56 CLQ 437 [Johnston, "Fat Lady Singh"]; Stewart, "The Privilege", *supra* note 53; Tim Quigley, "Principled

the individual is vulnerable in police detention and under interrogation, there are additional contexts where the individual is at risk. The underpinnings of the right cast doubt on other undercover operations, not just those undertaken when the suspect is in police custody[66] and the line in the sand drawn by the Court seems at odds with the Court's repeated commitment[67] to upholding the freedom of choice of the individual engaging with authorities.

To conclude, the protection against self-incrimination plays a significant procedural and substantive role in our criminal justice system. At its heart, the protection is about ensuring that an individual is not coerced into contributing to his or her own prosecution. Seen through the lenses of coercion, the protection has both systemic and individual implications. On one hand, this protection connects disparate rules of procedure, such as the presumption of innocence, the burden of proof, a case to meet, and ensures a coherent system. Coercion would negate all of them. On the other hand, the protection is concerned with ensuring that the evidence obtained is reliable, that the state cannot use its resources to coerce individuals into cooperating (abuse of process), and that the individual's choice and personal autonomy are respected. In the next section, I take the position that Mr. Big-elicited statements present all these concerns.[68]

## III. Mr. Big Undercover Operations

### *A. Characteristics and Legal Framework*

Mr. Big is different from other undercover investigations. Usually, in the latter, police infiltrate a criminal organization with the purpose of catching the suspect in action. Police do not invent the crime, nor do they lure the suspect into it. The officer is merely joining a criminal enterprise that already existed and gains access to information and earns the suspect's trust because of the officer's efforts to fit into the criminal world. The purpose of the operations is diverse: it may be to gather evidence against certain people, or to obtain intelligence on different types of crimes, gangs, etc.

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Reform of Criminal Procedure," in Don Stuart et al, *Towards a Clear and Just Criminal Law: A Criminal Reports Forum* (Toronto: Carswell, 1999) at 253; Dale E. Ives & Christopher Sherrin, "R v Singh — A Meaningless Right to Silence with Dangerous Consequences" (2006), 51 CR (6th) 250; Patrick Healy, "The Right to Remain Silent: Value Added, But How Much?" (1990), 77 CR (3d) 190 at 200.

66 Dufraimont, "The Patchwork Principle", *supra* note 5 at para 29.

67 *Broyles*, *supra* note 31 at para. 23; *White*, *supra* note 28 at para. 43; *R. v. S. (R.J.)*, *supra* note 20 at paras. 81, 83.

68 For a similar opinion on this point see Dufraimont, "The Patchwork Principle", *supra* note 5 at 254-262.

In Mr. Big scenarios, the police create a criminal organization from scratch. All people involved in it are undercover officers, or their agents.[69] The operation is generally built around a single suspect and the goal is to get the suspect to confess to a specific crime. The suspect is observed and often wiretapped for long periods of time, during which time the police become familiar with the suspects' habits, friends, hobbies, routines, and most of all, his or her vulnerabilities. It is at this stage that an undercover officer will insert him or herself into the suspect's life by filling a void. The individuals that are subjected to such operations are often alienated, without a job, without friends, and with tense family relationships. The operation works most efficiently if the suspect is predisposed to outside influences due to low IQ, social stigma, a lifetime of racial discrimination, mental illness, poverty, or has other vulnerabilities.[70] The suspect is befriended and initially offered a job (generally this involves driving around, keeping an eye out while the undercover officer undertakes some transactions, or delivering parcels). The undercover officer will confide in the suspect and be by her side as much as possible. Sometimes the suspect will be encouraged to break or alienate family relationships and friends, and to dedicate her life to this new welcoming organization that makes her feel valuable.[71] The suspect's involvement in the organization will also be intensified. The jobs she will be assigned will appear to be increasingly illegal. She will be exposed to manifestations of violence and other practices that are meant to show her that she is associating with hardened criminals.[72] At one point, the suspect meets the boss, Mr. Big, as a reward for the work the individual did, or to interview for a better position within the organization. In all scenarios, Mr. Big wants to be able to trust his people. As a result, the individual's past will come into discussion. Generally, Mr. Big will bring up the crime under investigation and will request the truth about it. He will not take no for an answer, and a range of strategies are employed to convince the suspect to confess. For example, Mr. Big shows that he has access to (forged) incriminating police documents,[73] offers to make the subject's legal problems disappear,[74] or exposes the individual to an oppressive environ-

[69] Timothy E. Moore et al, "Deceit, Betrayal, and the Search for Truth: Legal and Psychological Perspectives on the 'Mr. Big' Strategy" (2009), 55 Crim LQ 348 at 348 [Moore, "Legal and Psychological Perspectives"].

[70] Kouri T. Keenan & Joan Brockman, *Mr. Big: Exposing Undercover Investigations in Canada* (Halifax: Fernwood Publishing, 2010) at 50-51. The authors have determined that from 89 cases, 11 suspects were Indigenous and 29 were from very poor social backgrounds. Others (though numbers were not available) had very poor education or reduced cognitive capacity.

[71] See *Hart* NLCA, *supra* note 8.

[72] See *Dix v. Canada (Attorney General)*, 2002 ABQB 580 (Alta. Q.B.), additional reasons 2002 CarswellAlta 1006 (Alta. Q.B.) [*Dix*]; *R. v. Keene*, 2014 ONSC 7190 (Ont. S.C.J.) [*Keene*].

