Mr. Big Operation Scripts Post-*Hart*

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ABSTRACT

Mr. Big operations ("MBOs") are a Canadian invention, a version of which dates back over 120 years, with its modern use beginning in the 1990s. However, it was not until 2014, with the *Hart* decision, that the Supreme Court of Canada found occasion to subject MBOs to regulation. The question this paper endeavours to undertake is whether the court's new analytical framework, which treats MBO confessions as presumptively inadmissible, has affected the scripting of MBOs – or if there remains a proliferation of the same basic plot points across multiple scenarios. In analyzing the 14 cases in which the MBO took place post-*Hart*, four of which in-depth – *Buckley*, *Dauphinais*, *Rockey*, and *Caissie* – the author concludes that *Hart* has had no meaningful impact on MBO scripting, apart from superficial changes regarding the criminality of the fictional organization the suspect is recruited into, and the level of direct violence utilized. The coercive, manipulative tactics used by MBOs which can induce false confessions remain embedded within the technique. MBOs by their very nature remain problematic, and *Hart*'s legal tinkering has not defused their potential for wrongful convictions and abuse of process. However, despite the merits of MBO abolition, this is unlikely to occur anytime soon. As such, the author proposes several interim MBO reforms: (1) greater external oversight; (2) re-invigorating the abuse of process analysis; and (3) treating MBOs as akin to in-person interrogations.

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INTRODUCTION

Mr. Big operations ("MBOs") are a Canadian invention, a version of which dates back over 120 years, with its modern use beginning in the 1990s.[1] However, it was not until 2014, with the *Hart* decision, that the Supreme Court of Canada ("SCC") found occasion to subject MBOs to regulation.[2] The question this paper endeavours to undertake is whether the court's new analytical framework, which treats MBO confessions as presumptively inadmissible, has affected the scripting of MBOs – or if there remains a proliferation of the same basic plot points across multiple scenarios. I will analyze MBOs since *Hart* to determine if any of the techniques or investigative "scripts" have evolved.

I will review the existing literature documenting MBOs as a backdrop, before analyzing four of the 14 cases in which the MBO took place post-*Hart* as of June 2022 – *Buckley*,[3] *Dauphinais*,[4] *Rockey*,[5] and *Caissie*[6] – to help answer this research question. While I draw on the work of Adelina Iftene and Vanessa Kinnear, who comprehensively examined court analyses, suspect profiles, and legal outcomes post-*Hart*, mine is a distinct inquiry. As Iftene and Kinnear note, their study did not assess the impact *Hart* has had on MBOs themselves, such as altering their structure.[7] It is this assessment I seek to undertake. The focus, then, is not on courts, but on MBOs themselves, at least those which have been the subject of litigation. Given their secretive nature, unprosecuted MBOs fall outside the bounds of my research.

Overall, I find that *Hart* has had no meaningful impact on MBO scripting, apart from superficial changes regarding the criminality of the

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1 *R v Hart*, 2014 SCC 52 at para 56 [*Hart*].

2 *Ibid.*

3 *R v Buckley*, 2018 NSSC 1 [*Buckley*].

4 *R v Dauphinais*, 2021 ABQB 21 [*Dauphinais*].

5 *R v Rockey*, 2020 ABQB 289 [*Rockey*].

6 *R v Caissie*, 2018 SKQB 279, 2019 SKQB 3 aff'd 2022 SKCA 48.

7 Adelina Iftene & Vanessa Kinnear, "Mr. Big and the New Common Law Confessions Rule: Five Years in Review" (2020) 43:3 Man LJ 295 at 340 [Iftene & Kinnear].

fictional organization the suspect is recruited into, and the level of direct violence utilized. The coercive, manipulative tactics used by MBOs which can induce false confessions remain embedded within the technique. Simply put, MBOs are by their nature problematic, and no amount of legal tinkering can defuse their potential for wrongful convictions and abuse of process. However, despite the merits of MBO abolition, this is unlikely to occur anytime soon. As such, I propose several interim MBO reforms: (1) greater external oversight; (2) re-invigorating the abuse of process analysis; and (3) treating MBOs as akin to in-person interrogations.

My analysis proceeds in four parts. In Part II, I explain what MBOs are, how they work, and what their general scripting has been before *Hart*. In Part III, I discuss the *Hart* decision, and how it has not markedly changed how MBOs have been legally analyzed. In Part IV, I outline the 14 post-*Hart* MBOs as of June 2022, analyzing four of them, to demonstrate *Hart*'s minimal impact on MBO scripting. In Part V, I set out three proposed MBO reforms.

A Brief MBO Backgrounder

A. The Typical MBO Set-up

An MBO is an undercover police investigation procedure, designed to elicit confessions from suspects in unsolved criminal cases. Police officers create a fictitious organization, often criminal, and then recruit the suspect into it. But, to join, the suspect is pressured to admit involvement in the crime. The technique contains at least four broad stages, including: (1) an intelligence probe; (2) a staged introduction; (3) world-building and gradual integration into the organization; and (4) the meeting with Mr. Big.[8]

During the intelligence probe, police officers conduct surveillance on the suspect to obtain information about their friends, family, work, lifestyle, etc. This information is used to create a tailor-made psychological approach to convince the suspect to go along with the scheme, with officer behaviour and attitude modified to suit the suspect.[9] There is then a staged "chance

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8 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 Pract 131 at 133-134 [Luther & Snook].

9 Adelina Iftene, "Mr. Big: The Undercover Breach of the Rights Against Self-Incrimination" in Christopher Hunt, ed, *Perspectives on the Law of Privilege* (Toronto:

encounter" between the suspect and an undercover officer, usually asking the suspect for help with a low-level, typically criminal, task. Once the initial task is done, the officer insinuates that there is more work to be had with the fictional organization.[10] A relationship develops, and the suspect becomes involved in the organization. The suspect often takes part in several staged criminal activities, escalating in seriousness, for which they are well-paid. There is usually a promise of further or more lucrative work if they become full members of the organization.

As the MBO progresses, operatives begin to pressure the suspect to reveal criminality, as a matter of trust and honesty, and to ensure the organization knows everything so they can deal with it accordingly.[11] The purported boss of the organization, Mr. Big, is portrayed as all-knowing, and capable of making legal problems go away.[12] In some cases, operatives will suggest that the suspect is under renewed investigation,[13] and even present fabricated police documents to this effect.[14] This investigation is portrayed as a potential problem for the organization and used to further pressure the suspect to confess.

The operation culminates in an interview with Mr. Big. The suspect is made to understand that if they come clean about their alleged crime, they will be accepted into the organization – with the money, lifestyle, and relationships that come with it – and that their legal issues will disappear.[15] The corollary implication, often expressly stated, is that if they do not confess there is no future for them in the organization. Suspects are made to believe there are no negative consequences to confessing, only upside: be it to secure a position in the organization,[16] please Mr. Big, make money and enjoy a luxurious lifestyle,[17] or some combination therein. However, for

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Thomson Reuters, 2019) 23 at 39-40 [Iftene]; Iftene & Kinnear, *supra* note 7 at 333.

10 Timothy E Moore, Peter Copeland & Regina A Schuller, "Deceit, betrayal and the search for the truth: Legal and psychological perspectives on the 'Mr. Big' strategy" (2009) 55 Crim LQ 348 at 351 [Moore et al].

11 *Ibid*.

12 *Buckley*, *supra* note 3; *Rockey*, *supra* note 5.

13 Moore et al, *supra* note 10 at 352.

14 *R v Amin*, 2019 ONSC 3059 [*Amin*]; *Dauphinais*, *supra* note 4.

15 *Buckley*, *supra* note 3; *R v Knight*, 2018 ONSC 1846 [*Knight*]; *R v South*, 2018 ONSC 604 [*South*].

16 *R c Johnson*, 2016 QCCS 2093 [*Johnson*]; *R v Tingle*, 2016 SKQB 212 [*Tingle*]; *Caissie*, *supra* note 6.

17 *R v Balbar*, 2014 BCSC 2285 at para 202 [*Balbar*]; *Buckley*, *supra* note 3 at paras 35-36.

Mr. Big to help – say by having another person confess[18] or have police contacts interfere with the investigation[19] – they must know everything about the purported crime. Mr. Big may suggest that the suspect's arrest is imminent and/or emphasize the strength of the police evidence to further induce a confession.[20]

Per the Royal Canadian Mounted Police ("RCMP"), MBOs have been used more than 350 times across Canada as of 2008 with over 95% of prosecutions resulting in conviction.[21] Operations can take months, if not years,[22] sometimes encompassing hundreds of scenarios, and employing dozens of operators (in one case, 50). The estimated costs are over $150,000 per operation, a figure that does not include the value of police resources used or labour costs.[23] MBOs are a significant intrusion into a suspect's life and pull the police away from other investigative tasks. A fundamental objection to MBOs is the use of such an elaborate ploy to ensnare a suspect based on mere suspicion of guilt. Proactively creating evidence of guilt through a confession induced by duplicitous means arguably distorts the traditional principles of law enforcement and criminal prosecution. MBOs differ from other undercover operations, and merit distinct analysis, in that they do not seek to catch a suspect in an act of criminality but to manipulatively connect them to a pre-existing crime they may or may not have committed.

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18 *Dix v Canada (Attorney General)*, 2002 ABQB 580 at para 124 [*Dix*]; *R v Mentuck*, 2000 MBQB 155 at para 90 [*Mentuck*].

19 *R v Handlen*, 2018 BCSC 1330 [*Handlen*]; *R v Bennett*, 2020 ABQB 728 [*Bennett*].

20 *Dauphinais*, *supra* note 4; *R v Darling*, 2018 BCSC 1327 [*Darling*].

21 RCMP, "Undercover Operations" (last modified 1 May 2015), online: *Government of Canada* <bc-cb.rcmp-grc.gc.ca/ViewPage.action?siteNodeId=23&languageId=1&contentId=6941> [perma.cc/985C-X23C].

