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Mr. Big and the New Common Law Confessions Rule: Five Years in Review

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ABSTRACT

The Supreme Court of Canada released its decision of *R v Hart* in July of 2014. The decision provided a two-prong framework for assessing the admissibility of confessions obtained through the undercover police tactic known as "Mr. Big". The goal of the framework was to address reliability concerns, to protect suspects from state abuse, and to reduce the risk of wrongful convictions. The first prong of the test created a new common law evidentiary rule, under which Mr. Big obtained confessions are now presumptively inadmissible. The second prong revamped the existing abuse of process doctrine.

In this article, the authors review the last five years of judicial application of the new *Hart* framework. In total, all 61 cases that applied *Hart* were analyzed qualitatively and quantitatively, looking at whether the goals of the *Hart* framework have been met, what effect the framework has had on the admissibility of Mr. Big obtained confessions, and what, if any, shortcomings the framework has. The authors argue that the flexibility and discretion built into the *Hart* framework have resulted in an inconsistent application of the two-prong test. In the end, the framework has had a negligible impact on the number of confessions that are admitted.

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I. INTRODUCTION

R v Hart,[1] a case where the use of a Mr. Big obtained confession was challenged, provided the Supreme Court of Canada (SCC) with the opportunity to acknowledge that there are many issues raised by Mr. Big operations. These include the operations' lack of regulation and concerns around permitting the use of potentially unreliable evidence obtained through such techniques. The majority decided to regulate the admissibility of confessions resulting from these stings by creating a two-prong test ("the *Hart* test"). For the first time in decades, the SCC created a new common law evidentiary rule as the first prong of the test. The second prong was an attempt to revamp the abuse of process doctrine.

This paper draws upon a 5-year review of judges' applications of the *Hart* test in subsequent cases. The *Hart* test had a mixed reception at the time it was created; some commentators believed that it did not go far enough in regulating the admissibility of evidence obtained through questionable police tactics.[2] Others believed that it struck an appropriate balance between the state's interest in catching criminals, society's need to prevent wrongful convictions, and the desire to protect suspects from state abuse.[3] In this article, we conduct an analysis on the new admissibility

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1 2014 SCC 52 [*Hart*].

2 Adelina Iftene, "The 'Hart' of the (Mr.) Big Problem" (2016) 63 Crim LQ 151; H Archibald Kaiser, "Hart: More Positive Steps Needed to Rein in Mr. Big Undercover Operations" (2014) 12 CR (7th) 304; 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" (2016) 18:2 J Forensic Practice 131; Chris Hunt & Micah Rankin, "R v Hart: A New Common Law Confession Rule for Undercover Operations" (2014) 14:2 OUCJL 321; Steve Coughlan, "Threading Together Abuse of Process and Exclusion of Evidence: How it Became Possible to Rebuke Mr. Big" (2015) 71 SCLR (2d) 415 at 416.

3 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

framework and its subsequent application, with the aim of answering the following questions:

> Do the goals of the *Hart* framework (including the new common law evidentiary rule) appear to be met?
> What was the effect of the framework on the admissibility of Mr. Big obtained confessions in court?
> What, if any, appear to be the shortcomings of the new framework?

First, we will describe the methodology that was employed to conduct our analysis. Next, we will provide an overview of Mr. Big police investigations in section II of this paper. Specifically, we will describe what Mr. Big undercover operations entail, as well as how evidence obtained as a result of them was dealt with pre-*Hart*. We will then proceed by discussing the *Hart* test, focusing on a more detailed review of its content and goals. In section III, we will take a deep dive into how the *Hart* test was applied by courts between August 2014 and August 2019, through a qualitative and quantitative analysis of cases. Finally, in section IV, we will interpret our findings against the goals set out in *Hart*.

A. Methodology

In evaluating the outcomes of the *Hart* test, our review included the Canadian cases decided between August 2014 and August 2019 where the *Hart* test was applied. The majority of these cases applied the framework to a confession obtained by the Royal Canadian Mounted Police (RCMP) in a Mr. Big type operation. In a small number of cases, judges applied the *Hart* framework to cases where a confession was obtained through other undercover tactics employed by the RCMP. Since the purpose of this analysis is to review the functionality and effects of the framework in its application, we have included these cases in our analysis. However, the vast majority of the discussion in this paper is focused on Mr. Big operations.

To search for cases, we used WestlawNext Canada, noting up the *Hart* decision. The cases were sorted by date, starting with the oldest cases first. All of the cases discussing *Hart* were afforded an initial, cursory scan to determine whether the *Hart* test was applied or whether *Hart* was mentioned but not applied for any number of reasons. For example, some judges mentioned *Hart* outside the context of undercover operations, in relation to the more general analysis of the probative value versus prejudicial

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on Mr. Big and a New Approach to Unreliable Prosecution Evidence" (2015) 71 SCLR (2d) 475 at 485 [Dufraimont, "Hart and Mack"].

effect of evidence proffered by the Crown in a particular case.[4] In other cases, judges used the framework because it "confirmed that the principle against self-incrimination, as enshrined in s. 7 of the *Charter*, is not restricted to statements obtained through traditional police interviews."[5] Only the cases where the test was actually applied (regardless of what type of undercover police investigation was used) were flagged as relevant to our analysis and, therefore, given a more in depth review.

In order to assess whether the subsequent application of the *Hart* test met its stated goals, we reviewed whether and how the relevant factors put forward in *Hart* were considered for each prong of the test. Specifically, the factors we tracked were: the personal characteristics of the suspect (age, mental health, addictions, social, and economical status), the length of the operation, the relationship between the target and the handler, the incentives used, the presence of violence or threats, and the presence and strength of various types of confirmatory evidence. We also assessed the level of scrutiny that judges applied to these factors.

For the quantitative analysis, we coded the factors by attributing each one with a value and variables. As an example of coding, *Hart* mentions a number of characterises (such as youthfulness, financial situation, addictions, education, social alienation, and level of sophistication) that the individual may present and which need to be considered in order to assess both the prejudicial effect versus probative value and whether the tactics used amounted to abuse of process. Each of these characteristics was attributed a value, and the variable could be 'yes' (if the trial judge identified that as present), 'no' (if the trial judge did not identify it as being present), or 'ND' (if it was not discussed in the decision). Using SPSS software, we generated basic statistics indicating the frequency of each factor. We also used SPSS to create combinations of these factors and to establish their frequency. For instance, we combined values that indicated a target was financially destitute with values that indicated the target received significant financial incentives and values indicating there was no corroborative evidence present.

This quantitative analysis was used to get a sense of the frequency with which the factors and combinations of factors listed in *Hart* negatively impacted the reliability of a confession (i.e. that increased the prejudice and decreased the probative value) or increased the likelihood of abuse of

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4 See e.g. *R v Clyke*, 2019 NSSC 137 at paras 21–22.

5 *R v Ball*, 2018 ONSC 4556 at para 63.

process being identified in the cases to which the *Hart* framework was applied. We also analyzed whether there appeared to be any correlation between the presence of the various factors and combinations of factors and the admission or exclusion of the confession (i.e. if the combination made it more likely that the evidence would be excluded). In other words, we used statistical data to determine when confessions were excluded and to create a numerical picture of the factors that may influence the different ways in which judges applied the *Hart* framework.

Through our qualitative analysis, we sought to identify patterns in how each factor was used to justify the exclusion or admission of evidence. This required the use of in-text coding of the judges' language in trial decisions. We then separated the citations into categories for each of the *Hart* factors. This helped piece together a visual narrative of how courts understand and apply the *Hart* test, as well as how and to what extent various circumstances and characteristics of individual targets may factor into the judgement.

Our assessments and conclusions must be read in light of the limitations of the sources available to us and of the cases that we reviewed. First, we only had access to cases that made it to trial; we were generally unable to include cases where the individual pled guilty after confessing[6] or where the RCMP started but did not continue the operation. Second, we had difficulty finding comparators for most of the variables discussed in our analysis. We were not able to compare the factors considered post-*Hart* with the factors considered pre-*Hart*. This was because there was no regulation of Mr. Big confessions prior to *Hart* and because the factors were not consistently applied. Furthermore, the pre-*Hart* case information available is even more scarce than the information available today. Thus, we had to limit ourselves to assessing how the *Hart* framework was applied by judges, comparing that against the test's set goals, as opposed to the pre-*Hart* treatment of confessions. Third, the number of cases where confessions were excluded is notably smaller than the number of cases in which confessions were admitted. This is analyzed more fully later in this paper. Nonetheless, due to the small number of cases where evidence was excluded, our statistical analyses were limited.[7]

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6 Though there were three cases where the accused pled guilty mid-trial after the admissibility of the confession was considered. We included those cases as well.

7 For instance, we were able to run the frequencies of various factors considered and of combinations of factors, but we were unable to assess statistical relevance.

Finally, our conclusions are the result of our interpretation of certain patterns identified. The circumstances of the cases reviewed are very different and not all of the details are available in the reported decisions. This means that a conclusive analysis is impossible. In addition, the *Hart* test incorporates a significant amount of judicial discretion by design, and trial judges are entitled to deference once they have considered and applied all of the relevant factors.[8] Thus, the findings of this review should not be interpreted as reflections on the correctness of the individual judges' decisions to admit or exclude evidence. Rather, the purpose of this review is to assess how judicial discretion is being exercised and the extent to which the relevant factors from *Hart* are discussed.

In an attempt to mitigate some of these limitations, to assess the broader impact of the admissibility framework on Mr. Big operations, and to generate more context for our analysis, we submitted a request under the *Access to Information Act* to the RCMP.[9] We received a response letter[10] indicating that the RCMP does not collect any of the data that we requested and they were, therefore, unable to provide us with any information. This response is striking. While some of our requests were more detailed and would require time to gather the information, other aspects of our requests were straightforward. Considering the large amount of money that goes into these operations,[11] it seems reasonable to assume that, at the very least, the

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8 *Hart*, *supra* note 1 at para 110.

9 The request contained the following questions: *The information sought from across Canada for two periods of time: 1991-July 2014 and July 2014 - 2019. How many Mr. Big operations have taken been started and completed? How many cases made it to trial based on Mr. Big collected evidence? How many cases for which a Mr. Big operation was employed did not go to trial? What were the main reasons? How many Mr. Big operations resulted in conviction after a trial (excluding guilty pleas)? How many Mr. Big targets have pled guilty? How many cases for which a Mr. Big operation was employed made it to trial and resulted in an acquittal or a stay? How many Mr. Big operations were started and then abandoned before the target made a confession? What are the main reasons? What is the average cost of a Mr. Big operation, what is the cost of the most expensive and of the cheapest operation? What is the average length of the surveillance period before contact is made with the target? What is the average, longest and shortest time for a Mr. Big operation? In how many cases did RCMP start surveillance in a cold case for a Mr. Big operation but desisted without going any further? What are the main reasons?*

10 Letter in Response to Access to Information Request from the Access to Information and Privacy Branch, Royal Canadian Mounted Police (2 July 2019) A-2019-03433 [RCMP, Letter in Response].

11 See generally *R v Mildenberger*, 2015 SKQB 27 [*Mildenberger*] ("Operation Fiftig" was a 6-month long operation with a total cost of $311,815.88); *R v Buckley*, 2018 NSSC 1 [*Buckley*] ("Operation Hackman" was a six-month long operation with a forecasted

RCMP would maintain a record of the number of times Mr. Big was employed as an investigative tactic and the cost of these operations. It is simply inconceivable that large sums of money would be approved to conduct and continue Mr. Big investigations without any corresponding record keeping of these costs.

In *Hart*, the SCC specifically condemned the lack of monitoring of these operations.[12] Yet, five years after *Hart,* the RCMP has not improved their record keeping on even the most basic information regarding these operations.

II. CONTEXT

A. Mr. Big Undercover Operations and their Pre-*Hart* Regulation

Mr. Big operations involve the police creating a fictitious criminal organization for the purpose of luring a specific suspect into it. Generally, the police target a single suspect in an unsolved case, with the ultimate goal of getting that suspect to confess to the crime. The people involved in the fictitious criminal organization are all either undercover officers or their agents.[13]

These operations are planned out in advance in a meticulous and targeted manner. The suspect is often watched, and sometimes even wiretapped, for an extended period of time. The police use their surveillance to learn the suspect's habits, hobbies, and routines. The police use the considerable time spent watching their suspect to create a tailored approach for convincing the target to befriend them or work for them.

The police do not target just anyone. The targeted suspects are often socially isolated and alienated from those around them. Many of them are unemployed and have either non-existent or tense family relationships. The operation works best if the suspect is predisposed to being influenced by outside pressures, whether due to having a low IQ, having experienced

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budget of $300,000. The actual cost is not reported in the decision). It is note worthy that in many cases, the costs of these operations are not mentioned in the written decisions. The RCMP does not release the numbers either.

12 *Hart*, *supra* note 1 at para 80.

13 Timothy E Moore, Peter Copeland & Regina A Schuller, "Deceit, Betrayal, and the Search for Truth: Legal and Psychological Perspectives on the 'Mr. Big' Strategy" (2009) 55:3 Crim LQ 348 at 348.

social stigma, or having experienced a lifetime of racial discrimination, mental illness, poverty, or other vulnerabilities.[14]

Once the suspect is 'hooked' (connected to the organization), the person is quickly befriended by undercover officers and hired to do various jobs for their fictitious criminal organization. The undercover officers begin to confide in the suspect, attempting to form a deeper bond. While many suspects later describe the bond as friendship, some have also said the undercover officers felt like family.[15] The suspect's involvement in the organization will progressively intensify. The suspect will begin receiving jobs that appear to be illegal, and increasingly so.

The climax of a Mr. Big investigation is the introduction of the target to the boss of the organization (the 'Mr. Big' character), either as a reward for the work the suspect has done or as an interview for a better position within the organization. Mr. Big will bring up the crime under investigation and will demand that the suspect tell him the truth about it. If the suspect denies involvement, Mr. Big employs a variety of tactics to elicit a confession. He may offer to make the suspect's legal problems disappear. He may also go as far as to create an oppressive and fear-inducing environment or suggest that the individual will have to leave the organization if he refuses to confess.