[73] *R. v. Simmonds*, 2002 BCCA 332 (B.C. C.A.), leave to appeal refused 2003 CarswellBC 396, 2003 CarswellBC 397 (S.C.C.) [*Simmonds*].

ment. In the latter case, the suspect may be led to believe that the organization will not tolerate people that cannot be trusted by being shown fake beatings, killings, kidnappings, or hit and run events,[75] implying that if she does not confess she will have to leave the organization, or she will remain on the side lines of it.[76]

The use of Mr. Big obtained evidence existed in a legal vacuum until 2014. The common-law confessions rule did not apply. Under this rule, a statement made to a person in authority is presumed to be inadmissible unless proven voluntary by the Crown. However, the suspect had to know that s/he was talking to a person in authority.[77] The right to silence under s. 7 did not apply because *Hebert*[78] required the individual to be in state detention for this protection to apply.[79] The statements would not be excluded as hearsay evidence, because they fell neatly within the categorical exceptions to the hearsay rule.[80] The law of entrapment would not apply because the target was never charged with the offences he committed during the operation, but only with the one he confessed to undercover officers to have committed prior to the operation.[81] In the years leading up to the SCC's decision in *Hart*, scholars had been divided on how and which law should be adapted to provide some regulatory basis for this type of operation.[82] However, the fact that, despite the many laws that Mr. Big appeared to be violating it could still circumvent the letter of all of them, was not the product of chance. Rather, it was by design.[83]

Finally, in 2014, the SCC created a new common-law confessions rule[84] to assess the admissibility of statements made by suspects during Mr. Big operations. For the majority, Moldaver J. held that the main concerns raised by the Mr. Big technique are the reliability of the evidence obtained, the prejudice such evidence may bring to the accused, and the risk of police misconduct during the sting.[85] As a result, he proposed a two-prong

74 *R. v. Earhart*, 2011 BCCA 490 (B.C. C.A.) [*Earhart*]; *R. v. Bridges*, 2005 MBQB 142 (Man. Q.B.); *R. v. Bridges*, 2006 MBCA 118 (Man. C.A.) [*Bridges*]; *R. v. Buckley*, 2018 NSSC 1 (N.S. S.C.) [*Buckley*]; *R. v. M. (M.)*, 2015 ABQB 692 (Alta. Q.B.), [*M(M)*].

75 *Dix*, *supra* note 72; *R. v. Terrico*, 2005 BCCA 361 (B.C. C.A.), leave to appeal refused 2006 CarswellBC 143, 2006 CarswellBC 144 (S.C.C.) [*Terrico*]; *R. v. Roberts*, 1997 CarswellBC 772, [1997] B.C.J. No. 765 (B.C. C.A.) [*Roberts*]; *Buckley*, *ibid.*

76 *R. v. Mentuck*, 2001 SCC 76 (S.C.C.); *Mack*, *supra* note 10.

77 *R. v. Oickle*, 2000 SCC 38 (S.C.C.) [*Oickle*].

78 *Hebert*, *supra* note 6.

79 On this see Dufraimont, "The Patchwork Principle", *supra* note 5 at 258-262.

80 To this point see Coughlan, *supra* note 8 at 417.

81 On this see *ibid.* at 418.

82 Dufraimont, "The Patchwork Principle", *supra* note 5; Nikos Harris, "The Less-travelled Exclusionary Path: Sections 7 and 24(1) of the Charter and R v Hart" (2014), 7 CR (7th) 287; David Milward, "Opposing Mr. Big in Principle" (2013), 46:1 UBC L Rev 81; Amar Khoday, "Scrutinizing Mr. Big: Police Trickery, the Confessions Rule and the Need to Regulate Extra-Custodial Undercover Interrogations" (2013), 60 Crim LQ 277.

83 Coughlan, *supra* note 8, at 438.

84 *R. v. Hart*, 2014 SCC 52 (S.C.C.) [*Hart*].

85 *Ibid.* at paras. 68-80.

approach that would address these concerns to fill the "legal vacuum" in which such operations were run. Thus, where the state recruits an individual into a fictitious criminal organization, the statements made by the suspect would be presumptively inadmissible. In order to overcome this presumption, the Crown has to show that the probative value (which flows from its reliability) of the evidence is higher than the prejudice flowing from the bad character evidence embodied by the fact that the individual engaged in a criminal organization.[86] The Court believed that such prejudice can be mitigated by giving limiting instructions to the jury or by excluding parts of the evidence that are not essential to the narrative.[87] The second prong was created to prevent abuse of process. In particular, the Court found that violence or threat of violence, serious inducements, or taking advantage of someone's vulnerabilities such as mental health issues, addictions or youthfulness, are unacceptable forms of coercion that require the exclusion of evidence.[88] Moldaver J. believed that this new common-law rule would be sufficient to uphold *Charter* values and would adequately address concerns that related to the right against self-incrimination.[89]

A full critique of the SCC majority's legal framework, and of its subsequent applications has been developed by this author and other scholars elsewhere,[90] and it is outside the scope of this chapter. On the one hand, the framework itself has a number of limitations especially since, unlike the protection against self-incrimination, it is concerned only with the reliability of evidence and extreme forms of abuse of process. On the other hand, Mr. Big has always been about evading exact proscriptions, and, as discussed in the next sub-section, it has continued to do so post-*Hart*, and arguably, would continue to do so under any framework.