22 45% of post-*Hart* cases lasted 3-5 months, 37% lasted 6-11 months, and the longest operation, *R v Ader* 2017 ONSC 4643, lasted 8 years: Iftene & Kinnear, *supra* note 7 at 319-320.

23 Kouri T Keenan & Joan Brockman, *Mr. Big: Exposing Undercover Investigations in Canada* (Halifax: Fernwood, 2010) at 23-24. Some operations cost much more. The *R v Skiffington*, 2004 BCCA 291 operation lasted two years and cost $1.6 million. *R v Ciancio*, 2010 BCSC 1847 cost $4 million. *Hart*, *supra* note 1 at para 38, costs $413,268.

B. The Psychological Backdrop of MBOs

MBOs produce a powerful incentive for fabrication. Mr. Big confessions are often the product of misleading police conduct, power imbalance, intimidation and/or coercion, all of which undermine voluntariness and reliability. There is a tangible benefit to confessing, with no apparent downsides, providing a motive to lie which can hamper reliability. The psychological mechanisms of MBOs can be understood by reference to various principles of social cognition: (1) positive reinforcement; (2) friendship and allegiance; (3) authority, expertise, and compliance; and (4) fear and intimidation as motivators.[24]

These soft pressure or social influence techniques are effective in getting individuals to alter their behaviour. MBOs employ at least six such tactics to achieve this goal: reciprocity;[25] consistency;[26] liking;[27] social validation;[28] authority;[29] and scarcity.[30] Isolation, attacking denials of innocence, minimization of consequences, rationalization of the alleged crime, threats of harm, and quid pro quo offers – all techniques used by MBOs[31] – have each been established to have causal links to false confessions. In one study, minimization tactics tripled the rate of false confessions, offers of leniency more than doubled it, and when the tactics were combined, false confessions increased to over seven times the base rate.[32] False confessions, in turn, are linked to wrongful convictions.[33]

The pressure on MBO suspects to confess is substantial, and the enticements are both explicit and significant. The suspect is manipulated to perceive their new friends as "skilled, knowledgeable, powerful, well-connected and successful" – influential social agents to be respected and

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24 Timothy E Moore & Kouri Keenan, "What is Voluntary? On the Reliability of Admissions Arising from Mr. Big Undercover Operations" (2013) 5:1 Int'l Investigative Interviewing Research Group 46 at 48-50 [Moore & Kennan].

25 Luther & Snook, *supra* note 8 at 8-9.

26 *Ibid* at 9-10.

27 *Ibid* at 11-12.

28 *Ibid* at 13-14.

29 *Ibid* at 15-16.

30 *Ibid* at 16-18.

31 Steven M Smith, Veronica Stinson & Marc W Patry, "Using the "Mr. Big" technique to elicit confessions: Successful innovation or dangerous development in the Canadian legal system?" (2009) 15:3 Psychol Pub Pol'y & L 168 at 182-183.

32 *Ibid*.

33 *Hart*, *supra* note 1 at para 70.

feared – and the key to their continued social and financial good fortune.[34] The combination of enticement and fear "constitutes an almost irresistible degree of psychological influence and control".[35] As Iftene notes,[36] the operators may offer a family-like environment and friends where the individual has none,[37] financial stability to impoverished people,[38] alcohol and drugs to addicts,[39] respect and trust to socially marginalized individuals,[40] a stable residence for under-housed people,[41] or the prospect of love.[42] As suspects are often unemployed or of low socio-economic status, financial offers can be very enticing. Suspects are often socially isolated and alienated from those around them. Sometimes they are even encouraged to reduce or eliminate contact with friends and family to better immerse themselves in the organization.[43]

Overall, MBOs work best if the suspect is vulnerable to influence, due to factors such as youth, low IQ, psychological disorder, poverty, racial discrimination, and/or social stigma/isolation.[44] The overrepresentation of vulnerable persons among MBO suspects is especially disconcerting given these vulnerabilities are targeted by police.[45] Despite court caution that special attention must be paid to certain factors which increase vulnerability to persuasion in the custodial interrogation context,[46] addiction,[47]

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34 Moore et al, *supra* note 10 at 381, 400.

35 *Ibid*.

36 Iftene, *supra* note 9 at 38.

37 *Buckley, supra* note 3; *R v Lee*, 2018 ONSC 308 [*Lee*]; *R v SM*, 2015 ONCJ 537 [*SM*]; *R v Nuttall*, 2016 BCSC 1404 aff'd 2018 BCCA 479 [*Nuttall*]; *R v Shyback*, 2017 ABQB 332 [*Shyback*].

38 *Buckley, ibid; R v Streiling,* 2015 BCSC 1044; *Rockey*, *supra* note 5 [*Streiling*].

39 *R v Perreault,* 2015 QCCA 694 [*Perreault*]; *Balbar*, *supra* note 17.

40 *Amin, supra* note 14; *Lee*, *supra* note 37.

41 *Buckley, supra* note 3; *Rockey, supra* note 5; *R v Magoon*, 2018 SCC 14 [*Magoon*].

42 *R v Subramaniam*, 2015 QCCS 6366, aff'd 2019 QCCA 1744 [*Subramaniam*].

43 *Hart, supra* note 1; *Dauphinais*, *supra* note 4.

44 Iftene & Kinnear, *supra* note 7 at 301-302. Smith et al, *supra* note 31 at 187-188.

45 Iftene & Kinnear, *ibid* at 332.

46 *R c Otis* (2000), 37 CR (5th) 320 (QCCA) at para 54, leave to appeal ref'd [2001] 1 SCR xvii; *R v Lafrance*, 2022 SCC 32 at paras 79, 87 [*Lafrance*].

47 *Subramaniam, supra* note 42 at para 30 [*Subramaniam*]; *Balbar, supra* note 17 at para 270; *R c Johnson*, 2016 QCCS 2093 at para 76 [*Johnson*].

intellectual deficits,[48] youths[49]/youthfulness,[50] financial or psychological stress,[51] and health issues[52] are often uncritically present in MBO suspects.[53]

HART CHANGE, BUT NO CHANGE OF HEART, FOR MBO LEGAL ANALYSES

No court before *Hart* found that MBO conduct amounted to an abuse of process, and only two decisions, *Creek*[54] and *Mentuck*[55], excluded a confession due to prejudicial effect outweighing probative value. This is despite highly questionable conduct by the police, including:

- undermining the suspect's relationship with his fiancée, which was seen as interfering with the operation;[56]
- conveying to the suspect that he could be killed for displeasing Mr. Big;[57]
- a feigned "bloody" assault on a female, who was then forcibly thrown into a car trunk;[58]
- the male suspect being directed to lure an operator posing as a gay male into a motel room under the pretenses of engaging in sexual activity so they could be severely beaten due to an outstanding debt;[59]
- the suspect assisting in kidnapping someone who, after receiving simulated oral sex by a prostitute (each played by operators), was tied up, blindfolded, taken to another location, and tortured. The next day the victim was portrayed as having been shackled, severely tortured, and sodomized;[60] and
- a staged murder after a botched drug deal.[61]

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48 *Balbar, ibid* at paras 381-383; *Nuttall, supra* note 37 at paras 224, 226, 260, 412; *Hart, supra* note 1 at paras 117, 232.

49 *R v M(TC)*, 2007 BCSC 1778 at para 9; *R v ONE*, 2000 BCSC 1200; SM, *supra* note 37 at para 7.

50 *Subramaniam, supra* note 42 at paras 34-40; *R v* MM, 2015 ABQB 692 at paras 169-170; *R v Omar*, 2016 ONSC 4065 at para 23 [*Omar*].

51 *R v Laflamme*, 2015 QCCA 1517 at para 31 [*Laflamme*]; *Lee, supra* note 37 at para 115, *Nuttall*, *supra* note 37 at para 792.

52 *Johnson*, *supra* note 47 at paras 156, 158.

53 Iftene, *supra* note 9 at 38; Iftene & Kinnear, *supra* note 7 at 333.

54 *R v Creek*, [1998] BCJ No. 3189 (SC) at paras 30, 35.

55 *Supra* note 18 at paras 93, 100-101.

56 *R v Proulx*, 2005 BCSC 184 at paras 13, 44.

57 *Burns v USA* (1997), 117 CCC (3d) 454 (BCCA) at para 4.

58 *R v Hathway*, 2007 SKQB 48 at para 19.

59 Moore et al, *supra* note 10 at 397.

60 *Ibid*.

61 *Dix, supra* note 18 at paras 126-131.

It was increasingly clear that MBOs needed greater judicial regulation. And in 2014, for the first time, the SCC provided it in *Hart*. In recognizing the inherent dangers of MBOs, the court held that MBO admissions are presumptively inadmissible, establishing a two-pronged admissibility test: (1) the statement's probative value outweighs its prejudicial effect; and (2) there is no abuse of process.[62]

The first prong is about the reliability of the Mr. Big confession.[63] Circumstances that may undermine reliability should be examined, including: the length of the operation, the number of interactions between the police and the accused, the nature of the relationship between the undercover officers and the accused, the nature and extent of the inducements offered, the presence of any threats, the conduct of the interrogation itself, and the personality of the accused, including their age, sophistication, and mental health.[64] The court must also analyze the confession for markers of reliability such as: the level of detail, whether it leads to the discovery of additional evidence, whether it identifies any elements of the crime that had not been made public, whether it accurately describes mundane details of the crime the accused would not likely have known had they not committed it, and whether there is confirmatory evidence.[65]

Regarding the second prong, abuse of process is "almost certainly" established if police conduct "approximates coercion", "overcomes the will of the accused", involves physical violence or threats of violence, preys on an accused's vulnerabilities – such as mental health problems, substance addiction, or youthfulness – or otherwise "offends the community's sense of fair play and decency".[66] *Hart* leaves open the possibility that MBOs can become abusive in other ways too, per the discretion of the trial judge.[67]

A. *Hart* Has Failed to Change Court Analyses

In a 2020 article, Iftene and Kinnear reviewed the 61 cases that have applied *Hart* between August 2014 and August 2019 and found its