The use of Mr. Big obtained evidence in court existed in a legal vacuum until 2014.[16] Confessions obtained through these stings were routinely admitted at trial under the party admission exception to the exclusionary hearsay rule.[17] Despite the use of violence, derogatory language, and simulated crime by police agents in these Mr. Big operations, the confessions obtained still managed to slip through the cracks of any exclusionary rule in existence at the time. None of the following exclusionary rules applied: the common law confessions rules (because the suspect did not know that he was talking to a person in authority), section 7 of the *Charter* (because the suspect was not in police detention), hearsay

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14 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).

15 *Hart*, *supra* note 1 (the Supreme Court noted that the fictitious criminal organization was "essentially his new family" at para 227).

16 *Ibid* at para 79.

17 *Ibid* at para 63.

(because it fell under the party admission exception), or the law of entrapment (because the suspect was not charged with an offence committed during his involvement with the fictitious organization).[18] Yet, it was not a product of chance that Mr. Big operations somehow managed to circumvent the letter of all of these laws. Rather, it was by design.[19]

B. The *Hart* Framework: Content and Goals

In 2014, Justice Moldaver, writing for the majority in *Hart*, acknowledged that Mr. Big operations run significant risks for both the administration of justice[20] and for the suspect.[21] In light of these dangers, routinely admitting confessions resulting from these stings is legally and ethically problematic.

Justice Moldaver identified three dangers associated with Mr. Big confessions that needed to be mitigated by any framework that regulated their admission. First, when powerful inducements or veiled threats are used to obtain a confession, the risk that the confession is unreliable increases, potentially leading to a wrongful conviction.[22] Second, because the confessions are obtained in the context of the suspect's involvement in what they believe to be criminal activity, there is a high risk of prejudice towards the accused when this evidence is brought before a trier of fact, especially a jury.[23] The more violent and brutal the scenarios are, the more likely that the evidence provided will include bad character evidence. Bad character evidence creates the risk of a jury deciding that the confession was true and should be believed based on the rationale that someone involved with a criminal organization is capable of also committing the offence they confessed to. Justice Moldaver warned that the combination of powerful inducements or threats used to obtain a confession and the bad character evidence put before juries significantly increases the risk of a wrongful conviction.[24] Third, these operations may become abusive and coercive.

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18 See Lisa Dufraimont, "The Patchwork Principle against Self-Incrimination under the Charter" (2012) 57 SCLR (2d) 241 at 258–62; Coughlan, *supra* note 2 at 417–18.

19 Coughlan, *supra* note 2 at 438.

20 *Supra* note 1 at paras 10, 83.

21 *Ibid* at paras 79, 83.

22 *Ibid* para 6.

23 *Ibid* at paras 74, 145.

24 *Ibid* at para 8.

Police tactics that overbear the will of the accused should not be permitted in obtaining a confession.[25]

For the first prong of the test, the SCC created a new common law confession rule. Under this new rule, all Mr. Big confessions are now presumptively inadmissible.[26] The onus is on the Crown to show at the admissibility stage that, on a balance of probabilities, the probative value of the evidence is higher than its prejudicial effect.[27] Justice Moldaver provides a set of criteria that should be considered by the trial judge in assessing whether the Crown has discharged its burden.

Probative value is determined by the strength of the particular guarantees of reliability; these may derive either from the confession itself or from the circumstances surrounding the confession.[28] Circumstances that should be considered for the purpose of assessing reliability include: the length of the operation, the number of interactions between police agents and the target, the nature of the relations established, the type of inducements used, the presence of threats, the conduct of the police, and the personality of the target (including age, sophistication, and mental health).[29] Other markers of reliability which increase the probative value of the confession include the level of detail of the confession, whether the confession led to any new evidence, and if the target identified elements of the crime which were not made public (so-called 'holdback evidence'). Corroborative evidence is not necessarily required but, where it does exist, it significantly increases the reliability of a confession.[30]

When considering the prejudicial effect of a Mr. Big confession, the judge must be attentive to the moral prejudice that may exist (that is, if the operation portrays the accused as a violent man or having a violent past, he could be seen as a 'bad person') or reasoning prejudice that may confuse the jury (depending on the amount of time needed to detail the operation and controversy over certain events or conversations).[31] The trial judge will decide whether this threshold reliability has been met and the court of appeal must defer to the trial judge's decision on this matter.[32]

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25 *Ibid* at para 11.
26 *Ibid* at para 85.
27 *Ibid.*
28 *Ibid* at para 102.
29 *Ibid.*
30 *Ibid* at para 206.
31 *Ibid* at para 106.
32 *Ibid* at para 110.

If the first prong is met, the judge is then required to consider the second prong. The second prong is essentially a restatement of the abuse of process doctrine: that the police cannot overcome the will of the accused and use coercion to obtain a confession.[33] During the second prong, the burden shifts to the accused to provide evidence of abuse of process. In their assessment, the judge will need to consider if violence or threats of violence were used against the target. If so, it will generally render the operation abusive and the confession should be excluded.[34] However, there are other aspects that should be considered in order to assess if the target was oppressed, specifically whether the police have preyed on a person with vulnerabilities (including mental health issues, addictions, or youthfulness).[35]

The SCC had the opportunity to demonstrate how the majority's test applies in a companion case, *R v Mack*.[36] In assessing the first prong, the important role of confirmatory evidence was highlighted by the Court.[37] Information on holdback evidence or that leads to the discovery of real evidence play a significant role in outweighing heavy prejudice against the accused. In addition, *Mack* also emphasized the role that threats and violence play in increasing prejudice and decreasing probative value. As there were no direct threats and violence present in this case, the Court deemed that the prejudicial value against Mack was low.[38] For the second prong, the SCC found that there was no abuse of process because no overwhelming inducements or threats of violence were used in the operation.[39] Interestingly, the SCC found that there were, in fact, veiled threats of violence through references to previous acts of violence committed by other members of the organization, but they ultimately found that this form of intimidation did not amount to coercion.[40]

Following the *Hart* and *Mack* decisions, some critics were skeptical of how this new framework would play out in practice given that the very

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33 *Ibid* at para 115.

34 *Ibid* at para 11.

35 *Ibid* at para 117.

36 2014 SCC 58 [*Mack*]. The case was jurisprudentially important for the guidelines on jury instruction with regard to Mr. Big evidence. However, jury instructions will not be discussed in this paper, which instead focuses on issues of admissibility.

37 *Ibid* at para 34.

38 *Ibid* at para 35.

39 *Ibid* at para 36.

40 *Ibid.*

foundations of these operations are coercion, deceit, and veiled threats.[41] They were also concerned that the creators of Mr. Big operations would adapt to the new framework, finding creative ways to again elude the black letter law. There were additional concerns that the criteria provided by the *Hart* framework would be watered down as it was applied in future cases.[42]

Nonetheless, *Hart* also received praise, with some scholars expressing hope that the new framework would have a chilling effect on Mr. Big operations which will decrease in both number and intensity.[43] Some scholars praised the framework for providing new tools to be used in the fight against wrongful convictions,[44] for being a more culturally sensitive approach that considers an individual's vulnerabilities,[45] for better preserving *Charter* values,[46] for encouraging courts to be more vigorous in assessing these confessions,[47] and for reinvigorating the abuse of process doctrine and providing stronger protections against state abuse.[48]

For the remainder of this article, we will assess if, based on the information available, any of these predictions have proven true in the past 5 years and if the goals set by *Hart* (to prevent the use of unreliable evidence, the prejudice to the accused, and police misconduct during the operation) appear to be met through the subsequent applications of this framework.

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41 MacLean & Chapman, *supra* note 2 at 188–89; Luther & Snook, *supra* note 2 at 133–38.

42 Iftene, *supra* note 2 at 166–68; Kaiser, *supra* note 2 at 307–08; Hunt & Rankin, *supra* note 2 at 333–35; MacLean & Chapman, *supra* note 2 at 188–89; Luther and Snook, *supra* note 2 at 133–38; Coughlan, *supra* note 2 at 416–18; Stephen Porter, Katherine Rose & Tianna Dilley, "Enhanced Interrogations: The Expanding Roles of Psychology in Police Investigations in Canada" (2016) 57:1 Can Psychol 35 at 37; Christina J Connors, Marc W Patry & Steven M Smith, "The Mr. Big Technique on Trial by Jury" (2018) 25:1 Psychology Crime & L 1 at 18, 21 DOI: <10.1080/1068316X.2018.1483507>.

43 Dufraimont, "Hart and Mack", *supra* note 3 at 486–89; Adrianna Poloz, "Motive to Lie? A Critical Look at the 'Mr. Big' Investigative Technique" (2015) 19:2 Can Crim L Rev 231 at 237–39.

44 Nikos Harris, "Less-Travelled Exclusionary Path: Sections 7 and 24(1) of the *Charter* and *R v Hart*" (2014) 7 CR (7th) 287 at 287; Tanovich, *supra* note 3 at 299.

45 Tanovich, *supra* note 3 at 298.

46 *Hart*, *supra* note 1 at paras 121, 168; Adrien Iafrate, "Unleashing the Paper Tiger: How the Abuse of Process Doctrine Can Overcome Charter Limitations" (2017) 64:1/2 Crim LQ 147.

47 Dufraimont, "Hart and Mack", *supra* note 3 at 499.

48 Lisa Dufraimont, "R v Nuttall and R v Derbyshire: Abuse of Process and Undercover Operation" (2016) 31 CR (7th) 315 at 315, 317.

III. The Application of the *Hart* Framework August 2014–August 2019

A. Overview

Between 2014 and 2019, there were 61 cases in which the *Hart* test was applied to determine the admissibility of confessions obtained through RCMP undercover operations (see the Appendix of this article). Two of these cases were not a result of a Mr. Big operation[49] and 59 were. The confession was admitted by the trial judge in 51 cases. In three cases, the evidence was excluded based on the new common law confession rule (lack of reliability)[50] and it was excluded in four cases due to abuse of process.[51] In three cases, it was unclear whether the confession was or would have been excluded because the accused pled guilty after or during the admissibility voir dire.[52]

In all but two cases[53] where the confession was admitted, the accused was found guilty. There were three cases where the confession was excluded and the following outcomes resulted: the case was dismissed, the Crown withdrew its case, and the accused was acquitted due to a lack of Crown evidence.[54] In two of the cases where the confession was thrown out, the accused was found guilty at trial, but a stay was entered on appeal.[55] In the other two cases the outcome of the case is unknown, as the trial decision was not reported.[56]

As illustrated in the Appendix, numerous cases were never appealed or, when they were appealed, the trial verdict was upheld. In addition to the

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49 *R v Giles*, 2015 BCSC 1744 [*Giles*]; *R v Derbyshire*, 2016 NSCA 67 [*Derbyshire*].

50 *Buckley, supra* note 11 at paras 100–01; *Smith v Ontario*, 2016 ONSC 7222 at para 31 [*Smith*]; *R v South*, 2018 ONSC 604 at para 75 [*South*].

51 *R v Nuttall*, 2016 BCSC 1404 at paras 2, 7 [*Nuttall*]; *R v M(S)*, 2015 ONCJ 537 at paras 71–73 [*M(S)*]; *R v Laflamme*, 2015 QCCA 1517 at paras 87–88 [*Laflamme*]; *Derbyshire*, *supra* note 49 at para 153.

52 *R v Gill*, 2017 BCSC 1026; *R v Duncan*, 2015 BCSC 2688 [*Duncan*]; *R v Pernosky*, 2018 BCSC 1252 [*Pernosky*]. However, we can speculate that the confession in these cases was either admitted or was likely to be admitted, otherwise it is unlikely that the accused would have decided to change his plea.

53 *R v Streiling*, 2015 BCSC 1044 at para 73 [*Streiling*]; *R v Tingle*, 2016 SKQB 212 at paras 404–05 [*Tingle*].

54 *Buckley*, *supra* note 11; *Smith*, *supra* note 50; *Derbyshire*, *supra* note 49 at para 6, respectively.

55 *Laflamme*, *supra* note 51; *Nuttall*, *supra* note 51.

56 *M(S)*, *supra* note 51; *South*, *supra* note 50.

two cases where a stay was entered on appeal, in seven cases a retrial was ordered by the Court of Appeal.[57] In two cases[58], the accused persons pled guilty to lesser offences after being granted retrials.[59] In two other cases, the retrials resulted in the accused persons being found guilty again.[60] The remaining three retrials have not yet been heard or reported.[61]

Between 1990 and 2008, Mr. Big was allegedly used a total of 350 times, with the majority of cases prosecuted resulting in a conviction.[62] If this number is accurate, it means that prior to *Hart*, there were 14 cases on average, per year (including those that made it and did not make it to trial). Since *Hart,* there have been 11 cases per year that have made it to trial. Note that this number does not account for some of the unreported cases where the accused pled guilty, unreported cases that did not result in trial for any other reason, or cases which were ongoing at the time of our review.

Therefore, *Hart* does not appear to have had any impact on either the number of cases brought to trial or the number of cases where the evidence

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57 It is important to note that the case was sent back for retrial for reasons unrelated to the application of the *Hart* framework in all but one case: *R v Ledesma*, 2019 ABQB 88 [*Ledesma*] (the Court of Appeal found that the trial judge did not analyse prejudice adequately. Upon retrial Mr. Ledesma was found guilty again). The rest of the cases were sent back due to insufficient jury instruction (*R v Beliveau*, 2016 QCCA 2133 para 44 [*Beliveau*]; *R v Perreault*, 2015 QCCA 694 at para 99 [*Perreault*]; *R v Larue*, 2019 SCC 25 [*Larue*]; *R v Bernard*, 2019 QCCA 1227 at para 59 [*Bernard*]; *R v Jeanvenne*, 2016 ONCA 101 [*Jeanvenne*]) or an error in limiting the cross examination of a police officer (*R v Worme*, 2016 ABCA 174 [*Worme*]).

58 *Beliveau*, *supra* note 57; *Worme*, *supra* note 57.

59 See Maxime Massé, "Murder of Alain Bernard: Alain Béliveau pleads guilty" (22 November 2017), online: *LaVoixel'Est* <www.lavoixdelest.ca/actualites/granby/meurtre-dalain-bernard-alain-beliveau-plaide-coupable-3d5ab2560aa0e9f6335e5cc7a693eae2> [perma.cc/TF2A-5CTP]; Ryan White, "Sheldon Worme pleads guilty to second-degree murder in vicious attack on Daniel Levesque" (5 September 2018), online: *CTV News* <calgary.ctvnews.ca/sheldon-worme-pleads-guilty-to-second-degree-murder-in-vicious-attack-on-daniel-levesque-1.4081585> [perma.cc/8KGM-3QT6].