As a general point, and regardless of any inherent shortcomings of the framework itself, it is worth noting that the decision appears to have had a different effect then initially predicted. For instance, some were expecting that under the two-prong approach in *Hart*, the use of these operations would decrease.[91] The numbers available do not support this assertation.

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86 *Ibid.* at para. 85.
87 *Ibid.* at paras. 106-107.
88 *Ibid.* at para. 117.
89 *Ibid.* at paras. 121-123.
90 See Adelina Iftene, "The 'Hart' of the (Mr.) Big Problem" (2016), 63 Crim L Rev 151; H Archibald Kaiser, "Hart: More Positive Steps Needed to Rein in Mr. Big Undercover Operations" (2014), 12 CR (7th) 304 [Kaiser, "Hart"]; H Archibald Kaiser, "Mack: Mr. Big Receives an Undeserved Reprieve, Recommended Jury Instructions Are Too Weak" (2014), 13 CR (7th) 251; Jason MacLean & Frances E. Chapman, "Au Revoir, Monsieur Big? — Confessions, Coercion, and the Courts" (2015), 23 CR (7th) 184; Kirk Luther & Brent Snook, "Putting the Mr. Big Technique Back On Trial: A Re-Examination of Probative Value and Abuse of Process Through a Scientific Lens" (2015), 18:2 J Forensic Practice 131; Chris Hunt & Micah Rankin, "R v Hart: A New Common Law Confession Rule for Undercover Operations" (2015), 14:2 OUCJL 321; Coughlan, *supra* note 8.
91 Kaiser, "Hart", *ibid.* at 312; Luther & Snook, *ibid.* at 138.

For example, the RCMP stated that between 1990 (when the operation came into use) and 2008, the sting was employed 350 times.[92] The target is said to have been charged in 75 percent of cases, and from the cases that went to trial, the target was convicted in 95 percent of cases.[93] While the same kind of data is not available after 2014, in four years (summer 2014-summer 2018) the *Hart* framework has been applied in court at least 54 times.[94] This number only reflects the operations where charges were laid and where the accused did not plead guilty (so this number is likely lower than the total number of times the operation was actually employed in those four years). In addition, despite the holding in *Hart* that Mr. Big obtained evidence is *prima facia* inadmissible, post-*Hart*, the evidence was in fact admitted in all but six cases.[95]

For the remainder of this chapter, I will focus on showing that Mr. Big operations breach all of the rationales of the principle against self-incrimination under s. 7 of the *Charter*. In a different form, a s. 7 argument was put forward by the Newfoundland Court of Appeal in *Hart*.[96] The majority of that Court accepted that there is an overarching principle against self-incrimination that applies independently[97] because some of the Mr. Big operations may raise concerns related to the reliability of the statement, coercion, the existence of an adversarial relationship between state and suspect, and abuse of power.[98] In addition, the Court also maintained that expanding the notion of detention under s. 7 is aligned with the *Hebert* decision which justified detention as a limit due to increased state control over people in custody. In some Mr. Big cases, the Court asserted, the state control is so intense that the suspect is in functional detention.[99] The Court of Appeal proposed a case-by-case approach to determining the

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92 *Hart*, *supra* note 84 at para. 56.

93 Keenan & Brockman, *supra* note 70 at 23.

94 In the summer of 2018, the author conducted a review of all post-*Hart* cases. The search of Westlaw resulted in 54 cases (most of them voir dires, since jury trials are not reported). One of them (*R. v. Derbyshire*, 2016 NSCA 67 (N.S. C.A.), leave to appeal refused 2017 CarswellNS 215, 2017 CarswellNS 216 (S.C.C.) [*Derbyshire*]) applied the Mr. Big framework when analyzing the undercover investigation, but it was not in fact a Mr. Big operation.

95 The evidence was excluded due to lack of reliability (*Buckley*, *supra* note 74) or abuse of process in the form of threats of violence or exposure to violence (*R. c. Laflamme*, 2015 QCCA 1517 (C.A. Que.), leave to appeal refused 2016 CarswellQue 3271, 2016 CarswellQue 3272 (S.C.C.) [*Laflamme*]); *Derbyshire*, *ibid.*; *R. v. M. (S.)*, 2015 ONCJ 537 (Ont. C.J.) [*M(S)*]; *R. v. South*, 2018 ONSC 604 (Ont. S.C.J.) [*South*]; *R. v. Nuttall*, 2016 BCSC 1404 (B.C. S.C.), affirmed 2018 CarswellBC 3405 (B.C. C.A.) [*Nuttall*].

96 *Hart* NLCA, *supra* note 8.

97 *Ibid.* at para. 205.

98 For a description of the Court's holding on this point see Lisa Dufraimont, "R v Hart: Building a Screen for Mr. Big Confessions" (2012), 97 CR (6th) 104 at 108 [Dufraimont, "Screen"].

99 *Hart* NLCA, *supra* note 8 at paras. 195-198.

situations where, even outside of formal police custody, the state's role amounts to *de facto* detention, and thus triggers the application of s. 7 and the right to silence.[100]

In her partial dissent at the SCC, Karakatsanis J. identified all the concerns raised by such operations as being foundational to the right to silence: the reliability of evidence, the fact that they "compromise the suspects' autonomy" and that they "raise concerns about abusive state conduct".[101] However, unlike the *Hebert* scenarios, where evidence elicited by undercover officers from a detained suspect is automatically considered to breach s. 7 and almost always excluded, Karakatsanis J. proposed a case-by-case approach, based on four factors (reliability, abusive state conduct, coercion, and the presence of an adversarial relationship),[102] to assess whether the principle against self-incrimination has been infringed. This test would have been more faithful to *Charter* values than the majority's test, even though the framework is loose, it is unclear how effective its protection would have been in practice, and a case-by-case approach to the application of s. 7 is not optimal.