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62 *Hart*, *supra* note 1 at paras 10-11.
63 *Ibid* at para 99.
64 *Ibid* at para 102.
65 *Ibid* at para 105.
66 *Ibid* at paras 115-117.
67 *Ibid* at para 118.

framework has been inconsistently applied, with a negligible impact on the number of confessions that are admitted even in circumstances in which its reliability is questionable.[68] In the 56 non-guilty plea MBO cases in which the *Hart* test was applied,[69] only three cases excluded the confession due to a lack of reliability: *Smith*;[70] *South*;[71] and *Buckley*.[72] The *Smith* confession was excluded in June 2014, so predates *Hart*. *South* is anomalous as the MBO targeted an eyewitness, not the suspect. This leaves *Buckley*, which I will return to below. In any event, in all three cases, not only was there no confirmatory evidence, but the confessions contradicted other evidence that the police had.[73] That is, none of the confessions had any solid probative value. Iftene and Kinnear found that only four cases excluded the confession based on abuse of process.[74] However, two of these cases – *Derbyshire*[75] and *SM*[76] – are arguably not MBOs. A third, *Nuttall*,[77] is not a traditional MBO given the suspects were induced to commit a crime, not confess to one. In the fourth case, *Laflamme*, the abuse of process was due to the repeated use of simulated violence.[78]

Overall, in only two classic MBOs – *Buckley* and *Laflamme* – was the confession excluded in the first five years after *Hart*. *Laflamme* has subsequently been distinguished to support a narrow interpretation of the level of violence that gives rise to an abuse of process, primarily by holding that because the violence was not specifically directed towards somebody within the fictional criminal organization, the accused was not at risk of being coerced.[79] The post-*Hart* cases of *West*,[80] *Randle*,[81] and *Johnston*,[82] all

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68 Iftene & Kinnear, *supra* note 7 at 340.

69 *Ibid* at 307.

70 *Smith v Ontario*, 2016 ONSC 7222 at para 31.

71 *South*, *supra* note 15 at para 75.

72 *Buckley, supra* note 3 at paras 100–01.

73 Iftene & Kinnear, *supra* note 7 at 310.

74 *Nuttall*, *supra* note 37 at paras 2, 7; *SM*, *supra* note 37 at paras 71–73; *Laflamme*, *supra* note 51 at paras 87–88; *R v Derbyshire*, 2016 NSCA 67 at para 153 [*Derbyshire*].

75 *Derbyshire*, *ibid*, at paras 3-4, 99, 104.

76 *Supra* note 37 at paras 8-9, 64.

77 *Supra* note 37 at paras 593-594.

78 *Laflamme, supra* note 51 at paras 9, 65, 69-71.

79 Christopher Lutes, "Hart failure: Assessing the Mr. Big confessions framework five years later" (2020) 43:4 Man LJ 209 at 238 [Lutes].

80 *R v West*, 2015 BCCA 379 at paras 98-100 [*West*].

81 *R v Randle*, 2016 BCCA 125 at paras 87-89 [*Randle*].

82 *R v Johnston*, 2016 BCCA 3 at paras 50-61.

held that violence directed at individuals outside of the organization did not amount to an abuse of process. Courts have found that the use of fake violence is a necessary way to convey realistic crime and to broach the topic of the suspect's own crimes.[83] Indeed, violence or threats of violence in the accused's presence was used in 13 of the post-*Hart* cases, with none of the following conduct found to be an abuse of process:[84]

- putting an ostensibly loaded handgun into the mouth of an officer as part of a robbery;[85]
- assaulting and threatening to kill a female officer;[86]
- an officer threatening a debtor with burning his house down with his family in it if he failed to make payments;[87]
- a kidnapping scenario involving the use of "extreme violence";[88] and
- placing a dead pig into a hockey bag, then telling the accused it was a human body that he had to dispose of.[89]

This is all despite *Hart* categorically stating that "[a] confession derived from physical violence or threats of violence against an accused will not be admissible — no matter how reliable — because this, quite simply, is something the community will not tolerate."[90] No distinction is made between violence that directly threatens the accused and violence that is used in their presence. As such, the drawing of any such distinction is, arguably, legally erroneous. The fact that the suspect was not personally threatened is irrelevant; implied threats are threats all the same.[91] As Christopher Lutes notes, the undue focus on extra-organizational violence "is troubling because it assumes that accused persons who are exposed to violence that they believe to be real will neatly separate violence against people external to the organization from violence that could be directed at them."[92]

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83 Lutes, *supra* note 79 at 240.
84 *Ibid* at 240.
85 *Balbar*, *supra* note 17 at para 379.
86 *West*, *supra* note 80 at paras 18, 99.
87 *Handlen*, *supra* note 19 at para 124.
88 MM, *supra* note 50 at para 171.
89 *R v Potter*, 2019 NLSC 8 at paras 54-55, aff'd 2021 NLCA 11 [*Potter*].
90 *Hart*, *supra* note 1 at para 116.
91 Iftene & Kinnear, *supra* note 7 at 326.
92 Lutes, *supra* note 79 at 238-239.

Beyond violence, MBOs employ soft pressure tactics that can be just as effective at coercing a confession – tactics it does not appear courts are particularly sensitive to as being highly manipulative, despite *Hart* explicitly cautioning that offering attractive incentives to confess, or taking advantage of vulnerable individuals, can amount to an abuse of process.[93] It appears that absent hard pressure tactics, courts will not find an abuse of process. This is problematic, as noted by Kirk Luther and Brent Snook, given that soft pressure tactics can be equally effective in overcoming the will of the accused and functioning as an abuse of process.[94] In *Subramaniam*, for example, operators provided money and alcohol to an impoverished 19-year-old suspect with an alcohol problem (and who was in love with one of the undercover officers).[95] This was not considered an abuse of process because the court deemed that Subramaniam had "street smarts"[96] and no violence was involved.[97] As Iftene notes, such an analysis "constitutes a failure to understand the psychological impact of manipulation and its relation to coercion and choice that is 'free, informed and voluntary'."[98]

In 75% of post-*Hart* cases at least one persuasive incentive was used, breaking down as follows: money/attractive lifestyle (66%); meaningful friendships/family-like relationships (44%); good employment (5%); and promises that their legal issues will disappear (20%).[99] However, these incentives, and their potential effect on reliability, do not appear to have affected the admissibility of confessions in any discernible way.[100] In fact, the admission rate of Mr. Big confessions has increased since the framework was implemented, from 88-91.5% pre-*Hart* to 93.6% in the first five post-*Hart* years.[101] In all but two cases where the confession was admitted, the accused was found guilty.[102] It seems courts simply do not, or cannot, see how the presence of incentives can induce a false confession.[103] Nor has

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93 *Hart*, *supra* note 1 at paras 112-117.

94 Luther & Snook, *supra* note 8 at 18.

95 *Supra* note 42 at paras 27, 30-33.

96 *Ibid* at para 36.

97 *Ibid* at paras 41-45.

98 Iftene, *supra* note 9 at 42.

99 Iftene & Kinnear, *supra* note 7 at 316-317.

100 *Ibid* at 317-318.

101 Lutes, *supra* note 79 at 214, 218, 242.

102 Iftene & Kinnear, *supra* note 7 at 307: *Streiling*, *supra* note 38 at para 73; *Tingle*, *supra* note 16 at paras 404-405.

103 The promise to solve the target's legal issue is one that is often discussed by a judge but

Hart slowed the use of MBOs, going from 14 cases on average per year pre-*Hart* (including both those that made it and did not make it to trial) to 11 cases per year post-*Hart* (only counting those making it to trial).[104]

B. MBOs Continue to Have a Disproportionate Effect on Vulnerable Populations

In a 2010 survey, Kouri Keenan and Joan Brockman determined that from the 89 MBOs they reviewed, 11 suspects were Indigenous and 29 were from "very poor" social backgrounds. Others had poor education or reduced cognitive capacity, although exact numbers were not available.[105] Iftene and Kinnear's research shows that in 67% of the post-*Hart* cases and 54% of those where the evidence was admitted, the trial judge identified the presence of at least one vulnerability, as follows: history of abuse (8%); unstable housing (8%); lack of sophistication (20%); mental health illnesses other than addiction (15%); addiction (20%); youth (under 25) (23%); no family or social ties (26%); and significant financial difficulties (31%).[106]

Certain types of vulnerabilities, such as poverty, youthfulness, addiction, and mental illness, seem to be given less consideration than others if considered at all as a vulnerability.[107] Where vulnerabilities are found and analyzed, the typical conclusion is that the police did not prey on the vulnerabilities, despite being aware of them.[108] Overall, courts continue to "struggle with understanding the impact of the presence of vulnerabilities on the reliability of confessions".[109] In 18% of the post-*Hart* cases, the confession was admitted despite the target having at least one identifiable vulnerability and no confirmatory evidence.[110] In at least 6 of

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dismissed as creating any prejudicial effect: *Ibid* at 319.

104 *Ibid* at 308.

105 Keenan & Brockman, *supra* note 23 at 50-51.

106 Iftene & Kinnear, *supra* note 7 at 312-313.

107 *Ibid* at 313-315, 328-329. Where youthfulness is analyzed, this factor is often downplayed as a vulnerability factor, with qualifiers such as the person having 'street smarts,' appearing mature, or having a criminal record. Where mental illness is discussed, it is often subject to the overriding consideration that the target was not someone that could be "easily manipulated."

108 See e.g., *Amin, supra* note 14 at paras 39, 44-45; *Balbar, supra* note 17 at para 337; *Perreault, supra* note 39 at paras 87–89.

109 Iftene & Kinnear, *supra* note 7 at 316.

110 *Ibid* at 323.

these cases, the target had a vulnerability, at least one incentive was used, there was no confirmatory evidence, and the target was under 25 years old.[111] In two of these cases, threats were also used, and the target was involved in violent scenarios.[112]

Overall, there is no indication that targets who are especially vulnerable due to factors such as race, poverty, social isolation, or limited education are being screened out post-*Hart*. As Iftene and Kinnear conclude, "an investigative tool that has historically been built overwhelmingly on [vulnerabilities] should raise heightened concerns…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."[113] If *Hart*'s caution that the police should avoid taking undue advantage of vulnerability was heeded, leading as it may to unreliable confessions and/or abuses of process, MBOs would almost certainly be less successful given non-vulnerable people are "less likely to fall for what is now a widely publicized undercover technique, rooted in the manipulation of vulnerabilities."[114] Less success, in turn, could lead to fewer MBOs – perhaps to the point of being phased out. However, that has not proven to be the case.