60 *Ledesma*, *supra* note 57; *Perreault*, *supra* note 57. See Julia Page, "Alain Perreault found guilty of 1st-degree murder" (29 September 2016), online: *CBC News* <www.cbc.ca/news/canada/montreal/alain-perreault-verdict-2016-1.3779617> [perma.cc/25MY-P53Y].

61 *Larue*, *supra* note 57; *Bernard*, *supra* note 57; *Jeanvenne*, *supra* note 57.

62 Royal Canadian Mounted Police, *Undercover Operations* (British Columbia: RCMP, last modified 1 May 2015), online: *Royal Canadian Mounted Police* <bc.rcmpgrc.gc.ca/> [perma.cc/6Z2S-HM7J]; Keenan & Brockman, *supra* note 14 at 31.

was excluded based on either of the framework's prongs.[63] The fact that most operations (all but eight)[64] were completed or started pre-*Hart* indicates that the *Hart* factors would not have been considered when designing the operations. It is interesting to note that, despite the fact that the confessions considered by judges since 2014 originated from operations designed pre-*Hart* (and which, as discussed below, continued to include the problematic features criticized in *Hart*), these confessions were still mostly admitted when judges applied the *Hart* framework.

B. Application of the Two Prongs by Numbers and Narratives

1. Reliability of the Evidence

The first prong described by Justice Moldaver in *Hart* is the new common law confession rule. Under the first prong, a trial judge must assess the reliability of the evidence by weighing the probative value against the potential prejudice to eliminate the possibility of false confessions and minimize the prejudice towards the accused.[65] In searching for markers of reliability in a Mr. Big confession under the first prong, the following should be considered: the length of the operation, the nature of the relations established, the type of inducements used, the presence of threats, the conduct of the police,[66] the personality of the target (including age, sophistication, and mental health), and the presence or absence of confirmatory evidence.[67] The SCC clarified that:

> In listing these factors, I do not mean to suggest that trial judges are to consider them mechanically and check a box when they apply. That is not the purpose of the exercise. Instead, trial judges must examine all the circumstances leading to and surrounding the making of the confession — with these factors in mind — and

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63 Because all but eight cases were premised on stings that took place entirely or at least started pre-*Hart*, it is not possible to assess whether *Hart* had any impact on the structure and content of the Mr. Big operations themselves.

64 *R v Amin*, 2019 ONSC 3059 [*Amin*]; *Buckley*, *supra* note 11; *R v Burkhard*, 2019 ONSC 1218 [*Burkhard*]; *R v Caissie*, 2018 SKQB 279 [*Caissie*]; *R v Darling*, 2018 BCSC 1327; *R v Lee*, 2018 ONSC 308 [*Lee*]; *Pernosky*, *supra* note 52; *R v Potter*, 2019 NLSC 8 [*Potter*].

65 *Hart*, *supra* note 1 at paras 94–110.

66 The conduct of the police is generally discussed in the reviewed cases in the context of the other factors (under categories such as use of threats or incentives); hence, we were not able to factor it into our analysis separately.

67 *Hart*, *supra* note 1 at paras 102–04.

> assess whether and to what extent the reliability of the confession is called into doubt.[68]

Under this prong, three cases were excluded.[69] In all three cases, not only was there no confirmatory evidence, but the confessions contradicted other evidence that the police had. In *South*, the target (not South) had significant difficulty providing reliable information on the identity of the accused: that the confession was "so unreliable that no reasonable factfinder could accept it as true."[70] In *Buckley*, the target recited the details from his disclosure materials and, when probed on other details, he contradicted the forensic evidence that he did not have access to.[71]

i. Threats and/or Exposure to Violence

Threats and/or exposure to violence were used in 8% of the cases.[72] With two exceptions,[73] all of the confessions from Mr. Big stings involving threats and exposure to violence were admitted. However, in both cases where the confessions were excluded, it was based on the second prong (abuse of process), not due to a reliability issue.

In fact, threats and violence were not generally discussed in connection with reliability. Yet, both threats and violence were deemed in *Hart* to have bearing on the common law confession rule. The presence of coercion makes a confession less reliable and thus decreases its probative value. In addition, the risk of prejudice to the accused is higher if he or she was involved in violent scenarios because the jury may be influenced by a history of violence (that is, it would be bad character evidence).[74]

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68 *Ibid* at para 104 [emphasis added].

69 *Smith*, *supra* note 50; *Buckley*, *supra* note 11 at paras 100–01; *South*, *supra* note 50 at para 114. All three were Mr. Big cases and all three failed on reliability. However, in *South*, the *Hart* framework was loosely applied. The confession was excluded not based on the new common law confessions rule but based on the application of *KGB*.

70 *Supra* note 50 at paras 5–8, 113. The judge clearly stated that the lack of confirmatory evidence was a big issue. However, he went on to say that even had it passed this prong, it would have failed at abuse of process because the scenarios incorporated a combination of threats and strong inducements.

71 *Supra* note 11 at para 55.

72 *R v RK*, 2016 BCSC 552 at paras 12, 44 [*RK*]; *Tingle*, *supra* note 53 at paras 28–31; *Potter*, *supra* note 64 at paras 20, 137; *R v Balbar*, 2014 BCSC 2285 at para 195 [*Balbar*]; *R v Randle*, 2016 BCCA 125 at paras 42–43 [*Randle*], *Laflamme*, *supra* note 51 at para 56; *Derbyshire*, *supra* note 49 at paras 59, 61.

73 *Laflamme*, *supra* note 51; *Derbyshire*, *supra* note 49.

74 *Hart*, *supra* note 1 at para 106.

Justice Moldaver said in *Hart* that confirmatory evidence can go a long way in increasing the probative value of a confession.[75] However, this explanation for why confessions obtained in violent scenarios were admitted only holds up in *Potter*, where the confession contained a lot of holdback information and details that went beyond the mundane aspects of the crime.[76] In *Balbar*, there was some confirmatory evidence (that is, information provided by the accused that was not publicly available) but it contained numerous inconsistencies.[77] In *RK*, *Randle*, and *Tingle*, there was no confirmatory evidence of any kind.[78]

Another issue raising concerns about the narrative employed around violence was the tendency to use the accused's willingness to partake in the criminal organization and their criminal past as evidence to increase probative value. A history of crime or violence is generally considered to be prejudicial; when used at trial, it may amount to bad character evidence and should be excluded.[79] It is true that the willingness to engage in violent scenarios or past history is used at the admissibility stage to establish the likelihood that the individual voluntarily engaged in that type of criminal organization. Thus, it is not used as true propensity evidence in the sense that the accused has likely committed the offence due to their record. However, if the Mr. Big scenario is admitted to trial, that can also be considered bad character evidence and should, at the very least, be edited or a warning to the jury should be given. Not only did the judges find that the use of violence did not increase the prejudice or decrease the probative value of the confession, but in the cases of *Balbar*, *Potter*, *RK*, and *Randle*, the target's openness with the crime boss was highlighted as evidence of the target not feeling personally threatened by the violent scenarios they were exposed to and the unedited scenarios made it into the trial. For example:[80]

> Given the nature of the murder being investigated, it is understandable that police would want to create an atmosphere in which [the target] would feel comfortable discussing violence involving the use of firearms.[81]

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75 *Ibid* at para 105.

76 *Potter*, *supra* note 64 at paras 126–27.

77 *Supra* note 72 at para 366.

78 *RK*, *supra* note 72; *Randle*, *supra* note 72; *Tingle*, *supra* note 53.

79 The issues with bad character and its relation to prejudice is explained in *Hart*, *supra* note 1 at paras 73–74.

80 *Balbar*, *supra* note 72 at paras 57, 206, 354, 362; *Potter*, *supra* note 64 at paras 196, 220; *RK*, *supra* note 72 at paras 52, 79; *Randle*, *supra* note 72.

81 *RK*, *supra* note 72 at para 708.

> Mr. Balbar was more than willing to participate in activities involving crime and threatened and feigned violence directed towards others.[82]
> Mr. Potter spoke to Cpl. R. of his own volition and he was ready, willing and even eager to do whatever he could to endear himself to Cpl. R. so he could work with him.[83]

There is no mention of the possibility that these targets spoke to the crime boss precisely because of fear. If arguments such as "confessing after exposure to violence is an indication of comfort" or "someone previously involved in crime would not be intimidated by violence" are found by judges to increase probative value of a confession, it is unclear if anything short of physically beating the confession out of the target would count as coercion. We suggest that this type of analysis does not represent the spirit of the *Hart* framework and it raises further issues regarding abuse of process. This is discussed more in the next chapter.

ii. Vulnerabilities

Hart held that, in assessing the probative value of a confession, particular attention ought to be paid where the target has identifiable vulnerabilities.[84] Vulnerabilities of the target may negatively influence the reliability of the confession, given that the operation itself revolves around manipulation and vulnerable targets may be easier to coerce into wrongly confessing in certain circumstances.

In 67% of all of the cases and 54% of the cases where the evidence was admitted, the trial judge identified the presence of at least one vulnerability (this distribution is shown in Table 1). In 16% of all of the cases, the judge specifically noted that the target had no identifiable vulnerability. In all of these latter cases, the confession was admitted.

In 17% of the cases, the presence or absence of vulnerabilities was not mentioned at all in the decision. In light of the prominent role that these play in Mr. Big stings and the SCC's direction that the presence of vulnerabilities should be incorporated into the analysis, we question how thorough the analyses conducted in some of these cases have been.

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82 *Balbar*, *supra* note 72 at paras 383.

83 *Potter*, *supra* note 64 at para 237.

84 *Supra* note 1 at paras 102–03.

Table 1: Distribution of Cases Where Vulnerabilities Were Identified Based on Types of Vulnerabilities

Vulnerability identified	% (n)
History of abuse	8% (5)
Unstable housing	8% (5)
Lack of sophistication	20% (12)
Mental health illnesses other than addiction	15% (9)
Addiction	20% (12)
Youth (under 25)	23% (14)
No family or social ties	26% (16)
Significant financial difficulties	31% (19)
Total	67% (41)

* In some cases, more than one variable applies

Upon reviewing the cases where vulnerabilities were identified, several patterns regarding the manner in which judges incorporated these traits as markers of reliability in their analyses were apparent.

First, certain types of vulnerability appear to be given less consideration than others. For instance, despite the fact that *Hart* mentioned youthfulness as one of the vulnerabilities that ought to be given special consideration in an analysis,[85] young age (where the individual is in their late teens or early 20s) is often not addressed in a nuanced or consistent manner by judges. In some instances, young age is mentioned in the decision simply as part of the description of the accused person (essentially just 'background information')[86] or discussed in some contexts but not in relation to the probative value versus prejudicial effect analysis. For example, the accused was 15 years old at the time of the commission of the alleged offence in *R v M(S)*.[87] His youthfulness was discussed in depth in relation to the law of statements made to police by young persons under the *Youth Criminal Justice Act* (YCJA), but the impact of his youthfulness on the reliability of the confession was not analyzed.

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85 *Ibid* at para 103.

86 *Lee*, *supra* note 64 at para 125; *R v Omar*, 2016 ONSC 4065 at para 7 [*Omar*]; *RK*, *supra* note 72 at para 15.

87 *Supra* note 51 at para 3. It should be noted that the confession in this case was excluded based on abuse of process, not reliability.

There was also at least one instance where the youthfulness of the accused was not even mentioned in the decision, let alone factored into the probative value analysis. For example, in *R v Tang*[88] the accused was only 22 years old at the time of the alleged commission of the offence. We identified his age through news articles published during his trial.[89] There are several decisions we reviewed where age is not mentioned; it is possible then that youthfulness has been disregarded in more instances than we were able to identify.

We also noted a pattern that showed that age was often minimized by judges through qualifiers like the young person having 'street smarts'[90] or the appearance of maturity.[91] For instance, in *Lee*, the judge commented that "[w]hile he may not have been well-educated, he was street smart. He was young, but he was not naïve."[92] Mr. Lee was 23 years old with a grade 9 education. His mother had died of cancer when he was 15 years old. His father was an abusive alcoholic. Mr. Lee was poor and sold drugs to support himself. Despite the police creating scenarios which involved financial inducements and tasking Mr. Lee with collecting items needed to dispose of a body, the confession to Mr. Big was admitted "with some modest editing."[93]

Once again, there appeared to be a trend to use past violent or criminal behavior to minimize vulnerabilities and increase the probative value of the confession. For example, in *R v Subramaniam*, despite the accused person being only 19 years of age and the judge recognizing that "youthfulness is an element that must be seriously taken into consideration",[94] his youthfulness is juxtaposed with his criminal record: "Subramaniam cannot be described as a weak individual. The record shows that he is already evolving in the criminal world at the time of the events."[95]

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88 2015 BCSC 1643 [*Tang*].

89 See e.g. "Richmond man found guilty of 2nd-degree murder in mother's death" *CTV News Vancouver* (12 November 2015), online: *CTV News Vancouver* <bc.ctvnews.ca/richmond-man-found-guilty-of-2nd-degree-murder> [perma.cc/XC8L-QRP3].

90 See e.g. *R v Knight*, 2018 ONSC 1846 at para 45 [*Knight*]; *R v M(M)*, 2015 ABQB 692 at paras 80, 112, 119, 123, 169-170 [*M(M)*]; *Lee, supra* note 64 at paras 145, 150, 287, 303, 334.

91 See e.g. *RK*, *supra* note 72 at paras 65, 314, 536.

92 *Supra* note 64 at para 145.

93 *Ibid* at para 123.

94 2015 QCCS 6366 at para 34 [*Subramaniam*].

95 *Ibid* at para 35.

Second, addictions and mental illnesses tended to be given only a cursory mention if there was no concrete evidence that the police directly took advantage of them. Mr. Balbar had severe addictions and low intellectual abilities. The judge commented:

> On this basis, I am unable to find that Mr. Balbar had a sufficiently low level of intellectual capacity or adaptive functioning so as to warrant a finding that he was too vulnerable a person to be a target in Project Eventail. To the contrary, the evidence of how Mr. Balbar actually behaved during the Mr. Big operation and the very limited evidence about his background and lifestyle portrays a person who may be of limited intelligence, yet, for whatever reason, possesses considerable "street smarts" and an eclectic store of knowledge and skills, the full extent of which remains unknown.[96]

Third, the financial situation of the target generally did not impact any analyses. Even in cases where the target's financial situation was bad, they were on social assistance, had a long history of unemployment and social isolation, and large financial incentives were provided, there was still no impact on the probative value of the confession because the target was not "destitute".[97]

Finally, it is worth noting that in many cases, regardless of the vulnerabilities identified, these were often just noted and not fully engaged with. They were, thus, used by judges as a checklist, which Justice Moldaver specifically warned against in *Hart*.[98] In a number of cases where a target's vulnerabilities were discussed by judges more thoroughly, the conclusion

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96 *Balbar*, *supra* note 72 para 337.