As I will now show, the very design of Mr. Big operations raises most of the concerns which the right against self-incrimination aims to protect against. Despite Moldaver J's statement to the contrary,[103] the current framework did not and, arguably no framework could, make a Mr. Big operation respectful of *Charter* values as they relate to the right against self-incrimination. Failure to recognize this perpetuates the arbitrary limits to the protection, increases the disconnect of the application of the right to its rationales and diminishes the value of the protection against self-incrimination, as well as of the related criminal rules of evidence and procedure (the presumption of innocence, the burden of proof, the case to meet etc.). It also means that these operations continue to be constitutional, even though, judged by the arguments used to grant *Charter* protection to suspects in other settings, the premise of Mr. Big operations itself (tricking or pressuring the individual to confess in a highly state-controlled scenario) is constitutionally suspect. Aside from reliability concerns that may have been, to a degree, addressed by the new framework,[104] the other values

[100] *Hart* NLCA, *supra* note 8. For a comprehensive description and analysis of the Court of Appeal's decision see Dufraimont, "Screen", *supra* note 98. In Iftene, *supra* note 90, I develop an argument that the individual is in functional detention in all Mr. Big operations, as an essential component of this type of sting, and that s. 7 should apply to Mr. Big scenarios on this basis.

[101] *Hart*, *supra* note 84 at para. 172.

[102] *Hart*, *supra* note 84 at para. 187.

[103] *Hart*, *supra* note 84 at paras. 121-123.

[104] See David Tanovich, "R v Hart: A Welcome New Emphasis on Reliability and Admissibility" (2014), 12 CR (7th) 298; Lisa Dufraimont, "R v Hart: Standing Up to Mr. Big" (2014), 12 CR (7th) 294; Lisa Dufraimont, "Hart and Mack: New Restraints on Mr. Big and a New Approach to Unreliable Prosecution Evidence" (2015), 71 SCLR (2d) 475 at 485.

promoted by the principle against self-incrimination continue to be tarnished by Mr. Big operations. Thus, advocating for the extension of the right against self-incrimination over such operations is more than simply an intellectual exercise, or a matter of choosing between two frameworks of equal value and consequence. Rather, what is at stake is the protection of individuals against different forms of coercion and manipulation, as well as the coherence and integrity of the criminal justice system.

### *B. Mr. Big Violates All Rationales Behind the Right Against Self-Incrimination*

Mr. Big continues to violate all the rationales presented in s. II for the protection against self-incrimination: reliability,[105] abuse of power, normative concerns regarding personal autonomy and dignity, and procedural goals related to the adversarial nature of the trial.

It has been widely accepted, both by courts and scholars, that the principle against self-incrimination is about "the right of the individual to choose whether to make a statement to the authorities or to remain silent".[106] The very reason why a Mr. Big operation is started in the first place is because the suspect *chose* not to speak to the authorities and thus police are forced to accept that they do not have sufficient evidence to proceed with charges. However, despite these shortfalls, police have a strong suspicion that the suspect is guilty of a serious crime (generally murder). The nature of the crime and the fact that the agents have allegedly compelling reasons to believe she is guilty are the justifications provided for the operation. In other words, police decide that the individual is guilty and thus start a very expensive[107] and lengthy (months or years long) mission[108] to obtain the evidence required for a criminal prosecution.

[105] Currently reliability is being measured by courts through the presence or absence of confirmatory evidence. This has led police to be vigilant about obtaining confirmatory evidence during Mr. Big scenarios. The evidence was only excluded in one case based on reliability issues; this was the only case where confirmatory evidence was not produced (*Buckley*, *supra* note 74). Concerns have been expressed that confirmatory evidence is not in and of itself always a good indicator of reliability. See e.g. Nikos Harris, "Justice for All: The Implications of *Hart* and *Hay* for *Vetrovec* Witnesses" (2015), 22 CR (7th) 105; Kaiser, "Hart", *supra* note 90 at 307; Coughlan, *supra* note 8 at 425-426. However, the inquiry into whether confirmatory evidence can overcome reliability concerns requires a separate paper. For the purpose of this chapter I will accept that perhaps reliability concerns raised by Mr. Big could be overcome through a framework (though it is questionable if that framework is the present one). I will instead build my arguments around the breach of the other rationales of the right against self-incrimination.

[106] *Hebert*, *supra* note 6 at para. 104.

[107] Where numbers are available, the costs of such operations are very high: $137,000 (*Dix*, *supra* note 72), $311,815.88 (*R. v. Mildenberger*, 2015 SKQB 27 (Sask. Q.B.) [*Mildenberger*]), $400,000 (*Buckley*, *supra* note 74), $1.6 (*R. v. Skiffington*, 2004 BCCA 291 (B.C. C.A.), leave to appeal refused 2013 CarswellBC 3325, 2013 CarswellBC 3326 (S.C.C.)), and $4 million dollars (*R. v. Ciancio*, 2006 BCSC 1673 (B.C. S.C.)).