HAS *HART* CHANGED THE MBO SCRIPT? A REVIEW OF POST-*HART* MBOS

Iftene and Kinnear's research shows that *Hart* has not changed much in terms of legal analyses, court outcomes, or the targeting of vulnerable suspects. However, the question remains as to whether MBOs themselves have become less coercive due to *Hart*'s guidance. That is, has *Hart,* for all its various failures, nonetheless had a positive impact in terms of modifying MBO scripts? Or, conversely, are MBOs continuing as they did before, demonstrating resistance to change?

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111 *R v Worme*, 2016 ABCA 174; *R v RK*, 2016 BCSC 552 [*RK*]; *R v Charlie*, 2017 BCSC 218; *Randle, supra* note 81; *Magoon, supra* note 41; *Omar, supra* note 50.

112 *RK, ibid* at paras 705-738, *Randle*, *ibid* at para 4.

113 Iftene & Kinnear, *supra* note 7 at 334.

114 *Ibid* at 333.

There have now been 14 court cases as of June 2022 – 13 reported,[115] one unreported[116] – in which the MBO took place in whole or in part after the *Hart* decision.[117] That is, MBOs which were scripted, at least in part, with the benefit of *Hart*'s reasons. This case count does not include failed MBOs, unprosecuted MBOs, guilty pleas, or unreported decisions not otherwise commented on publicly. From the 14 cases for which a public record is available, three confessions were excluded: *Buckley* (on the first *Hart* prong); *Handlen* (one of two confessions on the first prong); and *Dauphinais* (on both prongs). Six of these cases are in addition to those discussed by Iftene and Kinnear.[118]

To summarize the findings, there is a lack of uniformity as to how post-*Hart* MBOs are scripted. Some are indistinguishable from pre-*Hart* cases.[119] In others there has been a marked shift away from portraying the criminal organization as directly violent, to one engaged in activities such as credit card fraud, "fencing" stolen items, passport forgery, etc.[120] Still others portray the organization as non-criminal, albeit with criminal, policing, or other connections that can make a suspect's legal problems go away, and/or

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115 *Buckley, supra* note 3; *Dauphinais, supra* note 4; *Rockey, supra* note 5; *Caissie*, *supra* note 6; *Amin*, *supra* note 14; *Knight*, *supra* note 15; *Handlen, Bennett, supra* note 19; *Lee, Shyback supra* note 37; *Potter*, *supra* note 89; *R c Habib*, 2017 QCCQ 1581 aff'd 2019 QCCA 2043 [*Habib*], and *R v Wingert*, 2020 ABCA 304 [*Wingert*].

116 *R v Sneesby*: Jonny Wakefield, "Ex-trucker found guilty of manslaughter — not murder — in death of Alberta Indigenous woman missing almost three years" (1 June 2022), online: *Edmonton Journal* <edmontonjournal.com/news/local-news/ex-trucker-found-guilty-of-manslaughter-not-murder-in-death-of-alberta-indigenous-woman-missing-almost-three-years>.

117 *R v Burkhard*, 2019 ONSC 1218 may be seen as a 15th case, but in my view, it is not an MBO. Rather, it involved undercover operators trying to extort a confession by falsely stating there was incriminating video evidence that they could get rid of. There is also *Darling* in which a stay of proceedings was entered due to inadequate disclosure: see e.g., *Darling, supra* note 20 at para 11; Paul Willcocks, "A Botched Murder Case and Secrecy at the Top" (14 November 2018), online: *The Tyee* <thetyee.ca/Opinion/2018/11/14/Botched-Murder-Case-Secrecy/> [perma.cc/9G2P-4MRX]. As the MBO was never properly analyzed by the court, I have excluded it from the count.

118 *Habib*, *Rockey*, *Dauphinais*, *Wingert*, *Bennett*, *supra* note 115; and *Sneesby, supra* note 116.

119 In this category, I put *Shyback*, *Handlen*, *Dauphinais*, *Buckley*, *Potter*, and *Rockey, supra* note 115.

120 In this category, I put *Knight*, *Lee*, *Bennett*, and *Habib, supra* note 115.

a propensity to use violence if necessary.[121] The lessons taken from *Hart* appear to be that there are two chief problematic narrative elements to avoid: (1) the use of violence and/or portraying the organization as violent; and (2) creating an explicit fear of reprisal should the suspect leave the organization. That is, to equate abuse of process and prejudicial effect with induced criminality and violence. However, this fails to account for the fact that violence and fear are not the only coercive psychological techniques.

Overall, MBOs continue to employ the same soft pressure techniques as before – financial pressure, friendship, and promise of a stable future – so remain coercive, albeit in a more subtle way.[122] MBO scripters have seemingly found that people can be induced to confess as much by soft pressure tactics than by threats and violence, with such methods – often overlooked as coercive – having a better chance of standing up in court.[123] Less stick, more carrot, still the same trickery, deceit, and psychological manipulation. The same results are achieved by leveraging greed as opposed to fear, and triers of fact seem to have far less sympathy for the former.

While the sample size is too small to make any definitive pronouncements, *Hart* has so far failed to meaningfully change how MBOs are scripted. To draw this point out, I will focus on four of the 14 post-*Hart* MBOs in particular – *Buckley*, *Dauphinais*, *Rockey*, and *Caissie* – as they best represent ongoing problems with MBOs and the *Hart* analysis, including dubious convictions and confessions being tossed out in court.

A. *Buckley*

In *Buckley*, the confession elicited after a $300,000, 77-scenario operation running from October 2015 to April 2016 was found inadmissible.[124] Overall, the court concluded that the prejudicial effect of admitting the confession far outweighed any "nominal" probative value.[125]

When the police first contacted John Buckley he was on social assistance, with no fixed address. He was in his early 20s with limited

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121 In this category, I put *Amin*, *Caissie*, *supra* note 115 and *Sneesby*, *supra* note 116. *Wingert*, *supra* note 115 also fits best here, although the suspect confessed before the full details of the scenario could be laid out.

122 *Iftene*, *supra* note 9 at 42.

123 Iftene & Kinnear, *supra* note 7 at 336.

124 *Supra* note 3 at para 3.

125 *Ibid* at para 99. As abuse of process argument was not argued, no analysis was undertaken.

education, without many friends, orphaned with a strained relationship with his only sibling, and not involved in any extracurricular activities.[126] Buckley was intercepted where he cashed his welfare cheque and was eventually offered a job with a fictitious company at a starting rate of $20/hour.[127] In time, it was revealed that this company was a criminal organization involved in, *inter alia*, insurance fraud and illegal sales.[128] Part of the ruse was to show Buckley that the organization had various connections to fix any given criminal issue, including corrupt police officers who could subvert investigations.[129]

Buckley quickly moved up in the organization – transporting gold nuggets, counting $240,000 in cash – and began travelling around Canada. He stayed in hotels, was taken to a high-end Yukon getaway, went to a Montreal Canadiens game, and continuously dined in restaurants, all at the organization's expense. He was bought clothes, after repeatedly wearing the same outfit, and lent money when short on rent.[130] As the judge noted, this was a "far cry" from living on welfare. In total, he received pay and benefits of $31,000 over the six-month operation and worked 622.5 hours for the organization.[131] Buckley also became friends with various members of the organization, especially "M.L." who became his best friend and with whom he spent approximately 700 hours (or about 4 hours/day).[132]

Eventually, the subject of Buckley's involvement in his mother's death began to come up. He initially proclaimed his innocence. Nonetheless, the organization discussed the possibility of offering some sort of assistance and began pressuring him to confess. A Mr. Big interview was scheduled. Just before that was to happen, Buckley was told that the organization's police contacts gave them a tip that he was about to be arrested and charged for his mother's murder.[133] Buckley said that if he went back to jail, he would kill himself. A solution was offered. There was a biker in prison that owed

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126 *Ibid* at paras 14, 73.
127 *Ibid* at para 16.
128 *Ibid* at paras 21-22.
129 *Ibid* at paras 23, 25-27.
130 *Ibid* at para 35.
131 *Ibid* at paras 33-35.
132 *Ibid* at paras 17-18.
133 *Ibid* at para 38.

the organization a favour who would falsely confess, but Buckley would need to give them every possible detail to make it believable.[134]

Buckley continued to deny he killed his mother but offered to provide all necessary details from the disclosure he received in 2012 to the biker. Undercover operators said this was not good enough. They would need an actual confession. If Buckley did not confess, the organization would have no choice but to sever all ties with him. If he did confess, his name would be cleared, he could continue to work for the organization, and he could collect the insurance money from his mother's death. The overall impression was that there were only positives to confessing, and only downsides not to.[135]

During the Mr. Big interview, Buckley continued to deny any involvement in his mother's death, but, after some further pressure – including an implication that Mr. Big himself had committed a murder – he eventually relented and said he killed her with a hammer. The description of the hammer varied during the interview.[136] There were other internal inconsistencies, such as what happened to the clothes he was wearing at the time of his mother's death, and whether he was wearing shoes.[137] His confession recited details from the disclosure materials he received, however when asked to go beyond this material, he contradicted himself.[138] He provided no mundane details that would have only been known if he committed the crime.[139] No additional evidence was discovered as a result of the confession.[140]

Commentary

Buckley is an example of how by the time the MBO is run, it can be too late to address significant weaknesses and problems with the case other than the confession being deemed inadmissible. From the outset, there should have been major red flags. Buckley was young, destitute, transient, largely unemployed, with no meaningful friends, family, or social circle to speak of. Nor was there any holdback evidence.[141] Buckley had been provided with

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134 *Ibid* at para 39.
135 *Ibid* at para 40.
136 *Ibid* at paras 41-42.
137 *Ibid* at paras 46, 49-50.
138 *Ibid* at paras 51-55.
139 *Ibid* at para 90.
140 *Ibid* at para 84.
141 *Ibid* at paras 51, 87.

disclosure and would have been fully familiar with the location of his mother's body, the details of the crime scene, and the details of the investigation whether he was the perpetrator or not.[142]

Pre-*Hart*, this may have been more understandable given the lack of judicial guidance regarding MBOs. But the *Buckley* operation began approximately 15 months after *Hart*, leaving plenty of time to adjust the operation, or even to consider not running the operation at all. It seems to point to a continued pattern of running MBOs without more structured advanced planning to prevent especially hazardous operations from going forward. *Hart* had no appreciable effect on how Buckley was selected as a target, or how this operation was scripted, apart from the decision to portray the criminal organization as non-violent. As it was nonetheless portrayed as having connections to other violent criminal organizations such as "bikers" and "Italians", with members who had "done very bad things" including assaulting a police officer, and engaging in blackmail and obstruction of justice, this may be a distinction without a difference. Indeed, the judge noted as much.[143] While there were no threats of violence to Buckley or other feigned violence during the scenarios, there were nonetheless explicit implications that things would go wrong for him if he refused to confess.