97 *R v Johnston*, 2016 BCCA 3 at para 58 [*Johnston*]; *Beliveau*, *supra* note 57 at para 13; *Randle*, *supra* note 72 at para 83; *R v Allgood*, 2015 SKCA 88 [*Allgood*].

98 *R v Bahia and Baranec*, 2016 BCSC 2686 at paras 4–5; *Buckley*, *supra* note 11 at para 60; *R v Carlick*, 2018 YKCA 5 at para 62 [*Carlick*]; *R v Charlie*, 2017 BCSC 2187 [*Charlie*]; *Giles*, *supra* note 49 at para 296; *R v Handlen*, 2018 BCSC 1330 at paras 156, 645, 654 [*Handlen*]; *Jeanvenne*, *supra* note 57 at para 27; *R v Johnson*, 2016 QCCS 2093 at paras 58, 66, 694, 698 [*Johnson*]; *R v Keene*, 2014 ONSC 7190 at para 148 [*Keene*]; *Laflamme*, *supra* note 51 at para 31; *Lee*, *supra* note 64 at para 364; *M(M)*, *supra* note 90 at paras 168–69, 181; *M(S)*, *supra* note 51 at para 75; *R v Magoon*, 2018 SCC 14 [*Magoon*]; *R v MacDonald*, 2018 ONSC 952 at para 18 [*MacDonald*]; *R v Niemi*, 2017 ONCA 720 at para 3 [*Niemi*]; *Nuttall*, *supra* note 51 at para 49; *Pernosky*, *supra* note 52 at para 39; *Potter*, *supra* note 64 at paras 183–84; *RK*, *supra* note 72 at para 538; *Randle*, *supra* note 72 at para 83; *R v Shaw*, 2017 NLTD(G) 87 at para 58 [*Shaw*]; *South*, *supra* note 50 at para 84; *Subramaniam*, supra note 94 at paras 13, 36; *R v West*, 2015 BCCA 379 at para 100 [*West*]; *R v Wilson*, 2015 BCCA 270 [*Wilson*]; *R v Zvolensky*, 2017 ONCA 273 [*Zvolensky*]; *Smith*, *supra* note 50.

was that the police did not prey on the target's vulnerabilities, despite recognizing that they had vulnerabilities that the police were aware of.[99]

We suggest that, based on the multitude of cases in which the targets had identifiable vulnerabilities, as well as the superficial and inconsistent manner in which judges sometimes factored them into their analysis, courts may frequently struggle with understanding the impact of the presence of vulnerabilities on the reliability of confessions. These concerns are amplified in cases where significant incentives were used and where there was a complete lack of confirmatory evidence. This is discussed more fully in the next sections.

iii. Incentives

Mr. Big operations revolve around the idea of incentives. Incentives are what motivate an individual to join the organization and eventually confess that they committed a serious offence. Thus, it is not a question of whether there were incentives provided in Mr. Big operations; that is a given. The question is how strong those incentives were. In *Hart*, Justice Moldaver expressed concerns about some incentives being so strong that they could lead individuals into false confessions.[100] Thus, the stronger the incentive offered in exchange for the confession, the lower the probative value.[101]

The strength of an incentive cannot be assessed in isolation. It is directly linked to the personality of the accused. For instance, money and jobs are much stronger incentives for someone in dire economic circumstances than for someone who has financial stability. Similarly, alcohol is a weak incentive unless someone has an addiction and lacks the money necessary to feed it. People with lower levels of sophistication or mental disabilities may be more easily enticed by seemingly weaker incentives. Justice Moldaver emphasized that incentives need to be considered contextually, in conjunction with the presence or absence of vulnerabilities and confirmatory evidence.[102] Justice Moldaver's approach should, theoretically, allow for a balanced analysis that meets the goals of the *Hart* framework. It raises red flags that there was no reference to the presence or absence of

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99 *Amin*, *supra* note 64 at paras 39, 44–45; *Balbar*, *supra* note 72 at para 337; *Ledesma*, *supra* note 57 at para 7; *R v Moir*, 2016 BCSC 1720 at paras 499, 545 [*Moir*]; *Omar*, *supra* note 86 at paras 23–27; *Perreault*, *supra* note 57 at paras 87–89; *R v Wruck*, 2016 ABQB 370 at paras 21–22 [*Wruck*].

100 *Hart*, *supra* note 1 at paras 69, 140, 165.

101 *Ibid* at para 69.

102 *Ibid* at paras 102–03, 117, 194.

incentives in 20% of the cases. In 5% of the cases, the judge noted that the incentives used were mild (usually involving some type of promise). In 75% of the cases, the judge identified at least one stronger incentive that was utilized. This distribution is shown in Table 2.

Table 2: Distribution of Cases Where Incentives Were Used, Based on Types of Incentives

Incentive used	% (n)
Money/attractive lifestyle	66% (40)
Meaningful friendships/family-like relationships	44% (27)
Good employment	5% (3)
Promise that their legal issues will disappear	20% (12)
Total	75% (46)

* In some cases, more than one variable applies

Numerically, the presence of strong incentives did not appear to make a difference on whether the confession was admitted. In 67% of the cases where evidence was admitted, identifiable incentives were used. While this statistic is of concern, it is not problematic on its own, as the strength of an incentive should be analyzed contextually. Nonetheless, upon a qualitative analysis, we were once again able to discern some problematic trends in how incentives are factored into the decision.

First, contrary to the suggestion in *Hart*, large sums of money never appeared to be considered by judges to be strong enough incentives to decrease probative value, even when used for a target who was unemployed or destitute.[103] For example, the target in *Allgood* was introduced to a lifestyle of expensive restaurants and hotels.[104] He was paid $8,500 over four months and all of his expenses were covered by the organization. He was also promised a $25,000 payout. Prior to the operation, Mr. Allgood was unemployed with no job prospects. In *R v Zvolensky*,[105] the undercover officer promised to significantly fund the purchase of a business that he and

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[103] See e.g. *Amin*, *supra* note 64; *Balbar*, *supra* note 72 at para 183; *Beliveau*, *supra* note 57 at paras 40, 64; *Jeanvenne*, *supra* note 57 at paras 15, 27; *Johnston*, *supra* note 98 at paras 58, 66; *Randle*, *supra* note 72 at para 83; *Niemi*, *supra* note 98 at paras 4, 36; *Nuttall*, *supra* note 51 at para 49; *Perreault*, *supra* note 57 at paras 14, 38.

[104] *Supra* note 97 at para 11.

[105] *Supra* note 98 at paras 41, 44.

the target would run together (including telling the target that he had $500,000 to invest in the business). Mr. Zvolensky was told that he would become the manager. The undercover officer even bought Mr. Zvolensky expensive clothes "so he would look like a businessman."[106]

The strong bonds that developed between the target and operatives never contributed to a finding of a lack of reliability in the confession, despite the fact that the relationship could factor in as an incentive to confess (fear that they may lose that relationship if they did not confess to what the operative wants to hear). *Hart* listed the creation of strong bonds as a distinct factor that should be considered in any analysis, as it may be easier to persuade someone to confess in the context of a close relationship.[107]

In half of the cases reviewed, the judges noted that those relationships were central to the case. For instance, the target in *Allgood* stated that he felt he was treated like a family member, in addition to receiving significant amounts of money.[108] Similarly, in the cases of *Hales* and *Niemi*, the targets stated that they felt the undercover officers were like brothers to them.[109] In *M(M)*, the undercover operative and target developed a strong mentor/mentee relationship.[110] In *Moir*, the target was enticed by "a sense of importance, collegiality, friendship, and respect."[111] In *Perreault*, the court noted: "[t]he scenarios were also designed to forge a bond between the appellant and the primary police operative, whom he considered his best friend and whom he trusted completely."[112] In *Subramaniam*, the 19 year-old target had a history of addictions and fell in love with the operative.[113] In *M(S)*, the father of the target was employed as an agent of the state. The target was young and desperate to have a relationship with his father who had not been part of his life until that point.[114] In all of these cases, the judges did not even consider these foundational relationships as incentives

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106 *Ibid* at para 41.

107 *Supra* note 1 at para 102.

108 *Supra* note 97 at para 11.

109 *R v Hales*, 2014 SKQB 411 at paras 54, 112 [*Hales*]; *R v Niemi*, 2012 ONSC 6385 at para 56 aff'd *Niemi*, *supra* note 98.

110 *Supra* note 90 at para 79.

111 *Supra* note 99 at para 365.

112 *Supra* note 57 at para 14.

113 *Supra* note 94 at para 33.

114 *M(S)*, *supra* note 51 at para 7. As previously mentioned, the confession was excluded in *M(S)* due to a finding of abuse of process.

that may have persuaded the target to confess.

Finally, the promise that the organization could make the target's legal issues disappear was commonly employed. Such promises were generally brushed away by judges and, while mentioned, their impacts on the targets were not discussed.[115] This is surprising, given that the targets were often made to believe that their arrest was imminent and that they were often provided with the opportunity to witness other people's alleged problems being solved by the organization. The lack of emphasis on this issue may be due to the fact that the promise is not made by someone the suspect knows to be a person in authority and hence, someone who is legally able to make the suspect's issues disappear. Yet, when faced with an imminent arrest (even for a crime the suspect did not commit), a promise to make it go away seems equally persuasive when the person making it has the perceived power, whether legal or otherwise, to do so. Once again, this was all the more problematic in cases where no confirmatory evidence (discussed below) was present.

iv. Length of the Operation

The operation in *Hart* lasted four months and involved 63 scenarios. The SCC described it as "lengthy"[116] and factored that into their analysis. A longer operation, thus, may be indicative of an increased potential for coercion, but it also runs the risk of increasing both the moral prejudice against the accused (because the accused voluntarily stayed involved in a criminal organization for a long time) and the reasoning prejudice (a long, convoluted operation may confuse the jury).[117]

In many of the post-*Hart* cases, the duration of the operations was longer than four months and often included a similar, or an even greater, number of scenarios[118] (Table 3). The longest operation, *R v Ader*,[119] lasted

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115 *Beliveau*, *supra* note 57; *Keene*, *supra* note 98 at paras 71, 98; *R v Klaus*, 2017 ABQB 721 at para 75 [*Klaus*]; *Knight*, *supra* note 90 at paras 122, 125; *Ledesma*, *supra* note 57; *Lee*, *supra* note 64 at para 415; *Magoon*, 2015 ABQB 35 at para 44; *RK*, *supra* note 72 at paras 440–41; *Carlick*, *supra* note 98 at para 24; *South*, *supra* note 50 at para 88; *Tang*, *supra* note 88 at para 78.

116 *Hart*, *supra* note 1 at paras 12, 133.

117 *Ibid* at para 106.

118 See e.g. *Pernosky*, *supra* note 52; *Larue*, *supra* note 57; *R v Kelly*, 2017 ONCA 621 [*Kelly*]; *Carlick*, *supra* note 98 at para 62; *Shaw*, *supra* note 98 at para 34; *Magoon*, *supra* note 98; *M(M)*, *supra* note 90 at para 9; *Johnson*, *supra* note 98 at para 635; *MacDonald*, *supra* note 98; *Handlen*, *supra* note 98 at para 110; *Keene*, *supra* note 98 at para 99.

119 2017 ONSC 4643 at para 4 [*Ader*].

eight years.

Table 3: Distribution of Cases Based on the Length of the Operation

Length of Operation	% (n)
< 3 months	9.8 (6)
3–5 months	37.7 (23)
6–11 months	31.1 (19)
12 months or more	4.9 (3)
ND	16.4 (10)
Total	100 (61)

The length of the operation was never discussed in any of the cases involving lengthy operations; rather it was only mentioned as background information on the case. In 16% of the cases, information on the length was altogether absent. While it may be understandable that the length of the operation had less of an impact on the confession's reliability in cases where there was strong confirmatory evidence (as an example),[120] it is concerning (and contrary to the guidance from *Hart*) that judges do not even discuss this as a factor worthy of consideration.

It was more likely that judges would engage with the length when the operation was somewhat short;[121] however, the manner in which length was factored into the decision was not consistent. In some cases, the short length was cited as a factor that reduced the prejudice.[122] In other cases, such as *Potter*, the judge found that the four month operation was rushed because the operative wanted to expose Mr. Potter to criminal activity that simulated the crime they were investigating.[123] The officer mentioned that he would usually plan a Mr. Big operation to be longer in duration and would involve "40 to 60 scenarios, allowing more time for him and the target to be at ease

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120 *Ibid.* In *Ader*, for instance, his confession to Mr. Big included strong confirmatory evidence, including details of his role in the kidnapping and references to 'holdback' details that would have only been known by someone who was involved in the commission of the offence.

121 However, in the case of a number shorter operations, length was still not discussed as a relevant factor: *M(S)*, *supra* note 51 (two months); *Worme*, *supra* note 57 at para 7 (2 months); *Niemi*, *supra* note 98 at para 14 (2.5 months); *West*, *supra* note 98 (3 months).

122 *Tang*, *supra* note 88 at para 59 (less than a month); *Knight*, *supra* note 90 at para 5 (3 months and 9 days).

123 *Supra* note 64 at para 134.

with each other."[124] Thus, what was deemed as a short length and fewer interactions had a negative impact on the probative value of the confession.