[108] The length of these operations, from surveillance to arrest, vary between a few months to a

In *Otis*,[109] the SCC clearly stated that certain people are more susceptible to persuasion than others. It cautioned that special attention needs to be paid to personal characteristics when the accused is in police interrogation in order to determine if their s. 7 rights have been infringed.[110] Paradoxically, in Mr. Big scenarios, the state uses its superior power, financial resources, and people who are highly trained in law enforcement and psychology to hone in on and target the special characteristics that would make the suspect more likely to respond to the technique. The factors mentioned in *Otis* as increasing vulnerability in the context of police interrogations (and which are also the ones Moldaver J. in *Hart*[111] and subsequently in *Mack* advised against exploiting because it may lead to abuse of process)[112] are the very same ones that continue to be specifically targeted by agents in order to successfully conduct a Mr. Big operation: addictions,[113] intellectual deficits,[114] youthfulness,[115] and stress (health,[116] financial or psychological[117]).

These characteristics are used to override the clearly stated wish of the suspect not to engage with authorities nor to contribute to his own prosecution. In other words, once they befriend the unsuspecting individual, the officers concentrate on his vulnerabilities. They may offer a family-like environment and friends where the individual has none,[118] financial stability to impoverished people,[119] alcohol and drugs to addicts,[120] respect and trust to socially marginalized individuals,[121] a stable residence for underhoused people,[122] or the prospect of love.[123]

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few years: *R. v. Subramaniam*, 2015 QCCS 6366 (C.S. Que.) [*Subramanian*] (four months), *R. c. Perreault*, 2015 QCCA 694 (C.A. Que.), leave to appeal refused 2016 CarswellQue 1420, 2016 CarswellQue 1421 (S.C.C.) [*Perreault*] (five months), *R. v. Carlick*, 2018 YKCA 5 (Y.T. C.A.) [*Carlick*] (seven months), *R. v. Magoon*, 2018 SCC 14 (S.C.C.) [*Magoon*] (eight months), *Keene*, *supra* note 72 (12 months), *R. v. Niemi*, 2017 ONCA 720 (Ont. C.A.) [*Niemi*] (four years).

109 *R. c. Otis*, [2000] R.J.Q. 2828 (C.A. Que.) at para. 54, leave to appeal refused 2001 CarswellQue 1280, 2001 CarswellQue 1281 (S.C.C.) [*Otis*].

110 *Ibid.*

111 *Hart*, *supra* note 84 at para. 117; *Mack*, *supra* note 10 at para. 31.

112 *Hart*, *supra* note 84 at para. 117.

113 *Subramanian*, *supra* note 108; *R. v. Balbar*, 2014 BCSC 2285 (B.C. S.C.) [*Balbar*]; *R. c. Johnson*, 2016 QCCS 2093 (C.S. Que.) [*Johnson*].

114 See *Balbar*, *ibid.*; *Nuttall*, *supra* note 95.

115 See *Subramanian*, *supra* note 108; *M(M)*, *supra* note 74; *Buckley*, *supra* note 74; *M(S)*, *supra* note 95; *Magoon*, *supra* note 108; *R. v. Moir*, 2016 BCSC 1720 (B.C. S.C.) [*Moir*]; *R. v. Omar*, 2016 ONSC 4065 (Ont. S.C.J.) [*Omar*]; *R. v. R.K.*, 2016 BCSC 552 (B.C. S.C.) [*RK*]; *South*, *supra* note 95.

116 See *Johnson*, *supra* note 113.

117 See *Laflamme*, *supra* note 95; *R. v. Lee*, 2018 ONSC 308 (Ont. S.C.J.) [*Lee*]; *Nuttall*, *supra* note 95 at para. 792.

118 *Buckley*, *supra* note 74; *Lee*, *ibid.*; *M(S)*, *supra* note 95 (here, the agents used the father of the suspect, by reconnecting him with his son to extract information from the son); *Niemi*, *supra* note 108; *Nuttall*, *supra* note 95; *R. v. Shyback*, 2017 ABQB 332 (Alta. Q.B.) at para. 7 [*Shyback*].

119 *Buckley*, *supra* note 74; *R. v. Streiling*, 2015 BCSC 1044 (B.C. S.C.) [*Streiling*] (the suspect

In exchange, after living up to their promises for months on end, all they want is one confession. The confessions in these scenarios are not organic; rather they are specifically planned and elicited. In the context of undercover operations where the accused is in police detention, elicitation means that if the statement is triggered by the agent[124] (which can be as little as asking "what are you here for?"), it is unconstitutional under s. 7. In the Mr. Big context, elicitation means that after months of working the suspect, he is made to believe not only that the confession will have no negative consequences, but it will have positive ones: it will solidify the individual's position within the organization,[125] they will continue to make money and enjoy a lifestyle they never previously had access to,[126] and their legal problems will go away.[127] Thus, even if threats and violence are not as commonly used post-*Hart*,[128] the meaningful choice of the individual is cancelled out by other police methods.

The non-violent methods employed in Mr. Big, called "soft pressure tactics" by forensic psychologists, are "qualitatively different but as effective as harsh pressure tactics"[129] (which include threats and violence). Soft pressure is created by using social influence techniques (such as reciprocity, consistency, creating a persona the target likes and identifies with, providing social validation, using authority, and offering the target a commodity that is scarce to him or her), which have been studied and validated as being successful in convincing people to acquiesce to a request or to change behaviour based on real or imagined group pressure.[130] By consulting with trained psychologists,[131] the police in each Mr. Big operation tailor these tools for the specific target, which virtually guarantees

here was completely financially dependent on the organization as they convinced him early on to quit his job); *R. v. Wilson*, 2015 BCCA 270 (B.C. C.A.), leave to appeal refused *Wilson v. R.*, 2015 CarswellBC 3200, 2015 CarswellBC 3201 (S.C.C.) [*Wilson*].