Despite superficial modifications, *Buckley* is virtually indistinguishable from pre-*Hart* cases. This is troubling as it demonstrates *Hart*'s guidance is being ignored. If this were an isolated case, it could be said to be an anomaly. But there are other, later MBOs which follow the same pattern of being scripted as if *Hart* never happened. The worry that *Hart* failed to create substantial and uniform changes to MBOs is further borne out in *Dauphinais* and *Rockey*.

B. *Dauphinais*

The 39-scenario *Dauphinais* MBO took place from January 16 to May 21, 2018.[144] Kenneth Dauphinais was recruited into a fictitious organization involved in criminal ventures such as credit card fraud and illegal gun purchases.[145] Eventually the subject of Dauphinais' involvement in his ex-spouse's murder came up. A staged call came in, with Dauphinais present,

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142 *Ibid* at para 51.

143 *Ibid* at para 73.

144 *Supra* note 4 at para 16.

145 *Ibid* at para 9.

indicating the police were looking to arrest and charge him for the murder. Mr. Dauphinais' demeanour changed significantly, becoming stressed out, irritable, and concerned for himself and the negative repercussions for the organization should he be arrested.[146] Dauphinais was offered support to make this problem go away but needed to give any information he had to Mr. Big.[147] Several members portrayed themselves as having criminal charges go away due to disclosing their situation to Mr. Big; others said they ended up in prison because they failed to do so.[148] The message was that there were only positives to confessing, and only downsides otherwise. Meanwhile, two police officers went to Dauphinais' house and told his teenage sons that he was wanted for the murder of their deceased mother. Other members told Dauphinais his impending arrest was bringing unwanted police attention to the organization, and that there was a "manhunt" for him with the police "swarming" the hotel room he had just left.[149]

With the pressure mounting on Dauphinais, the Mr. Big interrogation took place over four days, with Dauphinais moving between different hotels, and different cities, effectively isolated from anyone outside the organization. False incriminating evidence was put to him, including that his best friend had ratted him out. The organization offered to discredit this information if they knew the whole story. They also offered to give Dauphinais a false identity and smuggle him across the US border. These tactics failed to yield a confession.[150] It did, however, lead to Dauphinais making several suicidal statements, telling operators he would rather die than be arrested or go to prison. At one point Dauphinais outlined his options as: (1) self-harm; (2) giving himself up; or (3) talking to Mr. Big. An operator who was close to him, "X", steered Dauphinais away from suicide, and encouraged him to seek assistance from Mr. Big. The operator, playing on their friendship, said he did not want to lose Dauphinais to "jail or otherwise."[151]

Despite this assurance, Dauphinais' stress and paranoia continued to increase. He shaved his head and beard to change his appearance –

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146 *Ibid* at para 32.
147 *Ibid* at para 14.
148 *Ibid* at para 15.
149 *Ibid* at para 33.
150 *Ibid* at paras 33-35.
151 *Ibid* at para 38.

disposing of the clippings at another location to cover up the evidence – and complained of increasing blood pressure and back pain due to the stress. While driving, he was sure someone was following him. When he noticed a police car parked outside his hotel room, he pinned the curtains together. He expressed concern that his phone was bugged and did not want to use it to contact anyone, including his two sons.[152]

Dauphinais never did provide a full confession or much detail about his ex-spouse's murder. Whenever he stated that he had limited or no memory of events due to a pre-existing head injury, he was persistently challenged. His loyalty to the organization and his friendship with "X" were brought up as reasons he should be more forthcoming.[153] Yet no further credible details emerged, nor did Dauphinais identify any of the holdback evidence.[154] The court excluded the confession on both the first and second prongs of *Hart*. The confession was deeply prejudicial – with the court concluding that the "police showed no concept of restraint in the pressure they were willing to put on the accused"[155] – and its probative value was "weak" given the lack of any markers of reliability and Dauphinais' statements being "very contradictory."[156]

The MBOs subjective impact on Dauphinais also represented an abuse of process,[157] for two main reasons.

First, it was set up so that the only way to avoid arrest and prevent the organization from taking "heat" was to confess and let Mr. Big take care of the problem. Keeping Dauphinais isolated for four days, insinuating that his best friend had deeply betrayed him, and continuously disbelieving his version of events, was all highly coercive. Dauphinais was made to feel as if he was not free to leave until he gave officers the statement they wanted to hear. Dauphinais' erratic, paranoid behaviour should have been a red flag, but the effect of these high-pressure tactics was "disregarded, or at least minimized." The officers did "nothing to dispel the accused's increasing paranoia" and even reinforced his perception of imminent arrest as it was useful to pressure Dauphinais and have him believe only the organization

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152 *Ibid* at paras 41, 86.
153 *Ibid* at para 40, 43.
154 *Ibid* at para 44.
155 *Ibid* at para 42.
156 *Ibid* at paras 44, 49, 57.
157 *Ibid* at para 66.

could help him.[158] Continually fabricating information during four days of physical and psychological detention which left Dauphinais "captive" – with a complete personality change and increased paranoia due to the induced belief "that the full power of the state was being employed to track him down and arrest him" – constituted an abuse of process.[159]

Second, the exploitation of Dauphinais' relationship with his children was "offensive", especially as the police knew the two teenagers, one of whom was a minor, would be alone without parental supervision when they told them their father was wanted for arrest. The police showed a "shocking lack of care" regarding their vulnerability, and the effect this message might have had on them. The police also relayed this interaction to Dauphinais to further ramp up the pressure and validate their claim of an imminent arrest.[160]

1. Commentary

While the problems with *Dauphinais* are ably discussed in the judgment, it is telling as to just how many issues the MBO had that the court did not have to analyze the following factors to find a lack of reliability and an abuse of process:

- the frequent use of staged violence;[161]
- the access to, and willingness of members to use, firearms;[162]
- portraying certain members as having violent tempers (including beating someone so badly they wound up in a wheelchair);[163]
- Dauphinais' unemployment and precarious financial situation when the MBO began;[164]
- Dauphinais' lack of an extensive social network;[165] and
- Dauphinais' significant remuneration, including a job offer (after he said he needed a job, and to prevent him from pursuing a genuine job opportunity which would have compromised the operation).[166]

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158 *Ibid* at paras 71, 73, 76, 86, 88.
159 *Ibid* at paras 77, 91, 93-94.
160 *Ibid* at paras 79-83, 90.
161 *Ibid* at paras 11-13, 24.
162 *Ibid* at para 25.
163 *Ibid* at para 27.
164 *Ibid* at para 21.
165 *Ibid* at para 28.
166 *Ibid* at paras 20, 22.

It is disturbing that such an array of tactics was used in an MBO taking place 3.5 years post-*Hart*. It displays a deep ignorance regarding conduct the SCC deemed inappropriate. And there is no indication that a *Dauphinais*-type operation could not happen again. With no external MBO oversight, there is no reason to believe any such tactics/scripting would necessarily be screened out. *Dauphinais* makes the case that MBOs require more external supervision.

C. *Rockey*

From January 10, 2018, to April 27, 2018, Richard Rockey was immersed in a 56-scenario MBO to determine his role in an unsolved murder. When the MBO began, Rockey was unemployed and lacked significant income. His net monthly income was $1,100 from a disability cheque.[167] The police knew he was using meth.[168] He had no birth certificate or government-issued photo identification.[169] He was living in a low-rent motel, in a tumultuous relationship with his girlfriend, and unhappy with where he was living.[170] Initially recruited into a fictitious organization under the guise of moving beer kegs, the MBO escalated to, *inter alia*, collecting and delivering guns and drugs, drug importation, debt collection, and the purchase and use of firearms.[171]

Eventually, it was conveyed to Rockey that he could be part of an imminent "big deal" with substantial compensation. But first, he needed to have an interview with Mr. Big, who alerted him that the police were actively investigating him for murder.[172] An arrest warrant was being considered. Mr. Big offered to help him by creating a false alibi, altering DNA, bribing police and witnesses, and/or finding another person to confess to the murder. If Rockey did not want help, however, he was welcome to leave without consequence.[173] Meanwhile, Mr. Big reiterated the benefits Rockey was to shortly receive through the organization, including: a good place to live; reasonable wages; "large pay days"; new driver's and boating licenses;

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167 *Supra* note 5 at paras 55-56.
168 *Ibid* at para 92.
169 *Ibid* at para 71.
170 *Ibid* at paras 42-43.
171 *Ibid* at paras 34-38.
172 *Ibid* at paras 67-68.
173 *Ibid* at paras 110-112, 128.

and a whole new name and secondary life.[174] Rockey confirmed he wanted Mr. Big's help and confessed to the murder. Rockey initially provided a generalized account, then with more detail following Mr. Big's request to talk as if was telling this to someone "who's gonna go take the fall for you."[175]

The court admitted the confession, finding its probative value outweighed its prejudicial effect. No abuse of process was found. Despite the use of firearms, violence, threats of violence, and two staged deaths, the court downplayed this aspect as "not as immediate or graphic" as various other MBOs and "not problematic" given:[176]

- undercover operators did not routinely carry weapons for intimidation;
- victims were not murdered in Rockey's presence nor was he conscripted to administer threats;
- Rockey was not personally threatened with retributive violence; and
- any violence was directed at persons outside the organization.