While entirely speculative at this stage, it is possible that the courts' approach to length is indicative of an emerging trend that is perhaps an unintended, collateral consequence of *Hart*. Given that *Hart* placed an increased value on confirmatory evidence, obtaining confirmation may require longer operations. As a result, courts may be willing to overlook length in the hopes of encouraging the police to invest more time in seeking confirmation for the confessions they obtain.

v. Presence of Confirmatory Evidence

Hart seems to suggest that strong confirmatory evidence[125] may often overcome heavy prejudice and limit the negative impact of identifiable vulnerabilities and incentives on the target. Justice Moldaver noted that:

> Confirmatory evidence is not a hard and fast requirement, but where it exists, it can provide a powerful guarantee of reliability. The greater the concerns raised by the circumstances in which the confession was made, the more important it will be to find markers of reliability in the confession itself or the surrounding evidence.[126]

In 70% of the cases, there was some confirmatory evidence in the form of either a detailed confession that included holdback information (44%),[127] a confession that led to some real evidence (10%),[128] independently obtained evidence for confirmation (5%),[129] or forensics confirming details given by the target in the confession (11%).[130] In some cases, there were

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124 *Ibid* at para 136.

125 What we are referring to as confirmatory evidence (based on our case review and on *Hart*) includes: holdback information, independently obtained evidence, and forensic confirmation of details in the confession.

126 *Hart*, *supra* note 1 at para 105.

127 See e.g. *Ader*, *supra* note 119; *Balbar*, *supra* note 72 at para 192; *Beliveau*, *supra* note 57; *Hales*, *supra* note 109 at para 141; *Keene*, *supra* note 98 at paras 83–84; *Klaus*, *supra* note 115 at para 115; *M(M)*, *supra* note 90; *MacDonald*, *supra* note 98 at para 18; *Mildenberger*, *supra* note 11 at para 79; *Moir*, *supra* note 99 at paras 41, 77–79; *Potter*, *supra* note 64 at paras 129–31; *Tang*, *supra* note 88 at para 54; *Subramaniam*, *supra* note 94 at para 82; *Shaw*, *supra* note 99; *Shyback*, 2017 ABQB 332 at paras 18–20 [*Shyback*]; *Wilson*, *supra* note 98 at para 2; *West*, *supra* note 98 at para 88–89.

128 *Carlick*, *supra* note 98 at paras 60–61; *Handlen*, *supra* note 98; *Keene*, *supra* note 98; *Omar*, *supra* note 86 at paras 49–55.

129 *Burkhard*, *supra* note 64 at para 96; *Omar*, *supra* note 86 at paras 53–55; *Perreault*, *supra* note 57; *Zvolensky*, *supra* note 98 at para 86.

130 *Burkhard*, *supra* note 64 at paras 91–92; *Omar*, *supra* note 86 at para 49; *Streiling*, *supra*

multiple types of confirmatory evidence. Whenever the judge listed confirmatory evidence of any kind, the importance of such evidence in increasing the confession's reliability was always highlighted. In all but one case,[131] the confession was admitted where confirmatory evidence was present, regardless of the type or quality.

It appears that courts have taken the position that confirmatory evidence (regardless of quality) is a sufficient condition for proving reliability, but not a necessary one. For instance, confessions were admitted in cases where the target was identified as vulnerable and/or where strong incentives were used and where the "confirmatory" evidence was deemed inconsistent or its accuracy could not be confirmed.[132] There were also cases where some confirmatory evidence was mentioned, but it was not engaged with or it was not provided with meaning in the context of the other factors.[133]

Moreover, in 30% of the cases, the judges either did not discuss confirmatory evidence at all or specifically mentioned that it did not exist.[134] It is of concern that in 18% of the cases, the evidence was admitted, despite the fact that the target had at least one identifiable vulnerability and there was no confirmatory evidence.[135] In at least five of the cases where the evidence was admitted, the target had a vulnerability (including financial, social alienation, addiction, mental illness, or a combination of these), at least one incentive was used (including money, promises to make the legal issues go away, friendship, or a combination of these), there was no

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note 53.

131 *Derbyshire*, *supra* note 49. There was significant confirmatory evidence, but the confession was excluded as having been obtained through abuse of process. Notably, *Derbyshire* is not a Mr. Big case.

132 *Balbar*, *supra* note 72 at paras 337, 366; *R v Bradshaw*, 2017 SCC 35 at paras 88–89; *Carlick*, *supra* note 98 at para 59; *Jeanvenne*, *supra* note 57 at paras 47–53; *Subramaniam*, *supra* note 94 at paras 86, 89; *Wruck*, *supra* note 99 at paras 37–38.

133 See e.g. *M(M)*, *supra* note 90 at paras 127–28, 136, 146; *Shyback*, *supra* note 127 at paras 18–20.

134 *Bernard*, *supra* note 57; *R v Campeau*, 2015 ABCA 210; *Duncan*, *supra* note 52; *Giles*, *supra* note 49; *M(S)*, *supra* note 51; *Niemi*, *supra* note 98; *Charlie*, *supra* note 98; *Caissie*, *supra* note 64 at paras 245–46; *Johnston*, *supra* note 97; *Larue*, *supra* note 57; *Ledesma*, *supra* note 57; *R v Skiffington*, 2019 BCSC 178; *Tingle*, *supra* note 53; *Randle*, *supra* note 72.

135 See e.g. *Randle*, *supra* note 72 at paras 78, 81; *Niemi*, *supra* note 98 at para 36; *Allgood*, *supra* note 97 at para 58; *Amin*, *supra* note 64 at para 38; *Johnston*, *supra* note 97 at paras 21, 58; *Ledesma*, *supra* note 57; *MacDonald*, *supra* note 98 at paras 4, 10, 23.

confirmatory evidence, and the target was under 25 years of age.[136] In two of these cases, in addition to the presence of these factors and the lack of confirmation, threats were used and the targets were involved in violent scenarios.[137] A similar combination of factors was identified in four other cases where the confession was excluded.[138] Yet, with the notable exception of *Buckley*, the exclusion in these other cases was still not due to the Crown's inability to establish reliability. Rather, the confession was excluded due to an abuse of process.[139]

In the cases where there was no confirmatory evidence, the judges never engaged with its absence in the analysis. In other words, the absence of confirmatory evidence was ignored when assessing reliability, while the presence of vulnerabilities and incentives was minimized, as described in the previous sections.

While the sample is too small to claim statistical significance, it is suggestive that the creation of the new common law evidentiary rule does not appear to have influenced the admissibility of confessions. This is not only because very few confessions have been excluded, but because it is unclear what would constitute unreliable or reliable evidence based on the applications of the *Hart* test. It is not just that there are some discrepancies in the weight judges place on each factor; that would be understandable given that judicial discretion is permitted in this matter.[140] The bigger issues are that, 61 cases after *Hart*, there is still no trace of a pattern in how the various factors are balanced, some of these factors are not always considered, and oftentimes, even when they are considered, the judge's analysis looks like a checklist as opposed to a nuanced balancing. If any pattern is to be

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136 *Worme*, *supra* note 57; *Magoon*, *supra* note 98; *Omar*, *supra* note 86 at paras 7, 23; *RK*, *supra* note 72; *Charlie*, *supra* note 98; *Randle*, *supra* note 72. In these cases, the judge also did not identify abuse of process.

137 *RK*, *supra* note 72; *Randle*, *supra* note 72 at para 4.

138 *Buckley*, *supra* note 11 at paras 100–01; *Laflamme*, *supra* note 51 at paras 31, 44, 48, 65; *South*, *supra* note 50; *M(S)*, *supra* note 51 at paras 74–76.

139 It may be helpful to recall that, based on the *Hart* framework, the judge will assess the abuse of process only once the Crown has established, on a balance of probabilities, the reliability of the evidence.

140 There are, however, examples of extreme situations where the evidence was admitted and yet there were absolutely no factors that could reasonably be argued to increase probative value. For instance, in some of the cases discussed above, the confessions were admitted despite not being corroborated in any way and obtained through a number of incentives (including threats) from an unsophisticated individual struggling with significant financial difficulties and legal problems.

identified, it appears that the three cases where the common law confession rule lead to the exclusion of the confession were at odds with what otherwise appears to be a consistent approach: courts tend to overwhelmingly find that the probative value of the confession is higher than the prejudice and that Mr. Big obtained confessions are reliable, regardless of variations in the operation's scenarios.

2. Abuse of Process

Based on the *Hart* framework, even when the evidence is deemed reliable, reliability will not justify the use of any investigative tactics.[141] Rather, there are inherent limits to police power to manipulate for the purpose of obtaining a confession.[142] These limits exist in order to guard against state power that society finds unacceptable and which threatens the integrity of the justice system. Thus, the judge will have to consider if the tactics employed threaten the fairness of the trial for the second prong. If the confession was coerced through threats or exposure to violence, abuse of process will almost always be present and the confession ought to be excluded.[143] Also, if the police preyed on the target's vulnerabilities, it is possible that the practice was abusive and, thus, the confession ought to be excluded.[144] Other factors may also be considered to assess abuse of process.[145]

i. The Role of Violence and Threats

In *Derbyshire*, abuse of process was found based on the extreme level of violence involved. Ms. Derbyshire was kidnapped and threated into confessing. The Court of Appeal judge upheld the trial judge's finding that Ms. Derbyshire "made admissions because of fear created by the threatening conduct of police officers. Whatever the respondent's prior or current role in illegal activities, it does not give to the police carte blanche to coerce confessions"[146] Yet, it is important to note that this was not a Mr. Big scenario. This undercover operation was based on direct coercion, which is rare in a Mr. Big scenario. In a second case where abuse was found based on violence, *Laflamme*, the target was told that if he did not confess, his

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141 *Hart*, *supra* note 1 at para 112.
142 *Ibid*.
143 *Ibid* at paras 115–16.
144 *Ibid* at para 117.
145 *Ibid* at para 118.
146 *Derbyshire*, *supra* note 49 at para 142.

friend would be killed: "[h]e put his head on the chopping block for you."[147] That, together with extensive and extremely violent scenarios, led the judge to find that the behaviour of the police was unacceptable and coercive.[148]

In 8% of the cases, despite the presence of threats or violence, the judges found that there was no abuse of process because these were not overt. In *Randle*,[149] the accused was exposed to what appeared to be a kidnapping and murder of a police informant. The accused's confession was admitted, and he was convicted. The Court of Appeal, in reviewing the Mr. Big evidence, stated:

> The officers created an air of intimidation by referring to violent acts committed by members of the organization but did not threaten the appellant with violence if he would not confess. None of the undercover officers' conduct was said to approach abuse of the nature that would render the accused's statement inadmissible".[150]

In *Balbar*, the judge acknowledged the extensive threats and violence used in the scenarios, yet stated:

> While the Court is, of course, reluctant to be seen to condone any sort of violence, threatened violence, racism or misogyny, it must be remembered that in terms of violence and threatened violence, it is all staged, feigned and designed for a very specific purpose. The words spoken and the activities of the police officers are directed at creating an atmosphere considered appropriate for their investigation…Mr. Balbar was more than willing to participate in activities involving crime and threatened and feigned violence directed towards others. His prior criminal record and other evidence indicate that Mr. Balbar had a familiarity with crime and a lifestyle associated with illegal drugs and property offences. He was not personally threatened.[151]

In *Potter*,[152] one of the scenarios involved undercover officers enlisting Mr. Potter's help to dispose of an alleged human corpse (it was, in fact, a pig corpse). The officers told Mr. Potter that things had gone wrong when they went to collect money from a debtor and that they needed his help to dispose of the evidence.[153] In that case, the judge found no issue with the

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147 *Supra* note 51 at para 87.

148 *Ibid* at paras 84–87. It should be noted that, despite excluding the evidence, Laflamme was found guilty by the trial jury. On appeal, the court overturned the decision and entered a stay of proceedings.

149 *Supra* note 72 at para 4.

150 *Ibid* at para 67 [emphasis added].

151 *Supra* note 72 at paras 382–83 [emphasis added].

152 *Supra* note 64 at paras 54–55.

153 *Ibid* at para 52.

conduct of the police and did not analyze how the violent scene which Mr. Potter was exposed to may impact the reliability of the confession.[154] Instead the judge stated: "Mr. Potter spoke to Cpl. R. of his own volition and he was ready, willing and even eager to do whatever he could to endear himself to Cpl. R. so he could work with him."[155]

In *RK*,[156] the Mr. Big confession was also admitted even though the accused was subjected to two violent scenarios (scenarios 25 and 40). In scenario 25, the officer slapped an individual in the face, who had allegedly wronged him, in front of the target, and then "punched him in the stomach, slapped him a second time and kicked his hat that had fallen on the ground."[157] Although this was simulated violence, the accused believed that it was genuine. In scenario 40, the undercover officer simulated another assault, completed with fake blood coming from the person's mouth. The officer also told the victim (in front of the accused): "you fucken see me coming or you see her coming that means you're fucken dead, and I will kill you, I will fucken kill you, you don't talk to the fucken cops."[158] The judge noted that "these scenarios had a legitimate purpose"[159] and that "[g]iven the nature of the murder being investigated, it is understandable that police would want to create an atmosphere in which [the target]...would feel comfortable discussing violence involving the use of firearms."[160]

Indeed, the SCC has been clear that the creation of an air of intimidation in and of itself is not the issue; rather it is when that intimidation coerces the accused to provide incriminatory evidence.[161] However, the coercive intimidation can arise from direct or indirect threats and exposure to violence. While there is no bright light from where the operations become abusive,[162] the simple fact that the individual was "not personally threatened" is an insufficient argument. The SCC was clear that implied threats are threats just the same.[163]

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154 *Ibid* at paras 226-37.
155 *Ibid* at para 237.
156 *Supra* note 72 at paras 180–88, 289–306.
157 *Ibid* at para 181.
158 *Ibid* at para 296.
159 *Ibid* at para 706.
160 *Ibid* at para 708 [footnotes omitted].
161 *Hart*, *supra* note 1 at para 115.
162 *Ibid.*
163 *Ibid* at paras 194, 213.

In addition, the argument that the individual confessed after exposure to violence, which shows that he was not coerced, is used to justify abuse of process (just as it was used to justify reliability).[164] This argument was also advanced by the Crown in *Derbyshire*, but it was promptly rejected by the trial judge.[165] Yet, in *Derbyshire*, the threats were direct and personal. In all other cases, the judges accepted the argument that confessing after exposure to violence shows a lack of coercion, as the threats were not direct or personal.[166] That is simply not the test for abuse of process.[167] Also, none of the Mr. Big cases where threats or violence were used discussed the SCC statements that where threats and violence are present, there is almost always coercion[168] and that, in general, violence and threats of any kind are unacceptable.[169]

Due to the discretion built into the test, it is not possible to assess whether in the cases where threats or violence were noted, the judge was wrong in finding that there was no coercion and thus, no abuse of process. However, there are serious concerns regarding the arguments advanced to reject abuse of process.

ii. Other Ways to Overbear the Will of the Accused

In the other two cases where the confessions were excluded based on abuse of process, there were no threats or violence involved, but the judge found that the accused was exploited and the police did not act in good faith. In *Nuttall*, the target was impoverished, socially isolated, and looking for spiritual meaning. He was given "true" friends, gifts, religious guidance, and extensive travels.[170] It appears that what crossed the line for this particular judge was the manipulation of religion and the accused's spiritual needs in order to obtain the confession. This manipulation is not unique to this case. What is unique is that, unlike most Mr. Big operations, Nuttall

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164 *RK*, *supra* note 72 at para 756; *Potter*, *supra* note 64 at para 225; *Balbar*, *supra* note 72 at para 202; *Randle*, *supra* note 72 at para 67.