120 See e.g. *Perreault*, *supra* note 108; *Balbar*, *supra* note 113; *Johnson*, *supra* note 113.

121 *Perreault*, *supra* note 108.

122 *Buckley*, *supra* note 74; *Carlick*, *supra* note 108; *Magoon*, *supra* note 108; *Wilson*, *supra* note 119.

123 *Subramanian*, *supra* note 108.

124 *Hebert*, *supra* note 6; *Broyles*, *supra* note 31.

125 *Johnson*, *supra* note 113; *Her Majesty The Queen v. Tingle*, 2016 SKQB 212 (Sask. Q.B.) [*Tingle*].

126 *Balbar*, *supra* note 113 at para. 202; *R. v. Kelly*, 2017 ONCA 621 (Ont. C.A.) at para. 22, leave to appeal refused *Michael Kelly v. Her Majesty the Queen*, 2018 CarswellOnt 6807, 2018 CarswellOnt 6808 (S.C.C.) [*Kelly*]; *M(M)*, *supra* note 74; *Niemi*, *supra* note 108.

127 *Buckley*, *supra* note 74; Carlick, *supra* note 108; *R. v. Klaus*, 2017 ABQB 721 (Alta. Q.B.) [*Klaus*]; *R. v. Knight*, 2018 ONSC 1846 [*Knight*]; *South*, *supra* note 95.

128 Threats and violence were specifically mentioned in *Hart*, *supra* note 84 at para. 114, as likely leading to abuse of process. However, certain scenarios continue to maintain exposure to violence and threats. See e.g. *Buckley*, *supra* note 74; *Keene*, *supra* note 72.

129 Luther & Snook, *supra* note 90 at 133.

130 *Ibid.*

131 For ethical issue in using psychologists in Mr. Big operations see Stephen Porter et al, "Enhanced Interrogations: The Expanding Roles of Psychology in Police Investigations in Canada" (2016), 57:1 Can Psychol 35 at 37.

that a confession will be obtained. Forensic psychologists have found that many of the tactics used by Mr. Big are contained in Biderman's Chart of Coercion[132] — a list of tools used to gain control in various contexts (by an abuser over a victim, for instance) that ensures that the individual will comply with the requests and will not choose to walk away.[133]

Since choice and absence of coercion are the essence of the law of self-incrimination,[134] overriding meaningful choice has a number of implications for the principle against self-incrimination. Lack of meaningful choice impacts both the principle's systemic rationale (the coherence of the justice system) and its individual rationales (especially abuse of process, individual autonomy, and dignity).

First, from a systemic perspective, the state takes control over the individual's self and thoughts and undermines the supposition that two autonomous entities are opposing each other,[135] which is a core requirement in an adversarial proceeding. These operations are triggered by the fact that police cannot build an adequate case against the accused without his help. They are unable to present the suspect with a "case to meet," where his obligation to respond starts.[136]

Maintaining the balance between law enforcement needs and individual substantive or procedural rights has always been a challenge. Indeed, one may say that many law enforcement activities are intrusive, and yet necessary.[137] However, one must recognize that there is not only a quantitative difference between the different types of law enforcement tactics (how far do they go, or how strong is the impact on other values and interests), but also a qualitative difference. Most other techniques (observation or wiretapping of suspects, interrogation of suspects, collection of DNA evidence, and perhaps even other types of undercover stings) carry a significant possibility that the evidence collected will point either towards the guilt *or* the innocence of the individual. In other words, a suspect may be cleared through these methods. The ultimate test for identifying what techniques have gone too far in terms of maintaining a balanced tension between the procedural standards of adversarial criminal proceedings (such as the presumption of innocence for instance) and law enforcement needs, is to ask if these techniques would be perceived as appropriate when applied to individuals who may turn out to be factually innocent. No one measures the effectiveness of police questioning or of DNA evidence by how often these techniques lead to a conviction. Provided

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[132] Amnesty International, *Report on Torture*, 2nd ed. (London: Duckworth, 1975).
[133] Luther & Snook, *supra* note 90 at 138.
[134] *Hebert*, *supra* note 6 at para. 67.
[135] Davoudi, "(V)", *supra* note 19 at 4-5.
[136] Paciocco & Stuesser, *supra* note 40 at 306.
[137] See especially Penney, "The Wayward Path", *supra* note 44 at 255.

they are employed within certain set limits, we regard them as valid whether they lead to a conviction or an exoneration, and we expect that some suspects subjected to these tactics are factually innocent.

Yet Mr. Big techniques are justified by the fact that they are "effective" in obtaining a conviction against the individual who the police are sure is guilty, despite the lack of evidence to prove that.[138] Indeed, creating an expensive Kafkaesque universe in which the unsuspecting individual is drawn into, without meaningful choice of leaving it, and which leads to his whole life being substantially altered, would appear highly problematic if we accepted that, like many suspects who are questioned or from whom DNA evidence is collected, the Mr. Big target may too be factually innocent.