The court accepted the police's explanation that the staged deaths and general aura of violence were not to intimidate Rockey but to show him the organization could and would assist members and build his comfort to disclose prior criminal conduct.[177] The court reasoned that as Rockey was not threatened or directly exposed to violence, and was assured that members would not be subjected to violence, he was not coerced by fear.[178] Rockey's testimony that he feared for his life on several occasions was deemed "inconsistent with his violent history and demonstrated comfort in employing violence as an organization member."[179]

Despite Rockey's precarious financial situation when the MBO began, the court found he had "the financial capacity to function on a daily basis". While he was paid $8,425 over the 3.5-month MBO, provided $9,700 in accommodation, and $635 in meal costs, the court found these financial benefits only offered "moderate lifestyle improvements" and "were not life altering".[180] The fact that Rockey participated in 3-4 scenarios a week, akin

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174 *Ibid* at para 125.
175 *Ibid* at paras 113, 138.
176 *Ibid* at paras 40, 76, 81, 85-86.
177 *Ibid* at paras 81, 179.
178 *Ibid* at para 180.
179 *Ibid* at para 84.
180 *Ibid* at paras 55, 60-62, 65, 71, 126.

to a part-time job, and formed several friendships, including with one operator that he loved "like a sister", were not discussed as part of the *Hart* analysis.[181] Nor was Rockey's drug use a factor. His testimony of using meth daily during the MBO was not believed, despite having a two-day supply on him when arrested. This amount was deemed consistent with a relapse and not evidence of continued use. The court accepted the operators' testimony that they did not suspect Rockey of using meth, and as such, even if he were addicted, "by definition, they could not, and did not, exploit" it.[182]

While Rockey's confession corroborated mundane details and was consistent with certain holdback evidence, it did not lead to any new inculpatory evidence and was otherwise inconsistent and/or directly contradicted other key details, such as the victim's injuries, where the victim was struck, and where the murder weapon was disposed of.[183] These issues – as well as Rockey's allegation that he was parroting murder details learned from the actual perpetrator – did not trouble the court, who saw its role as merely determining threshold reliability, not undertaking a full reliability analysis.[184]

1. Commentary

Rockey is a dispiriting example of a court downplaying several significant vulnerabilities and failing to properly exercise its gatekeeping role over a confession that had major reliability issues. It epitomizes the problem with the *Hart* analysis: if a court wants to admit a confession, it will find a way to do so. Implying that someone must be murdered or for the accused to administer the violence to effectively amount to an abuse of process is an impossibly high standard to meet – and legally incorrect. *Rockey* maintains that nearly any level of violence is acceptable if done to those outside the organization. As noted above, this is not only a false dichotomy but fails to account for the fact that if an accused does not confess, they risk being excluded from the organization, and hence subject to this violence. The fact one is only protected by being a member only strengthens the incentive to become a member, or maintain membership, and hence to confess, given it is portrayed as the only sure way to stay within the organization.

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181 *Ibid* at paras 38, 49.
182 *Ibid* at paras 92-93, 96, 100-101.
183 *Ibid* at paras 142-147.
184 *Ibid* at paras 148-150.

On this point, the court's narrow focus on the fact that Rockey was already treated as a member when the "big deal" was offered as a means of downplaying this incentive to confess completely misses the point that the incentive was not to join the organization at that point, but to participate in the "big deal", which represented a critical chance to move up in the organization and make substantial money.[185] The court seems to think bare membership is all that matters, as opposed to significant advancement and remuneration. While an offer of membership is the classic MBO narrative device, there is no meaningful difference between this and a scenario where promotion is used as the reward instead. The *Rockey* script, and legal analysis, seem to have learned nothing substantial from *Hart*.

Further, the court's reasoning regarding Rockey's financial situation and drug use is questionable. He went from making $1,100/month to approximately $2,400/month, with $3,300 in other benefits, yet the court finds this was a modest increase that did not alter his life. However, a doubling of income, frequent hotel accommodation, and paid meals is far from a modest increase, and would significantly alter someone's life given $1,100/month is subsistence-level (especially in British Columbia, where Rockey lived). The court's analysis is insensitive to how that much money can be invaluable when impoverished.

As for his drug habit, the court concluded that Rockey's non-addiction and discontinuance of use were dispositive without grappling with how his meth consumption might have affected his mental and physical health or caused withdrawal symptoms. The court found that even if Rockey was addicted, the police could not exploit this addiction as they did not know about it. This logic is deeply flawed. Police ignorance regarding a particular vulnerability cannot be used as a shield. Otherwise, it would incentivize deliberately knowing less about a target. In any event, *Hart* does not require police to be aware of a vulnerability for it to be taken advantage of.[186] Here, the police knew Rockey was using meth at the onset of the MBO. His continued use, or withdrawal symptomatology, ought to have been within their reasonable contemplation.

Lastly, *Rockey* demonstrates why a more robust gatekeeping analysis must be built into the *Hart* framework. While the court was not necessarily wrong to find that threshold reliability is a relatively low standard, the fact

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185 *Ibid* at paras 121-124.

186 *Hart*, *supra* note 1 at para 117.

that a confession of such a dubious value was allowed to go before a trier of fact is problematic given what is known about the propensity to take such confessions at face value, despite how it may have been coercively induced (especially as *Rockey* was a jury trial).[187] Put simply, the danger of an MBO confession being too tempting to disregard despite possible coercion ought to militate against a standard of admission that is akin to hearsay statements. I return to this point in more detail below.

D. *Caissie*

During a 49-scenario MBO running from January 20, 2016, to July 19, 2016, Joseph David Caissie was immersed in the activities of a fictional criminal organization to determine if he killed his ex-partner. The "bump" was winning a fictional survey's grand prize of hockey tickets.[188] On the limousine ride to the game, he was introduced to officers posing as other winners. One of the officers, Smith – who attended with his boss, Mr. Big – commissioned Caissie to construct an ice fishing shack.[189] Smith later confided that he and Mr. Big were involved in criminality and began to involve Caissie in activities such as vehicle repossession, debt enforcement, and money laundering.[190] It was conveyed to Caissie that Smith was powerful and ready to use violence if necessary and that the organization worked with "bikers" and was able to intimidate them.[191] Caissie was also told Mr. Big had RCMP contacts who could sort out criminal issues.[192]

Eventually, the seed was planted that a membership spot in the organization was opening soon, with Smith asking Caissie if he would be prepared to take it. With Mr. Big providing gifts for his grandchildren, and his increased role in the organization, Caissie began to more assertively state his intention to join the organization full-time.[193] He also began to confess to the murder, but with inconsistent details. Caissie was fired from the organization for lying but stuck to his story. 13 days later, Mr. Big offered Caissie one last chance to come clean and prove he was telling the truth

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187 *Supra* note 5 at para 149.

188 An identical scenario was used in *Sneesby, supra* note 116. Indeed, the two MBOs play out as if from the same script.

189 *Supra* note 6, *SKQB 2018* at paras 105-111.

190 *Ibid* at paras 112-114, 121.

191 *Ibid* at paras 115, 125-127.

192 *Ibid* at para 133.

193 *Ibid* at paras 119, 147.

about the murder. Without 100% truthfulness, he would be out of the organization for good. Caissie confessed again, and despite certain details remaining inconsistent, he was arrested.[194]

The trial judge admitted the confession. The prejudicial effects were found to not be as acute as with other cases, mostly because there were:

- only "minimal" violence against people outside the organization;
- no violence against organization members; and
- no direct threats against Caissie (nor did Caissie participate in any violence).

It was repeatedly stressed to Caissie that he was free to leave the organization at any time or decline participation in any activity he was uncomfortable with. The inducements were also found to be "modest", with Caissie being told he should maintain his legitimate employment and not rely on work from the organization. The court concluded that Caissie wanted in but was not so dependent that he needed into the organization.[195]

As for probative value, as the trial judge put it, the confessions were "reliable enough". Caissie confessed on six separate occasions, however, certain details were not only internally consistent but did not match up with the evidence, including the holdback evidence, on various key points such as the mode of killing. Nonetheless, it was determined Caissie accurately described mundane details of the crime which met the lower threshold reliability standard.[196] Counsel agreed that abuse of process was not engaged, so it was not argued at trial.[197] These findings were upheld on appeal, which concurred that Caissie was "not lifted out of poverty" – the $11,900 in wages and gifts provided to Caissie during the 6-month MBO notwithstanding – nor was he "friendless" or lacking family ties. Accordingly, he was neither "desperate nor destitute", nor "financially, socially, or emotionally vulnerable."[198]

1. Commentary

Caissie appears to be a conscious effort to remix the MBO plot, such that criminality and violence are ostensibly eliminated as narrative

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194 *Ibid* at paras 161, 165, 177-186.

195 *Ibid* at para 158; *supra* note 6, *SKCA* at paras 41-42, *SKQB 2019* at paras 132, 236.

196 *Ibid* at paras 161-163, 210, 213, 227, 340; *SKCA* at paras 15-21, 35, 38-39; *SKQB 2019* at paras 129, 157-161.

197 *SKCA*, *ibid* at para 43.

198 *Ibid* at paras 74-79.

devices.[199] However, it is only exclusive criminality which is eliminated and direct violence which is minimized. *Caissie* continues to imply such aspects to the same effect, and the crucial quid pro quo offer of covering up the alleged crime and organizational membership in exchange for a confession remains in place. Replacing a violent criminal organization with one that is purportedly legitimate, but violence-adjacent and capable of obstructing justice for the suspect's benefit, is a distinction without a difference. As discussed, violence is unnecessary to psychologically manipulate a suspect.