165 *Derbyshire*, *supra* note 49 at para 61.

166 *RK*, *supra* note 72 at para 709; *Potter*, *supra* note 64 at para 228; *Balbar*, *supra* note 72 at para 354; *Randle*, *supra* note 72 at paras 67, 72.

167 *Hart*, *supra* note 1 at para 118; *Derbyshire*, *supra* note 49 at para 106.

168 *Hart*, *supra* note 1 at paras 116–17.

169 *Ibid* at para 117.

170 *Nuttall*, *supra* note 51 at para 792. It should be noted that, while the confession was thrown out based on abuse of process, the accused was found guilty at trial. On appeal, the court overturned the decision and entered a stay of proceedings.

was not set up to confess to murder. Rather, he was suspected of terrorist involvement and this organization was set up as an organization with terrorist ties. There was a clear entrapment component that was discussed in this case, which is absent from the traditional Mr. Big operations. It is possible that this aspect also rendered the judge more inclined to find abuse of process.

The second case, *M(S)*, was also a twist on the typical Mr. Big operation.[171] The target was 15 years old and he was not attracted into a criminal organization with strangers.[172] Rather, the police employed M(S)'s father, who had been absent from his life, and had him re-enter his son's life to prey on his vulnerabilities and obtain a confession.[173] The use of a parent in these circumstances was a main contributor to the finding that the fairness of the justice system was tampered with.[174]

Thus, in no typical Mr. Big operation was the police conduct found to reach the level of manipulation that would rise to abuse of process, despite the fact that in 56% of the cases, the target presented significant vulnerabilities and was provided with strong incentives. This may be because a substantive analysis of police conduct, in the context of considering abuse of process, was absent from many of the cases reviewed.

For instance, in *Caissie* and *Omar* (both of which included extensive vulnerabilities, strong incentives, and lengthy operations), the judges stated that there was no abuse of process because there were no threats or violence involved.[175] No further analysis was performed on the other circumstances.

In other cases, the judges argued that traits deemed as "vulnerabilities" in *Hart* did not count as true vulnerabilities for the purpose of abuse of process in that case. As such, the issue of overbearing the targets' wills did not arise:

> The background and life experience of Mr. Balbar are not shown on the evidence to establish any particular vulnerabilities. There is no evidence that the police preyed upon Mr. Balbar's apparent addiction to methamphetamines. In fact, there is evidence to the contrary. With regards to a particular vulnerability due to limited

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171 *Supra* note 51.

172 *Ibid* at paras 2–7.

173 *Ibid*.

174 *Ibid* at para 75.

175 *Caissie*, *supra* note 64 at para 437; *Omar*, *supra* note 86 at para 72. This is all the more interesting since, as discussed above, in the 8% of the cases where threats or violent scenarios were employed, the judges also concluded that there was no evidence of abuse of process without any other analysis than the one used to assess reliability.

> intellectual functioning, had Mr. Balbar's behaviour and reliable psychological testing borne out a low level of intellectual functioning, then targeting him in the Mr. Big operation might well have constituted an abuse of process. However, the totality of the evidence before the Court does not support such a finding.[176]

In *Amin*, the judge went as far as to praise the officers in how they dealt with the accused who was mentally ill and suffering from addictions:

> [T]he officers went out of their way to evaluate Mr. Amin's vulnerability as a target. They were fully aware of Mr. Amin's mental health issues and never, at any stage, sought to exploit them. Even though Mr. Amin drank alcohol during his interactions with the officers, there was no evidence of any kind of intoxication. Nor did the officers encourage Mr. Amin to drink or supply him directly with alcoholic beverages…There was no conduct constituting an abuse of process in this case.[177]

Sometimes, the same argument used to mitigate the impact of vulnerabilities, incentives, and threats on the probative value was also used to argue that the willpower of the accused was not overborne and hence, there was no abuse of process. These arguments included: that the accused, though young or unsophisticated, had "street smarts",[178] that despite their mental illness they were not someone that could be "easily manipulated",[179] or that although they were in financial distress, they were not destitute[180] (so the police were not preying on their need). Other times, the judges simply noted that despite the vulnerabilities identified, there was no evidence that the police preyed on them.[181]

The discussion of abuse of process tends to be brief and dismissive. This may very well be because, unlike for the first prong where the state has the

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176 *Balbar*, *supra* note 72 at para 381.

177 *Supra* note 64 at para 39. Additional cases in which a similar line of argument was presented include *MacDonald*, *supra* note 98; *Pernosky*, *supra* note 52 at para 39; *Potter*, *supra* note 64 at para 70; *Subramaniam*, *supra* note 94 at paras 30–31; *Shaw*, *supra* note 98 at para 20.

178 *M(M)*, *supra* note 90 at paras 80, 112, 119, 123, 169–70; *Lee*, *supra* note 64 at paras 145, 150, 287, 303, 334.

179 *Balbar*, *supra* note 72 at paras 381–83; *Amin*, *supra* note 64 at para 39; *MacDonald*, *supra* note 98 at para 19; *Pernosky*, *supra* note 52 at paras 22, 34; *Potter*, *supra* note 64 at paras 193–98; *Shaw*, *supra* note 98 at para 61.

180 *Beliveau*, *supra* note 57 at paras 40, 64; *Johnston*, *supra* note 97 at para 58; *Randle*, *supra* note 72 at para 83; *Allgood*, *supra* note 97 at para 58.

181 *Amin*, *supra* note 64 at paras 39, 44–45; *Balbar*, *supra* note 72 at paras 381–83; *Ledesma*, *supra* note 57; *Moir*, *supra* note 99 at paras 499, 544; *Omar*, *supra* note 86 at paras 23–27; *Perreault*, *supra* note 57 at paras 39–41; *Wruck*, *supra* note 99 at paras 21–22; *Giles*, *supra* note 49 at para 296.

burden of proving, on a balance of probabilities, that the evidence is reliable, the onus for the second prong is on the accused to establish that an abuse of process occurred.[182] Thus, if the accused fails to do so, the judge would arguably be justified in saying "there is no evidence that abuse of process occurred." Yet, we believe this raises two distinct issues.

The first issue is that, when the burden shifts to the accused, the evidence does not need to emanate from the accused, as it can also arise from other circumstances of the case. Thus, as an example, it is incongruous that after an extensive discussion on how an individual with addictions was provided with alcohol, the court would conclude that there is no evidence that the police took advantage of the addiction,[183] without any further analysis. It is unclear what other evidence the accused would need to prove that his addiction was exploited. Perhaps this speaks to the high evidentiary demands placed on the accused or the high standard required to prove abuse of process. Despite the fact that the standard for proving abuse of process is on a balance of probabilities (thus not particularly high), a remedy for abuse of process is granted only in the clearest of cases. This does appear to, in fact, elevate the standard beyond a balance of probabilities.

The second issue is that the evidence that the accused is required to produce may not be fully in the possession of the accused[184] or it may not be feasible for the accused to produce it. Showing abuse of process often requires the accused to testify. Given the high rates of mental illness, addictions, lack of education, and unsophistication among the targets, they may not make great witnesses. This results in the accused being put in a position where it may be unrealistic for them to be able to demonstrate abuse of process.

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182 *Hart*, *supra* note 1 at para 113.

183 *Subramaniam*, *supra* note 94 at paras 30–31.

184 We had the opportunity to review the disclosure materials in *Buckley*, *supra* note 11. The file is voluminous and essential information is lost among irrelevant documents. At the same time, parts of the file are redacted to protect the identity of the operatives and the covert nature of the operations. Many of the targets do not always have adequate representation, given their financial circumstances and the significant amount of work required to engage with undercover disclosure files. This may raise additional barriers in successfully raising arguments that abuse of process occurred. It should be noted that for his part, Mr. Buckley had the good fortune of receiving excellent representation from his lawyer, who managed to get the confession excluded on the first prong.

It is peculiar that in all but one case[185] where abuse of process was found,
there was no confirmatory evidence. Confirmatory evidence should have no impact on abuse of process. A strong confession obtained through oppressive techniques should still be excluded.[186] Yet, it seems that courts are only willing to throw out a confession accompanied by some confirmatory evidence when the most extreme level of violence is used.[187]

It is difficult to draw conclusions on how successful the *Hart* framework has been in revamping the abuse of process doctrine. We are, however, concerned that some courts appear to be conflating the analyses for the two prongs. We also question whether the abuse of process prong can play a significant role, given that the burden is on the accused to show abuse of process. Courts also seem to be reluctant to exclude a confession on the grounds that it was obtained in circumstances that fall short of direct threats of violence, extreme violence, or circumstances atypical for Mr. Big operations (such as entrapment). Yet, as recognized in *Hart*, and as further discussed in the next chapter, police oppression that overcomes the will of the accused may also occur in other ways. There is no evidence that the abuse of process prong provides protection against police misconduct in those cases.

IV. Evaluation of the Application of *Hart*

It is possible that the *Hart* framework has been watered down beyond its original intent.[188] However, the *Hart* framework itself may also have some weaknesses. *Hart* is an attempt to regulate an operation created with the intent to evade the black letter law, even though its structure theoretically

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185 *Derbyshire*, *supra* note 49 had confirmatory evidence. However, the circumstances were significantly different from a Mr. Big case where the individual is attracted into a criminal organization. In this sting, the level of violence used was extreme: Ms. Derbyshire was kidnapped by undercover officers and threatened until she confessed and provided confirmatory evidence.

186 *Hart*, *supra* note 1 at para 214.

187 However, the reverse is not true. That is to say, the lack of confirmatory evidence did not always lead to a finding of abuse of process, regardless of their circumstances. Thus, while the lack of confirmatory evidence was not a sufficient condition, it appears to be a necessary one.

188 Iftene, *supra* note 2 at 167–68. Arguably, this was predictable in light of the direction the SCC has taken in applying the confessions rule and section 7 of the *Charter*.

upsets so many rules and principles.[189] By creating a rule whose application is difficult to successfully appeal,[190] the use of confessions resulting from problematic operations remain unpredictable and largely unchecked. Working from our case review, we now turn to what we perceive to be some of the most concerning trends under the *Hart* framework.

A. Vulnerabilities Remain a Staple of Mr. Big Targets While They Play a Minimal Role in the Admissibility Analyses

In *Hart*, Justice Moldaver noted that coercion may exist even in the absence of threats or violence if the will of the target was overborne.[191] This is more likely to happen where the individual has a vulnerability that the state took advantage of. These vulnerabilities include mental illnesses, youthfulness, addictions, and socio-economic disadvantage.[192]

The presence of vulnerabilities does not immediately determine that coercion was involved. Clearly, the fact that someone has a mental illness or that they are young does not mean that they are incapable of deciding for themselves whether or not they wish to talk about something. Yet, out of the admitted confessions, 56% were obtained from people with an identifiable vulnerability.[193] The overrepresentation of vulnerable individuals among Mr. Big targets is in itself unsettling. However, of even more concern is that the factors that the SCC[194] warned could increase vulnerability and susceptibility to persuasion in the context of police

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189 See e.g. Coughlan, *supra* note 2 at 419; Kaiser, *supra* note 2 at 307.

190 That is not to say that the *Hart* framework can never be useful on appeal. In fact, in *R v Yakimchuk*, 2017 ABCA 101 it was the appeal court that applied the *Hart* framework at first instance, while in *Laflamme*, *supra* note 51, it was the appeal court that found abuse of process and entered a stay. But while the framework can work on appeal, in practice, that happens very sparingly.

191 *Supra* note 1 at para 113.

192 *Ibid* at paras 117, 213. Similarly, in *R v Otis*, [2000] RJQ 2828, 2000 CarswellQue 3702 [*Otis*], the Court recognized 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 under police interrogation in order to determine if their section 7 rights have been infringed.

193 It should be mentioned that this number reflects only the situations where the trial judge specifically identified a vulnerability that could, in some way, be documented. It is likely that the number of targets that actually had various vulnerabilities is much higher and that the trial judge did not or could not acknowledge them.

194 *Hart*, *supra* note 1 at para 117; *Otis*, *supra* note 193.

interrogations are specifically targeted by police: addictions,[195] intellectual deficits,[196] youthfulness,[197] health,[198] and financial or psychological stress.[199] Psychologists are being brought in to help the police design operations based on the characteristics of the accused in order to achieve maximum success (that is, obtaining a confession).[200]

Despite their continued prevalence and role in these operations, vulnerabilities were significantly downplayed in the cases we reviewed. In the previous chapter, we illustrated some of the narratives employed by judges to justify why vulnerabilities are of marginal relevance. The approach taken by courts to vulnerabilities raises at least two distinctive issues. First, it shows a disregard for how vulnerabilities interact with coercion and, by extension, with the reliability of evidence and abuse of process.

Second, quite apart from the issues of reliability and abuse of process, this approach is also problematic when viewed through disability and race lenses.[201] If the advice provided by Justice Moldaver that the police refrain from targeting vulnerable people would have been applied, it is likely that Mr. Big operations would eventually be phased out. That is not because non-vulnerable people do not commit crimes; rather, it is because non-vulnerable people are less likely to fall for what is now a widely publicized undercover technique, rooted in the manipulation of vulnerabilities. Unfortunately, the data suggests that in subsequent applications of *Hart*, judges may have sanctioned the continuing exploitation of vulnerable traits and set a very high bar for when police conduct is considered impermissibly exploitative.

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195 *Subramaniam*, *supra* note 94 at para 30; *Balbar*, *supra* note 72 at para 270; *Johnson*, *supra* note 97 at para 76.