Mr. Big operations are premised on the fact that the only person who could be guilty of the crime is the targeted individual and physical and psychological conditions are created to ensure that the suspect will provide a confession. Thus, what makes these operations different is not that they are the only ones that may have a tense relationship with the presumption of innocence or other adversarial principles. Rather, what makes them different is that this technique does not even allow room for entertaining the possibility of innocence. There is nothing the individual can do once the operation started to maintain his autonomy as an opposing force in an adversarial process. The level of trickery is so high, and the forces working to overcome the suspect's will are so intense (such as consulting with psychologists to find techniques to overcome someone's will, offering whatever the individual may desire etc.), that the technique is essentially the equivalent of getting an individual to plead guilty when he or she has no idea what the consequences are. An investigative process that coerces the compliance of an individual to a degree that guarantees that there will be a case against the suspect, goes beyond any acceptable procedural concessions made in the name of law enforcement. In other words, a technique that cannot reasonably lead to either a finding of guilt or of innocence, and which in fact would be considered outrageous if employed against a target who may turn out to be factually innocent, should never be used against someone legally innocent (as everyone is until a trier of fact decides differently). Such a technique constitutes a significant blow to most procedural rules (such as the presumption of innocence, the burden of proof, the case to meet etc.) tied together under the overarching principle against self-incrimination.[139]

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[138] "Undercover Operations", *Royal Canadian Mounted Police*, online: < coquitlam.rcmp-grc.gc.ca/ViewPage.action?siteNodeId = 23&languageId = 1&contentId = 6941 > (last updated 2015); See also Keenan & Brockman, *supra* note 70 at 23.

[139] As with any other argument, the potential shortcomings of the content or framing of this issue are entirely my own. However, I am very grateful to Steve Coughlan for the conversations we had on the role of the presumption of innocence pre-trial. They have been helpful in shaping this point.

Second, the operation raises pragmatic concerns related to the unfair methods in which the state has used its resources to elicit information from someone who clearly stated he did not wish to talk to the police. The new *Hart* framework addresses some of the abuse of process issues, [140] but only to the extent to which they protect against exposure to violence and the presence of threats.[141] There is no test for the abuse of process prong,[142] and the threshold the claimant needs to reach in order to prove it is high.[143] In the cases where this prong was discussed, including those where evidence was excluded, the questions were: is the individual obviously vulnerable and was there exposure to violence or threats that he may be intimidated by?[144] Absent such "hard pressure techniques,"[145] courts have found no abuse of process, despite the fact that Moldaver J. mentioned in *Hart* that abuse of process may result from other methods as well (such as very attractive incentives or taking advantage of vulnerable individuals).[146] To give just one startling example, in the case of *R. v. Subramaniam*,[147] providing money and alcohol to an impoverished 19-year-old target with a substance addiction, and making him fall in love with an undercover agent was not considered an abuse of process because the teenager had "street smarts"[148] and no violence was involved.[149]

Such an analysis constitutes a failure to understand the psychological impact of manipulation and its relation to coercion and choice that is "free, informed and voluntary".[150] Post-*Hart* operations have become subtler, with the state finding creative and more persuasive ways of convincing individuals to speak without recourse to threats and violence.[151] In this

[140] See e.g. Lisa Dufraimont, "R v Nuttall and R v Derbyshire: Abuse of Process and Undercover Operations" (2016), 31 CR (7th) 315 [Dufraimont, "Nuttall"].

[141] *Hart*, *supra* note 84 at 114 (though Moldaver J. mentioned that there may be other factors leading to abuse of process); Post-*Hart* evidence has been excluded in some instances where the presence of violence, threat of violence, or instigation to commit violence was clear: *Laflamme*, *supra* note 95; *Derbyshire*, *supra* note 94; *Nuttall*, *supra* note 95 at para. 602. However, on occasion, even where violence is present the evidence is still admitted (see *M(M)*, *supra* note 74; *Tingle*, *supra* note 125; *R. v. Yakimchuk*, 2017 ABCA 101 (Alta. C.A.), as examples).

[142] To this point see Adrien Iafrate, "Unleashing the Paper Tiger: How the Abuse of Process Doctrine Can Overcome Charter Limitations" (2017), 64 Crim LQ 147 at 149.

[143] Dufraimont, "Nuttall", *supra* note 140 at 139.

[144] *Perreault*, *supra* note 108 at para. 89; *R. v. Allgood*, 2015 SKCA 88 (Sask. C.A.) at para. 67, leave to appeal refused 2016 CarswellSask 122, 2016 CarswellSask 123 (S.C.C.); *Kelly*, *supra* note 126 at para. 49; *Knight*, *supra* note 127 at para. 65; *R. v. Randle*, 2016 BCCA 125 (B.C. C.A.) at para. 67, leave to appeal refused 2016 CarswellBC 2326, 2016 CarswellBC 2327 (S.C.C.); *Omar*, *supra* note 115 at para. 37. For a critique of the application of abuse of process analysis in Mr. Big cases see MacLean & Chapman, *supra* note 90.

[145] Luther & Snook, *supra* note 90 at 133.

[146] *Hart*, *supra* note 84 at paras. 112-117.

[147] *Subramanian*, *supra* note 108.

[148] *Ibid.* at para. 36.

[149] *Ibid.* at paras. 41-45.

[150] Stewart, "The Grant Trilogy", *supra* note 5 at 3; *Jones*, *supra* note 38.