Indeed, as scripted the *Caissie* MBO likely did not need violence or criminality at all, given Caissie was motivated primarily by greed, ambition, and a fervent desire to join the organization. As such, the court's reliance on Caissie being told there was no expectation to do anything criminal and being given a choice of criminal or noncriminal work as a marker of reliability is misplaced.[200] It was the work that mattered to Caissie, not the criminality. Whether these factors make his coercion and manipulation any more palatable is dubious, but the court evidently thought so. However, *Caissie* is not markedly different for the classic MBO inducements of a financial windfall and stable employment – and if one considers the implication that a powerful organization with an ability to cover up crime and intimidate bikers could believably harm one's interests, then both the greed and fear motivators to confess are present. As for the confession itself, the idea that it was "reliable enough" to go before a trier of fact despite serious issues is problematic, as noted with *Rockey*.

E. Conclusion

As evidenced by *Buckley*, *Dauphinais*, *Rockey*, and *Caissie*, MBO scripts remain coercive and disproportionately target vulnerable populations post-*Hart*. They do so either in ignorance of *Hart*, by playing in *Hart*'s shadows, or by evolving MBOs beyond the type of classic technique *Hart* discusses. Coercion and targeting of vulnerability are not accidental features but are embedded in MBO design and purpose. In MBOs the risk of (inadvertently) overlooking prejudicial effects and abuse of process 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. Subtler forms of coercion can be as effective as violence and fear, and the lack of these

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199 *Supra* note 6, *SKQB 2018* at para 102.

200 *Ibid* at para 350.

factors cannot be taken as a shortcut to an admissible confession. More nuance is needed, especially given triers of fact post-*Hart* continue to not be especially aware or sympathetic to various suspect vulnerabilities (education, poverty, youth, drug use etc.) which can compound existing reliability problems. Put simply, a vicious cycle remains: MBOs are generally the same post-*Hart* and triers of fact continue to tolerate them. Meet the new (crime) boss. Same as the old boss.

REFORMING MBOS

I agree with Iftene and Kinnear's conclusion that what makes MBOs efficient in obtaining confessions is also what makes them legally and ethically problematic: the exploitation of individual vulnerabilities through monitoring and tailor-made psychological techniques to induce a confession.[201] Consequently, MBOs pose an inherent risk of contributing to wrongful convictions.[202] This is further borne out by the analysis of post-*Hart* MBOs which have not changed this core tenet of exploiting vulnerability, notwithstanding the attenuated use of violence and the pretense of criminality in certain cases.

The state's monopoly on the legitimate use of force comes with a corresponding imperative to use it responsibly.[203] MBOs often represent an irresponsible use of state power. Legislative and intra-police oversight of MBOs continues to be lacking in Canada.[204] It is only the courts which provide a meaningful review mechanism. However, courts appear content with MBOs, save for the odd case. Judges tend to under-scrutinize suspect vulnerabilities, downplay reliability concerns, and not engage with the scientific literature on induced confessions. This has stripped *Hart* of its power to properly regulate MBOs. An overarching problem is court evaluation is purely *post facto*, and given the highly contextual nature of the exercise, somewhat arbitrary as to which confessions will be admitted and which will be excluded. If anything, *Hart* may have provided a degree of legitimacy to the technique – what courts permit they condone.

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201 Iftene & Kinnear, *supra* note 7 at 341.

202 Moore & Keenan, *supra* note 24 at 54.

203 Max Weber, "Politics as a Vocation" in *From Max Weber: Essays in Sociology*, eds HH Gerth & C Wright Mills (London: Routledge, 1998) 77 at 78.

204 Iftene and Kinnear, *supra* note 7 at 340-341.

This lack of proper court oversight has, in turn, allowed MBOs to remain effectively subject to the same often problematic scripts as employed pre-*Hart*. *Hart*'s new framework, simply put, did not and perhaps could not have solved the structural coerciveness and calculated avoidance of legal rules that MBOs employ. As Steve Coughlan notes, MBOs follow "the letter of the rules while snubbing its nose at the spirit of them. Creating an additional specific rule is unlikely to solve that problem because that approach plays the game at which Mr. Big is already a master."[205] Indeed, MBOs remain "both acutely alive and completely adaptable" post-*Hart*.[206]

In Luther and Snook's view, a consideration of the social influence tactics used to elicit confessions, which "verge on abuse of process", should lead to all MBOs being prohibited.[207] Iftene and Kinnear draw a similar conclusion, questioning whether MBOs "could ever be fully brought under the rule of law."[208] With appropriate scrutiny one would expect confessions to more routinely be deemed inadmissible, but this is not the case. This raises the question of whether a legislative solution might instead be sought. The overall costs of MBOs alone – which could be redistributed to victims of crime instead – would justify politically-induced abolition. The time and police resources spent on MBOs could also be more efficiently applied to other matters.

However, a degree of pessimism is warranted regarding any potential demise of MBOs. A counter to concerns of police impropriety is that MBOs are successful in bringing serious offenders to justice where conventional investigative methods have failed. As Justice Lamer (as he then was) stated in *Rothman*, "the investigation of crime and the detection of criminals is not a game to be governed by the Marquess of Queensbury rules."[209] Surely, police must have *some* investigatory leeway and be able to offer *some* inducements given that few suspects will spontaneously confess.[210] Criminal ingenuity cannot go completely unmatched, especially where it is difficult

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205 Steve Coughlan, "Threading Together Abuse of Process and Exclusion of Evidence: How it Became Possible to Rebuke Mr. Big" (2017) 71 SCLR (2d) 415 at 438. See also Iftene, *supra* note 9 at 24-25.

206 Adriana Poloz, "Motive to Lie? A Critical Look at the "Mr. Big" Investigative Technique" (2015) 19:2 Can Crim L Rev 231 at 250 [Poloz].

207 Luther & Snook, *supra* note 8 at 2, 18.

208 Iftene & Kinnear, *supra* note 7 at 341.

209 *Rothman v The Queen*, [1981] 1 SCR 640 at 697.

210 *R v Oickle*, 2000 SCC 38 at para 57 [*Oickle*].

to successfully employ traditional police techniques.[211] MBOs, it can be held, are a natural extension of these principles, and a necessary tool to effectively deal with serious, otherwise non-investigable crime.

There is no doubt that MBOs catch factually guilty individuals and are often a non-fungible tool for doing so. The issue is whether these successes and this innovation justify the risk of wrongful convictions, the toll it places on the administration of justice, and the significant use of police resources. The danger, as one commentator has stated, is that MBOs will continue to be tolerated and used because the technique works: "Of course it does. It relies on coercion, inducements, and threats".[212] I share Iftene's conclusion that as effective as MBOs may be in obtaining convictions, the "cost of those convictions may come at too great of a cost for individual rights and the integrity of the justice system. To cite Professor Kaiser, "if the Crown cannot prove its case without doing violence to so many principles 'then it's better that the case not be proven.'"[213] Abolishing MBOs is the only sure way to prevent the goal of solving crime from trumping fundamental rights and principles of justice. However, as this is not likely to occur any time soon, MBO reforms are a necessary interim measure. I set out three such proposals below: (1) greater external oversight of MBOs; (2) re-invigorating the abuse of process analysis; and (3) treating MBOs as akin to in-custody interrogations.

A. Greater External Oversight of MBOs

First, there is a need for MBOs to be subject to clear guidelines and greater external oversight. James Stribopoulos emphasizes the fact that, unlike Parliament, the courts cannot comprehensively address the wide array of issues that surround police investigations; rather they are bound to the issues in the specific case before them. This fact constrains the court from addressing relevant social facts that may alter their decision, such as research pertaining to racial bias.[214] Other than through courts, there

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211 *R v Mack*, [1988] 2 SCR 903 at 916-917; *R v Ramelson*, 2022 SCC 44 at paras 1, 33, 92.

212 Brian Hutchinson, "Of course Mr. Big confessions work. They rely on coercion, inducements and threats" (1 August 2014) online: *National Post* <nationalpost.com/opinion/brian-hutchinson-of-course-mr-big-confessions-work-they-rely-coercion-inducements-and-threats> [perma.cc/UU6M-937R].

213 Iftene. *supra* note 9 at 44-45, citing H Archibald Kaiser, "Hart: More Positive Steps Needed to Rein in Mr. Big Undercover Operations" (2014) 12 CR (7th) 304 at 307.

214 James Stribopoulos, "In Search of Dialogue: The Supreme Court, Police Powers and the Charter" (2005) 31:1 Queen's LJ 1 at 22.

appears to be minimal accountability and oversight over MBOs, and little interest among state or quasi-state actors to provide it.[215] Nor do police have to disclose whether the operations yield successful convictions, or how much they cost.[216] Kate Puddister and Troy Riddell argue for more independent control over and review of MBOs by way of legislative guidelines. They also recommend:

- Creating a board of management at the national level to provide management oversight of human and financial resources regarding MBOs, strategic planning and risk assessment, and the effects on the administration of justice. That is, national rules for how MBOs should be governed; and
- Providing provincial governments with reports that evaluate the costs and benefits of MBOs and how they contribute to the province's policy goals – including the possibility of wrongful convictions and the erosion of criminal justice values.[217]

To the first point, I would add that there should be some sort of screening process regarding the selection of Mr. Big targets that is not solely determined by police agencies. This process would, at a minimum, evaluate potential targets based on their vulnerability factors and not target those who are especially prone to false confessions, based on the factors set out in the psychological literature. To this end, the process should include those with psychological expertise such that the science of false confessions can be front-loaded into the process. Crown counsel could also be involved in an advisory role, either acting independently or as part of a suspect screening committee.[218] It is to everyone's benefit to prevent specious

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215 Kate Puddister & Troy Riddell "The RCMP's 'Mr. Big' sting operation: A case study in police independence, accountability and oversight" (2012) 55 Can Publ Adm 385 at 396-398.

216 Tracey Lindeman, "'Disgusting' behaviour at Canadian police undercover training course sparks inquiry" (3 June 2022), online: The Guardian <theguardian.com/world/2022/jun/03/canada-british-columbia-police-undercover-training-program> [perma.cc/G4FH-8DN6].