196 *Hart*, *supra* note 1 at paras 117, 232; *Balbar*, *supra* note 72 at paras 381–83; *Nuttall*, *supra* note 51 at paras 224, 226, 260, 412.

197 *Subramaniam*, *supra* note 94 at paras 34–40; M(M), *supra* note 90 at paras 169–70; *Buckley*, *supra* note 11 at para 77–78; M(S), *supra* note 51 at para 7; *Moir*, *supra* note 99 at para 280; *Omar*, *supra* note 86 at para 59; *RK*, *supra* note 72 at para 15; *South*, *supra* note 50 at para 84.

198 *Johnson*, *supra* note 97 at paras 156, 158.

199 *Laflamme*, *supra* note 51 at para 31; *Lee*, *supra* note 64 at para 115; *Nuttall*, *supra* note 51 at para 792.

200 Porter, Rose & Dilley, *supra* note 42.

201 Due to space constraints, the development of this argument will have to be left for a different occasion. We did, however, feel it was impossible to flag this collateral, yet very important issue raised by these operations.

In addition, all of the information on vulnerabilities is based on the trial judges' appraisals, since no systematic data is collected by the designers of these operations.[202] Given the nature of these operations, the judicial resistance to exclude what is deemed to be reliable evidence, and the manner in which vulnerabilities are minimized when identified by a judge, there is a distinct concern that the presence of vulnerabilities is underreported, under-identified, and downplayed beyond what we are able to ascertain based on a review of court cases. In addition, we are concerned by the fact that information regarding the race and ethnicity of the targets is not collected by the RCMP and, therefore, is not available. Finally, the RCMP's failure to collect information regarding their total number of operations and scenarios removes any kind of oversight of the operations that do not make it to trial. There is simply no way of knowing how many operations were so extreme that the Crown declined to prosecute or how many times such tactics were employed on people who refused to confess. It is also possible that in these under-scrutinized stings, vulnerable and racialized targets are overrepresented. Without oversight, accountability for the consequences of such operations is not even theoretically possible.

While it is known that marginalized groups and individuals are overrepresented at all levels of the criminal justice system, an investigative tool that has historically been built overwhelmingly on these characteristics should raise heightened concerns for human rights and disability rights scholars and activists. Not only is there no evidence that the *Hart* framework has led to more culturally sensitive approaches as some hoped, but it may have also provided legitimacy to an under-scrutinized investigative tool that may have disproportionate effects on marginalized groups.

B. The *Hart* Framework and Its Application Are Out of Sync with Evidence-Based Psychological and Sociological Studies on Coercion and Oppression

Statements that justify the lack of abuse of process by the absence of direct threats and violence are at odds with socio-psychological evidence-based research that illustrates the large variety of effective coercion tactics. The non-violent methods employed in Mr. Big, called "soft pressure tactics" by forensic psychologists, are "qualitatively different but as effective as harsh

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202 RCMP, Letter in Response, *supra* note 10.

pressure tactics" (i.e. threats and violence).[203] Soft pressure is created by using social influence techniques (such as reciprocity, consistency, creating a persona that the target likes and identifies with, providing social validation, using authority, and offering the target a commodity that is scarce to them) and has been studied and validated as successful in causing people to acquiesce to a request or change their behaviour based on real or imagined group pressure.[204] By consulting with trained psychologists,[205] each Mr. Big operation tailors these tools for the specific target, often guaranteeing that a confession will be obtained. Thus, in order to work, these operations are laden with compliance-gaining techniques. Other psychologists have suggested that they are the same tools, listed in the Biderman's Chart[206] of coercion, used to gain compliance in other contexts (e.g. in prisons or in the case of battered victims).[207]

It is unclear whether the failure to assess the coerciveness of soft tactic techniques, especially when coupled with vulnerabilities, is a by-product of a lack of knowledge or a resistance to exclude evidence that is so compelling. While it is an incorrect application of the abuse of process doctrine, the tendency to resist excluding reliable evidence, irrespective of police conduct, has been scientifically proven.

For instance, a 2012 study[208] asked judges to appraise culpability in certain cases. In one group, the confessions were obtained through high pressure techniques and there was some weak corroborative evidence; in the other group, the same techniques were used, but there was no corroborative evidence.[209] The conviction rate increased fourfold in the first group compared to the second, even where the judges agreed that some coercion may have been involved.[210] The study concluded that coercion and guilt are overwhelmingly perceived as independent by judges.[211] A number of other studies have concluded that regular police interrogations (even where high

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203 Luther & Snook, *supra* note 2 at 133.

204 *Ibid.*

205 For the ethical issues in using psychologists in Mr. Big operations see Porter, Rose & Dilley, *supra* note 42.

206 Amnesty International, *Report on Torture*, 2nd ed (London, UK: Duckworth, 1975).

207 Luther & Snook, *supra* note 2 at 138.

208 Saul M Kassin, Daniel Bogart & Jacqueline Kerner, "Confessions that Corrupt: Evidence from the DNA Exoneration Files" (2012) 23:1 Psychological Science 41.

209 *Ibid.*

210 *Ibid.*

211 *Ibid.*

pressure techniques were employed) were deemed to be less coercive where the confession led to some confirmatory evidence.[212] Sometimes when confirmation was available, the trier of fact did not even consider whether the confession was coerced.[213] In Mr. Big scenarios, the risk of (inadvertently) overlooking oppression due to perceive heightened reliability may be even higher than for other types of confessions because of the difficulties judges have in recognizing coercion when soft pressure techniques are used. An unconscious bias may also exist against the suspect who, more often than not, may be of dubious character, has confessed to a serious crime, and may have a lack of sophistication that prevents them from articulating an explanation.

While difficult to ascertain due to the small sample size, it is possible that the approaches taken by judges in the cases reviewed are an illustration of the trend identified in these studies. If so, there is a realistic possibility that the second prong of the *Hart* framework, as applied, may not adequately guard against overpowering the will of the individual.

C. Unreliable Confessions May Continue to be Admitted

Psychological studies show that false confessions are linked to vulnerability, suggestibility, and compliance.[214] Disposition factors such as low IQs, decreased mental capabilities, youthfulness, and certain personality traits significantly increase the risk that individuals will falsely confess when pressed.[215] While this is likely true for all confessions, the risk of a false confession may be heightened in Mr. Big scenarios because, unlike during police interrogations, the vulnerable suspect feels safe and is brought to believe that a confession will only have positive consequences.[216]

This is likely part of the reason why Justice Moldaver strongly recommended that the presence or absence of confirmatory evidence, as well as the level of detail of the confession, be considered by the judge

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212 Netta Shaked-Schroer, Mark Constanzo & Dale E Berger, "Overlooking Coerciveness: The Impact of Interrogation Techniques and Guilt Corroboration on Jurors' Judgements of Coerciveness" (2015) 20:1 Leg & Criminological Psychology 68 at 76–78; Rachel Greenspan & Nicholas Scurich, "The Interdependence of Perceived Confession Voluntariness and Case Evidence" (2016) 40:6 L & Human Behavior 650 at 651.

213 Shaked-Schroer, Constanzo & Berger, *supra* note 212 at 77.

214 Connors, Patry & Smith, *supra* note 42 at 3.

215 *Ibid.*

216 *Ibid.*

assessing the probative value of the statement.[217] However, Justice Moldaver also stated that reliability may arise from other sources than confirmatory evidence.[218] It is possible that what Justice Moldaver had in mind were situations where the individual confesses in the absence of an identifiable reason to lie (including inducements). While that may very well be the case in other contexts, this will likely only happen in exceptional circumstances in a Mr. Big scenario. These confessions are rarely organic; they are frequently elicited. In the Mr. Big context, elicitation means that the suspect is directly asked to confess after months of manipulation and after being made to believe that the confession will have no negative consequences. Not only that, but the target is made to believe that a confession will have positive ones (i.e. consolidate the individual's position within the organization,[219] make money and enjoy a lifestyle they never previously had access to,[220] and their legal problems will go away).[221] It is difficult to imagine what kind of sources, strong confirmatory evidence aside, could guarantee the reliability of a confession obtained in such circumstances.[222]

In 21% of the reviewed cases, the evidence was admitted in the absence of any confirmatory evidence (including holdback information) and despite the fact that, in most of these cases, the judge identified both the presence of vulnerabilities and the use of inducements. In addition, the presence or absence of confirmatory evidence was not discussed in nearly 10% of the cases. Thus, at least in these cases, the reliability of the confession may be called into question. We suggest that there may be more.

In almost 70% of the cases, there was some form of confirmatory evidence identified by the trial judges that may have weighted heavily in the decision to admit the confessions. In all but one of these cases, the confession was admitted.[223] While confirmation, especially independent confirmation, does increase reliability, it is not infallible. Issues with relying

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217 *Hart*, *supra* note 1 at paras 101, 105.

218 *Ibid* at para 105.

219 *Johnson*, *supra* note 97 at para 632; *Tingle*, *supra* note 53 at paras 26, 39.

220 *Balbar*, *supra* note 72 at paras 202–03; *Kelly*, *supra* note 118 at para 23; *M(M)*, *supra* note 90 at paras 86–87; *Niemi*, *supra* note 98 at para 4.

221 *Buckley*, *supra* note 11 at para 39; *Carlick*, *supra* note 98 at para 24; *Klaus*, *supra* note 115 at para 76; *Knight*, *supra* note 90 at paras 122, 125; *South*, *supra* note 50 at para 25.

222 See e.g. *Hart*, *supra* note 1 at paras 237–38. Justice Karaskatanis makes a similar point in her dissent.

223 *Derbyshire*, *supra* note 49.

on any confirmatory evidence to avoid wrongful convictions have been well documented.[224]

The independence and materiality of the confirmatory evidence (i.e. evidence that corroborates the confession, is not derived from the confession, and is relevant to a material issue of the confession) are seen as necessary guarantees for the prevention of wrongful convictions. In other words, the mere presence of some confirmatory evidence alongside a confession is not equated with a safe basis for a conviction. It is not enough that the corroboration restores the judge's faith in the reliability of the confession; it must also convince a judge beyond a reasonable doubt that the accused committed the offence.[225]

As discussed above, only 5% of the cases reviewed contained independent evidence for corroboration. The other types of evidence were either holdback information (44%), real evidence derived from the confession (10%), or forensic evidence that confirmed the details offered in the confession (11%). All of the confessions where some confirmation existed (even when containing inconsistencies),[226] were found to be reliable.

Unfortunately, overreliance on such evidence for boosting reliability can be problematic. Psychologists suggest that a confession has the potential to taint how the surrounding evidence is interpreted[227] and thus, this evidence is not as confirmatory as it is thought to be.[228] This theory is called confirmation bias: the process by which people preferentially seek out and

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224 See e.g. Timothy Moore, "False Premise: How the Veracity of Confessions Affects Confirmatory Evidence" (2015) 35:5 Lawyers Daily 14 at 14; Nikos Harris, "Justice for All: The Implications of Hart and Hay For Vetrovec Witnesses" (2015) 22 CR (7th) 105 [Harris, "Justice for All"]; Kaiser, *supra* note 2 at 305; Coughlan, *supra* note 2 at 436–37.

225 Harris, "Justice for All", *supra* note 224; Nikos Harris, "Vetrovec Cautions and Confirmatory Evidence: A Necessarily Complex Relationship" (2005) 31 CR (6th) 216; *R v Khela*, 2009 SCC 4 at paras 42–43.

226 See e.g. *Balbar*, *supra* note 72; *Jeanvenne*, *supra* note 57 at paras 48–49.

227 Timothy Moore, *Mr. Big Undercover Operations: Who is Deceiving Whom?* (Gledon College, York University, 2019) [unpublished]; Steve D Charman, "Forensic Confirmation of Bias: A Problem of Evidence Integration, Not Just Evidence Evaluation" (2013) 2:1 J Applied Research in Memory & Cognition 56 at 56; Greenspan & Scurich, *supra* note 212; Shaked-Schroer, Constanzo & Berger, *supra* note 212; Kassin, Bogart & Kerner, *supra* note 208; Jeff Kukucha & Saul M Kassin, "Do Confessions Taint Perceptions of Handwriting Evidence? An Empirical Test of the Forensic Confirmation of Bias" (2014) 38:3 L & Human Behavior 256.

228 Moore, *supra* note 224 at 14.

interpret information in a manner that confirms their bias.[229] The forensic confirmation bias occurs in a situation where the person's pre-existing beliefs or expectations affects the "collection, perception and interpretation of evidence during the course of a criminal case."[230] In other words, the initial piece of evidence leads to a 'verdict' which leads to subsequent evidence being evaluated in a manner that supports that verdict. Thus, ambiguity and uncertainty are sometimes eschewed by artificially imposing consistency between various pieces of evidence[231] (such as details in a confession and some forensic finding) or by downplaying the value of the forensic evidence that is not consistent with the confession.[232]

One study demonstrated that experts who had previously read a confession were more likely to erroneously conclude that the forensic evidence from the accused, such as handwriting, fingerprinting, and even DNA, was from the same person as the perpetrator.[233] In addition, an archival analysis of the DNA exonerations from the Innocence Project[234] has shown that exonerees had often been convicted based on confessions containing correct and graphic details of the crime. Most often, the false confession had been accompanied by some confirmatory evidence such as invalid or improper forensic science, eyewitness identification, and/or the testimony of an informant.[235] Confessions influenced the guilty verdict even when the individual was coerced into confessing, had a psychiatric illness or was under stress, and even when the confession was second hand information from an informant.[236]

All this is not to say that corroboration, scientific or otherwise, is without probative value. Rather, the problem lies with the failure to recognize that any subjective judgements (such as an evaluation of the meaning of scientific evidence or assessing how levels of detail match the crime scene) are subject to error and tend to be presented to the trier of fact

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229 Greenspan & Scurich, *supra* note 212 at 651; Kukucha & Kassin, *supra* note 227 at 256.

230 Greenspan & Scurich, *supra* note 212 at 651.

231 *Ibid.*

232 Moore, *supra note* 224 at 15.

233 Kukucha & Kassin, *supra* note 227 at 265.

234 Kassin, Bogart & Kerner, *supra* note 208.

235 *Ibid* at 43.