[151] To this point see MacLean & Chapman, *supra* note 90 at 190.

context, so-called "creativity" of police agents should not be celebrated[152] as successfully averting abuse of process. Instead of allowing "creativity" to be yet another tool through which Mr. Big evades the letter of the law, it should be recognized as a significant form of abuse of process, particularly because it seeks out and "creatively" uses vulnerabilities and pressure points. This use of state resources creates a clear adversarial disadvantage to the accused and is a breach of the individual's privacy.

Finally, diminishing meaningful choice also has normative consequences. The individual in this case is used as a means to an end; they become a tool for obtaining the incriminating confession, which is antithetical to preserving human dignity as a "benchmark of the values underlined by the *Charter of Rights*".[153] Going to great lengths to identify and use an individual's weakness to extract information, by alienating them from real life and making them believe in a fake reality, is a form of assault that diminishes "the concept of individual within society,"[154] and it works to deprive the individual of "independent selfhood and the dignity that flows from being an independent, moral agent".[155]

The individual thus becomes a puppet of the state, whose sole value over months is to build a case against herself. If, as Plaxton suggested, the right against self-incrimination protects against "the State's annexation of the citizen's moral landscape, its control over individual's internal determination of guilt or innocence",[156] then attracting someone into a criminal organization for the purpose of such manipulation is surely a breach of the right.[157] This right, as Paciocco stated, rests on personal autonomy and privacy of the mind, wherein their subversion is inherent "in the revulsion that elevated the principle against self-incrimination into a vital legal principle".[158] To lure someone into a criminal organization especially created for them, and to have expert psychologists and trained agents design the scenarios so that the particular individual cannot resist it, is quintessentially taking control over someone's autonomy, and accessing information "stored in the memory of the accused" in a manner that violates "the privacy of the mind, the last refuge of the individual".[159]

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[152] *R. v. Ledesma*, 2014 ABQB 788 (Alta. Q.B.) at para. 97 (the Court praised the "creative police work" which did not include violence).
[153] Stewart, "The Confessions Rule", *supra* note 39.
[154] Davoudi, "(VI)", *supra* note 50 at 5.
[155] Plaxton, *supra* note 33.
[156] *Ibid.* at 10.
[157] An analogous argument regarding Mr. Big but related to the law of entrapment has been made in Coughlan, *supra* note 8 at 418-419.
[158] Paciocco, "Case to Meet", *supra* note 15 at 89, discussing the rationale of the rights against self-incrimination.
[159] Paciocco, "Self-Incrimination", *supra* note 36 at 88.

Thus, there are concerns raised by Mr. Big operations that are either inadequately minimized by the current framework (such as abuse of process or issues related to the coherence of the system) or are ignored (such as issues related to autonomy and dignity).[160] To conclude, if the right against self-incrimination is a principle of fundamental justice under s. 7 because "it is a corollary of the principle of a case to meet, which defines the accusatorial system, which in turn exists in order to vindicate the rule of law"[161] and which upholds normative concepts related to individual autonomy and dignity, as well as pragmatic norms prohibiting the state from using its power to manipulate the accused, then the continued existence of Mr. Big operations frustrates the spirit of the law on all levels and makes a mockery of the *Charter's* "benchmark values".[162]

## IV. Conclusion

If, as described in *Hebert*, the pre-trial right against self-incrimination is about preventing police from obtaining indirectly — through oppression and trickery — that which the law prevents them from obtaining directly,[163] then excluding Mr. Big from the application of s. 7 because the individual is not in physical state custody is arbitrary. Despite the holdings in *Hart* and *Mack*, Mr. Big operations are in and of themselves a violation of every principle underlying the right against self-incrimination and thus of the *Charter*. By design, they undermine the adversarial system. They are oppressive because they are built around using overwhelming state resources to identify and then trigger individual pressure points that lead to confessions. These tactics also undermine individual autonomy and dignity by transforming the individual into a state puppet.

The *Hart* framework has done little to uphold the core values of the principle against self-incrimination, and the operation continues to be legal with minimal oversight. However, as Archie Kaiser beautifully put it, "it is because of its efficacy [in obtaining convictions] not its procedural elegance or constitutional fidelity that Mr. Big has survived to live another day".[164]

Recognizing that the very structure of these operations triggers the application of s. 7 would have significant consequences. Though the remedy of the exclusion of evidence is not automatic for a breach of *Charter* rights, where s. 7 is breached, the evidence tends to be excluded. This is consonant with the fact that the right against self-incrimination and the presumption of innocence do not generally lend themselves to a balancing of interests.[165]

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[160] *Hart*, *supra* note 84 at para. 218, Karakatsanis J. partially dissenting.
[161] Paciocco, "Self-Incrimination", *supra* note 36 at 103.
[162] Stewart, "The Confessions Rule", *supra* note 39 at 519.
[163] *Hebert*, *supra* note 6 at 180-181.
[164] Kaiser, *supra* note 90 at 307.
[165] Stewart, "The Privilege", *supra* note 53 at 98-99.

Rather, where engaged, evidence is often unsalvageable. Thus, recognizing that every Mr. Big sting triggers the application of s. 7 would provide constitutional grounds for the dismantlement of these operations. As effective as they may be in obtaining convictions, the cost of those convictions may come at too great of a cost for individual rights and the integrity of the justice system. To cite Professor Kaiser, "if the Crown cannot prove its case without doing violence to so many principles 'then it's better that the case not be proven.'"[166]

[166] Kaiser, *supra* note 90 at 307.