236 *Ibid* at 41. See also Saul Kassin, Itiel E Dror & Jeff Kukucka, "The Forensic Confirmation Bias: Problems, Perspectives, and Proposed Solutions" (2013) J Applied Research in Memory & Cognition 42.

as more conclusive than they actually are.[237] None of the cases contain any discussion showing that the judge had even turned their mind to the possibility of confirmation bias or to the fact that the prosecutor was attributing too strong of a meaning to some pieces of evidence. In other words, we are concerned that it appears that courts have adopted the idea that confirmatory evidence is powerful in an absolute way: confessions are always to be admitted where there is some confirmation, but confirmation is not needed for admission. This unnuanced approach is particularly dangerous when the confession is obtained from a questionable operation that did not receive prior judicial authorization,[238] which benefitted from little to no other oversight, and yet has a reputation of being "highly effective" in obtaining confessions that lead to convictions.[239]

V. CONCLUSION

The two prongs of the *Hart* test have been inconsistently applied by the courts over the last 5 years. The new common law confessions rule does not appear to have had a significant impact on the admissibility of evidence, even in circumstances in which reliability is in question. The impact of the abuse of process prong also appears negligible and there is a concern that some judges may be inclined to overlook oppressive techniques that overbear the will of the target where the confession appears to be reliable. It is also unclear if judges have a clear understanding of the interactions between vulnerabilities and incentives, on one hand, and abuse of process and reliability, on the other. Given the small number of operations that started post-*Hart* and which resulted in a trial at the time of writing, we could not assess the impact that *Hart* had on the Mr. Big operations themselves (whether they decreased in number post-*Hart* and whether their

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237 See e.g. Gary Edmond et al, "Forensic Science Evidence and the Limits of Cross-Examination" (2019) 42:3 Melbourne UL Rev 858; Emma Cunliffe, "Failed Forensics: How a Bungled Investigation Facilitated Stanley's Acquittal", Can B Rev [forthcoming in 2020].

238 For issues with the lack of prior judicial authorization for Mr. Big operations, see Joan Brockman, "The Use of Undercover Operators by Professional Organizations when Gathering Evidence to Enforce Their Monopolies: 'Reprehensible' Tactics and 'Outright Deception'?" (2015) 38:1 Man LJ 243.

239 In the words of Archie Kaiser, *supra* note 2 at 307: "[it is] because of its…efficacy, rather than its procedural elegance and constitutional fidelity, [that] Mr. Big has survived to live another day."

structure has changed). Yet, the fact that the framework had negligible effects on confessions obtained during operations designed before its time is a concern. The outcomes of the applications of *Hart* thus far raise the question of whether there is any incentive for the RCMP to change the manner in which they conduct these operations.

The potential concerns and failures we have identified in our review could be a by-product of the framework itself, as much as of its subsequent applications. A less flexible framework and a stricter requirement for the oversight of each operation might be advisable. It is appropriate, and perhaps essential, to generally allow judges some flexibility and discretion in how they consider the various factors and tailor their findings to the circumstances. Nonetheless, we question whether a flexible framework like *Hart* is, in fact, appropriate for confessions obtained during operations that do not benefit from robust oversight, for which, by the RCMP's own admission, basic data is not tracked, do not require judicial pre-authorization, rely heavily on soft coercion techniques in which judges have no expertise (and which are inherently difficult to understand and evaluate), and are designed by expert psychologists (and still applied mostly to vulnerable targets).

However, beyond the issues of the framework used and its application, there is also a question of whether Mr. Big operations could ever be fully brought under the rule of law.[240] What makes these operations efficient in obtaining confessions is also what makes them legally and ethically problematic: that is, the exploitation of individual vulnerabilities, monitoring the individual and creating scenarios tailored for their personality that ensure they will not resist, and the use of inducements that break the will of the accused. Should judges adequately scrutinize these Mr. Big operations, it would be rare for the operations to avoid frustrating at least one of the three main concerns raised by the SCC in *Hart* (that is, reliability of the confessions, prejudice to the accused, and oppressiveness of the operations). If that is the case, it begs the question of why Mr. Big continues to be a legally authorized method of police investigation.

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[240] On this, see Adelina Iftene, "Mr. Big: The Undercover Breach of the Rights Against Self-Incrimination" in C. Hunt, ed, *Perspectives on the Law of Privilege*, (Toronto: Thomson Reuters, 2019) at 39–60.

Appendix

Case Name	**Evidence Admit/ Exclude?**	**Trial Outcome** G: Guilty NG: Not Guilty	**Appeal Status**	**Notes**
R v Ader 2017 ONSC 4643 (voir dire on admissiblity of confession) 2017 ONSC 7052 (trial)	Admit	G	Not Appealed	
R v Allgood 2014 SKQB 29 (trial) 2015 SKCA 88 (appeal) [2015] SCCA No. 423 (leave to SCC denied)	Admit	G	Appealed. Verdict Upheld	
R v Amin 2019 ONSC 3059 (voir dire on admissibility of confession)	Admit	G	Not Appealed	
R v Bahia and Baranec 2016 BCSC	Admit	G	Not Appealed	

2686 (application for mistrial) No written trial decision, as jury trial				
R v Balbar 2014 BCSC 2285 (voir dire on admissiblity of confession) No written trial decision, as jury trial	Admit	G	Appealed. Accused abandoned appeal	
R c Beliveau 2016 QCCA 2133 (appeal)	Admit	G	Appealed. Sent for retrial (insufficient jury instructions)	Pled guilty to a lesser charge after being granted a retrial
R c Bernard 2015 QCCS 4903 (voir dire on admissibility of confession) No written trial decision (jury) 2019 QCCA 1227 (appeal)	Admit	G	Appealed. Sent for retrial (insufficient jury instructions)	Retrial decision not available yet

R v Bradshaw 2012 BCSC 202 (trial) 2015 BCCA 19 (appeal) 2017 SCC 35 (SCC appeal)	Admit	G	Appealed. Verdict Upheld	
R v Buckley 2018 NSSC 1 (voir dire on admissibility of confession) 2018 NSSC 2 (voir dire on admissiblity of cautioned statement)	Excluded because of reliability	NG	Not Appealed	Case dismissed due to lack of Crown evidence
R v Burkhard 2019 ONSC 1218 (voir dire on admissibility) No written trial decision (jury)	Admit	G	Not Appealed	
R v Caissie 2018 SKQB 279 (voir dire on admissibility) 2019 SKQB 3 (trial)	Admit	G	Appealed	Appeal decision not yet available.

R v Campeau 2010 (no reported decision: jury trial) 2015 ABCA 210 (appeal) 2016 CarswellAlta 490 (leave to appeal to SCC denied)	Admit	G	Appealed. Verdict Upheld	
R v Carlick 2012 (no reported decision: jury trial) 2018 YKCA 5 (appeal)	Admit	G	Leave to appeal denied	
R v Charlie 2017 BCSC 2187 (application for directed verdict in jury trial)	Admit	G	Not Appealed	

R v Derbyshire 2014 NSSC 371 (application to exclude confession) 2016 NSCA 67 (appeal) 2016 CarswellNS 1123 (leave to SCC denied)	Exclude because of an abuse of process	NG	Appealed. Verdict Upheld	The 2014 case is a retrial from a pre-*Hart* appeal.
R v Duncan 2015 BCSC 2688 (bail hearing)	/	G	Not Appealed	Pled guilty at trial
R v Giles 2015 BCSC 1744 (voir dire on admissibility of confession) 2017 BCSC 73 (application for stay of proceedings - denied)	Admit	G	Not Appealed	
R v Gill 2017 BCSC 1026 (application for disclosure of third-party records)	/	G	Not Appealed	Pled Guilty at trial

R v Hales 2014 SKQB 411 (trial) 2015 CarswellSask 759 (appeal)	Admit	G	Appealed. Verdict Upheld	
R v Handlen 2018 BCSC 1330 (voir dire on admissibility of confession) 2019 BCSC 267 (sentencing)	Admit	G	Not Appealed	
R v Jeanvenne 2010 ONCA 706 (appeal based on denial of severance) 2016 ONCA 101 (appeal)	Admit	G	Appealed. Sent for Retrial (insufficient jury instructions)	Retrial decision not available
R c Johnson 2016 QCCS 2093 (trial)	Admit	G	Not Appealed	
R v Johnston 2014 BCCA 144 (appeal - April 2014, pre-Hart) 2016 BCCA 3 (appeal, in light of *Hart*)	Admit	G	Appealed. Verdict Upheld	

R v Keene 2014 ONSC 7190 (voir dire on admissibility of confession) 2015 CarswellOnt 12484 (sentencing)	Admit	G	Not Appealed	
R v Kelly 2017 ONCA 621 (appeal) 2017 CarswellOnt 21191 (leave to SCC denied)	Admit	G	Appealed. Verdict Upheld	
R v Klaus 2017 ABQB 721 (voir dire on the admissibility of confession) 2018 ABQB 6 (trial)	Admit	G	Appealed. Verdict Upheld.	
R v Knight 2018 ONSC 1846 (voir dire on admissibility of confessions)	Admit	G	Not Appealed	

R c Laflamme Trial (2010) 2015 QCCA 1517 (appeal) 2015 CarswellQue 11754 (leave to SCC denied)	Exclude because of an abuse of process	G	Stay granted on appeal	
R v Larue 2018 YKCA 9 (appeal) 2019 SCC 25 (SCC dismissed the appeal)	Admit	G	Appealed. Sent for Retrial (insufficient jury instructions)	Retrial decision not yet available
R v Ledesma 2014 ABQB 788 (voir dire on admissibility of confession) 2017 ABCA 131 (appeal)	Admit	G	Appealed. Sent for Retrial (misapplication of the *Hart* framework - prejudice)	Found guilty at retrial
R v Lee 2018 ONSC 308 (application by Crown to admit accused's confession)	Admit	G	Not Appealed	

R v M(M) 2012 ABPC 73 (trial) 2015 ABQB 692 (voir dire on admissibility of confession)	Admit	G	Not Appealed	
R v M(S) 2015 ONCJ 537 (voir dire on admissibility of confession)	Exclude because of an abuse of process	Unknown – not reported (trial of young person)		
R v MacDonald 2018 ONSC 952 (trial) 2018 ONSC 1103 (sentencing)	Admit	G	Not Appealed	
R v Magoon 2015 ABQB 251 (trial) 2016 ABCA 412 (appeal) 2018 SCC 14	Admit	G	Appealed. Verdict Upheld	

R v McDonald 2015 BCSC 256 (voir dire) 2018 BCCA 42 (appeal) 2018 CarswellBC 1130 (appeal to SCC - leave denied)	Admit	G	Appealed. Verdict Upheld	
R v Mildenberger 2015 SKQB 27 (ruling on admissibility of confessions)	Admit	G	Not Appealed	
R v Moir 2010 (first trial) 2016 BCSC 1720 (voir dire)	Admit	G	Appealed. Verdict Upheld	
R v Niemi Trial (jury - convicted) 2017 ONCA 720 (appeal)	Admit	G	Appealed. Verdict Upheld	

R v Nuttall 2015 BCSC 943 (application for directed verdict) 2016 BCSC 1404 (application for stay)	Exclude (abuse of process)	G	Stay granted on appeal	
R v Omar 2016 ONSC 4065 (voir dire) 2017 ONSC 1833 (sentencing)	Admit	G	Not Appealed	
R v Pernosky Voir dire incomplete: pled guilty part way through **2018 BCSC 1252** (sentencing)	/	G	Not Appealed	Pled guilty during the voir dire.
R c Perreault Jury trial 2015 QCCA 694 (appeal) 2015 CarswellQue 7580 (leave to SCC denied)	Admit	G	Appealed. Sent for Retrial (insufficient jury instructions)	Found guilty at retrial

R v Potter 2019 NLSC 8 (voir dire) 2019 NLSC 50 (application for directed verdict)	Admit	G	Not Appealed	
R v RK 2016 BCSC 552 (voir dire) 2017 BCSC 1510 (Crown application for young offender to be sentenced as adult)	Admit	G	Not Appealed	
R v Randle 2014 BCSC 1990 (trial) 2016 BCCA 125 (appeal)	Admit	G	Appealed. Verdict Upheld	
R v Shaw 2017 NLTD(G) 87 (voir dire on admissibility of confession)	Admit	G	Not Appealed	
R v Shyback 2017 ABQB 332 (trial)	Admit	G	Not Appealed	

R v Skiffington 2001 convicted at trial by jury 2004 BCCA 291 (appeal - denied) 2013 CarswellBC 3325 (appealed denial of appeal to SCC) 2019 BCSC 178 (bail hearing - granted, pending investigation into police conduct)	Admit	G	Leave to appeal denied	At the time of writing there is an investigation underway into the police conduct.
R v South 2018 ONSC 604 (voir dire)	Exclude because of reliability	Unknown outcome (jury trial not reported)		
R v Streiling 2015 BCSC 597 (voir dire) 2015 BCSC 1044 (trial)	Admit	NG	Not Appealed	
R c Subramaniam 2015 QCCS 6366 (voir dire on admissibility of confession) 2019 QCCA 1744 (appeal)	Admit	G	Appealed. Verdict Upheld	

R v Tang 2015 BCSC 1643 (voir dire on admissibility of confession)	Admit	G	Not Appealed	
R v Tingle 2016 SKQB 212 (trial)	Admit	NG	Not Appealed	
R v West 2013 BCSC 132 (trial) 2015 BCCA 379 (appeal)	Admit	G	Verdict Upheld	
R v Wilson 2015 BCCA 270 (application to extend time to appeal - denied) 2015 CarswellBC 3200 (leave to appeal to SCC denied)	Admit	G	Leave to appeal denied	
R v Worme Jury trial (not reported) 2016 ABCA 174 (appeal) 2016 CarswellAlta 1932 (leave to appeal to SCC denied)	Admit	G	Appealed. Sent for Retrial (error in limiting the cross examination of a police officer)	Plead guilty to a lesser offence at retrial

R v Wruck 2016 ABQB 370 (voir dire on admissibility of confession) 2017 ABCA 155 (application to be released pending appeal - denied) No appeal reported	Admit	G	Appealed.	No appeal decision reported
R v Yakimchuk Trial decision not reported 2017 ABCA 101 (appeal)	Admit	G	Appealed. Verdict upheld	
R v Zvolensky 2017 ONCA 273 (appeal) 2017 CarswellOnt 17685 (leave to SCC denied)	Admit	G	Appealed. Verdict upheld	
Smith v Ontario 2016 ONSC 7222	Excluded because of reliability	NG	Not Appealed	The Crown withdrew its case due to lack of evidence