217 While the RCMP is a federal policing entity there are often agreements between federal and provincial governments for the RCMP to provide provincial policing services making RCMP policing a concern for both levels of government.

218 The notion of a committee to determine issues of legal importance to a suspect/accused is not without precedent. See, for example, Manitoba's In-Custody Informer Assessment Committee which evaluates if in-custody informer evidence should be called against an accused: Manitoba Department of Justice, "2:INF:1 - In-Custody Informer Policy" (5 Nov 2001), online (pdf): *Manitoba Prosecution Service* <gov.mb.ca/justice/crown/prosecutions/pubs/in_custody_informer.pdf>.

convictions, including the police. These operations are lengthy, costly, and labour-intensive – to say nothing about their prosecution. If they are to be run, they should only be run against those who it can safely be said would not be unduly influenced by the tactics necessarily involved in MBOs.

Buckley is exactly the type of case that would have benefitted from such a screening process. In hindsight, it seems obvious that Buckley was overly inducible and prone to false confessions. The goal is to convert hindsight into foresight. A national-level review process could also consider which crimes MBOs can be used to investigate. The use of the technique for non-murder and/or *mens rea*-driven offences, as in the post-*Hart* case of *Habib*,[219] deserves a review. Otherwise, police may be encouraged to improvise, expand, and apply MBOs beyond the most serious of crimes. Given that MBOs remain free of meaningful oversight, with evidence that many operations have failed to properly onboard *Hart*, such potential developments are cause for concern.

There also needs to be better training of MBO operatives, particularly regarding suspect vulnerabilities. Recent reports detail troubling behaviour in MBO training programs – such as penetrating a colleague using a vegetable, defecating on another, and exposing genitalia.[220] As Kent Roach notes: "If these allegations are correct, then obviously some of these officers' thought things were appropriate that are manifestly inappropriate". If this type of behaviour was deemed acceptable in a training context, it cannot come as much of a surprise when problematic behaviour is used towards suspects.

Lastly, questions of when, why, and how the police use MBOs deserve more transparent and accountable answers. MBOs, and their value relative to other policing priorities, should be subject to some form of public evaluation and comment. The current regime is unacceptably opaque and free of meaningful review. MBOs, and their acceptability to the public – be it based on morality, cost, or other considerations – merit greater scrutiny.

B. Re-invigorating the Abuse of Process Analysis

A court's abuse of process analysis should come before the confession is discussed, and ought to be more rigorous and sensitive to a suspect's vulnerabilities beyond the mere use of violence. Soft pressure techniques

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219 *Supra* note 115, QCCQ at paras 1, 39.

220 *Lindeman*, *supra* note 216.

must be considered and given their due weight. Promisingly, all this occurred in *Johnson*,[221] where the confession was excluded on both prongs of *Hart*. Starting with abuse of process can invite a more nuanced and informed analysis of the confession. Conversely, turning to the confession first may have the effect of lodging its probative value so firmly in the judge's mind that any abuse of process may be discounted to sustain a perceived finding of guilt. A confession can taint how other evidence is interpreted, sometimes referred to as confirmation bias,[222] a possibility none of the post-*Hart* cases indicates an awareness of.[223]

More broadly, the danger is that MBOs may be too entrenched in the legal culture to offend a judge's sense of fair play and decency, barring especially egregious facts. Judges may have a greater tolerance for MBOs by virtue of their familiarity with them, or knowledge that it has generally been legally accepted.[224] Indeed, the more MBOs are legally accepted, the more it becomes legally entrenched. The more MBOs become legally entrenched, the less chance there is of an abuse of process argument gaining traction. Wherever it is placed in the analytical order, courts must adopt a more robust conception of abuse of process than they typically have to date, as forcefully exhorted by the Ontario Court of Appeal ("ONCA") in *Quinton*:[225]

> [93] A search of the post-*Hart* case law indicates that very few Mr. Big confessions have been excluded because the police conduct amounted to an abuse of process, despite Moldaver J.'s comments that the doctrine must be reinvigorated to guard against abusive police conduct. It appears that the doctrine of abuse of process might still "be somewhat of a paper tiger", especially in cases like the case at bar, where the accused was not threatened with overt or implied violence: *Hart*, at para. 79. This is despite Moldaver J.'s comments, at paras. 78, 114, that police conduct

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221 *Johnson c R*, 2021 QCCS 5369 at paras 868-980, 995.

222 See e.g., 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; 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.

223 Iftene & Kinnear, *supra* note 7 at 338-339.

224 Whether a judge is an appropriate community representative, given they tend to be older, white, upper-class, and male, is also open to question: Mariana Valverde, *Law's Dream of a Common Knowledge* (Princeton: Princeton University Press, 2003) at 46. As recognized in *R v Labaye*, 2005 SCC 80 at para 18, the community shock test has "tended to function as a proxy for … personal views".

225 *R v Quinton*, 2021 ONCA 44.

> must be carefully scrutinized in light of the obvious "risk that the police will go too far".
> [94] The promise of a "reinvigorated" abuse of process doctrine must not be an empty one.

Quinton and *Johnson*, released in December 2021 and January 2021 respectively and both involving pre-*Hart* MBOs, provide some measure of hope that courts are becoming more aware of the subtle abuses of MBOs, and are not simply looking at violence, or the absence thereof, as dispositive. However, the jury remains out as to whether these cases will be more of an exception than the rule. If followed, they may be able to re-invigorate the abuse of process analysis, which in turn could lead to MBO scripting changes. That said, such an admonition was also offered by *Hart* to marginal effect. If courts and MBOs have largely ignored the SCC on this point, they may also ignore the ONCA and the Superior Court of Québec.

Overall, there should be more robust gatekeeping at the admissibility stage. Cases such as *Rockey* demonstrate that questionable confessions are being put before triers of fact, on the grounds that threshold admissibility is not a particularly stringent standard. The issue, primarily with juries, is that once the confession is tendered into evidence it can be difficult to ignore, no matter the various prejudicial effects and/or abuses of process in play. The scientific and legal literature is clear that MBO confessions are especially prejudicial, such that a higher degree of care is needed regarding their admissibility than is applied to hearsay evidence. One way to implement more stringent gatekeeping is to treat MBOs as akin to in-custody interrogations.

C. Treating MBOs as Akin to In-custody Interrogations

As noted above, offers of leniency, offers of benefits, threats of harm, and quid pro quo offers have all been established to have causal links to false confessions. False confessions, in turn, are a predominant cause of wrongful convictions.[226] As MBOs employ these coercive psychological techniques, they risk generating not only false confessions, but wrongful convictions. However, because MBOs are designed to elicit inculpatory statements regarding an event that occurred before the operation started and not for criminal activity during the undercover operation, MBOs typically fall outside of the Canadian definition of entrapment.[227] Given

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[226] Moore et al, *supra* note 10 at 384-385.

[227] *R v Ahmad*, 2020 SCC 11 at paras 15-19. That said, a finding of entrapment in an MBO

these dangers and gaps in the law, the Crown should be required to prove beyond a reasonable doubt that MBO statements are reliable and voluntary. This would raise the threshold of admissibility in line with the Canadian common law confessions rule and provide for greater protection against the admission of false confessions.[228] As Chris Hunt and Micah Rankin put it: "If the problem of false confessions is a central concern…then it is difficult to understand why, as a matter of principle, the Crown is not held to the same stringent standard when seeking to tender a Mr. Big confession," which is admissible even where there is a reasonable doubt that it was voluntary.[229]

Given that the police can exercise significant power when interrogating suspects, treating MBOs as akin to in-custody interrogations would not be a sea change. Per *Singh,* the police can continue to question a suspect notwithstanding their refusal to engage or stated intention for the interrogation to end.[230] Per *Sinclair*, once a suspect is provided with an opportunity to obtain legal advice, they cannot end an interrogation for further legal consultation, and the police can continue to question them without the presence of legal counsel (barring certain limited circumstances).[231] Under *Singh* and *Sinclair*, for better or worse, MBO operatives would retain wide investigatory latitude. They would still be able to seek a confession even if the suspect indicates they do not wish to speak about the alleged crime, and even if they retain legal counsel. What such a modification would do is allow for a greater focus on the voluntariness of the confession, an analysis which, as the SCC recently stressed in *Lafrance*, "must be alive" to an individual's vulnerabilities "which may relate to

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is not without precedent. In *R v Evans* [1996] 2 CR (5th) 106 (BCSC), the court found that due to Evans' limited mental capacity (brain damage and severe learning disabilities), he was manipulated and exploited by the police due to their persistence to involve him in criminal activity and their exploitation of his belief that the undercover officers were his friends: paras 33, 36.

228 Nathan Phelan, "Importing a Canadian Creation: A Comparative Analysis of Evidentiary Rules Governing the Admissibility of Confessions to Mr. Big" (2019) 42:3 Man LJ 38 at 423-424. This approach has also been taken in England: Chris Hunt & Micah Rankin, "R v Hart: A New Common Law Confession Rule for Undercover Operations" (2014) 14:2 OUCLJ 321 at 322, 335.

229 Hunt & Rankin, *ibid* at 335.

230 *R v Singh*, 2007 SCC 48 at paras 28, 45-47.

231 *R v Sinclair*, 2010 SCC 35 at para 2; *Lafrance*, *supra* note 46 at paras 68-79; *R v Dussault*, 2022 SCC 16 at paras 30-45.

gender, youth, age, race, mental health, language comprehension, cognitive capacity or other considerations."[232] It would also elevate the Crown's burden of proof in admitting the confession to beyond a reasonable doubt, a standard in line with police interrogations in other contexts.[233]

However, despite MBOs engaging several rationales for the protection against self-incrimination – reliability, abuse of power, normative concerns regarding personal autonomy and dignity[234] – these protections do not apply as the suspect is deemed to not be under state control, and hence not detained.[235] Another related reform, then, is to modify the existing common law confession rule by removing the threshold 'person in authority' requirement. This "modest recalibration"[236] is endorsed by Justice Karakatsanis, dissenting in *Hart*, who argued that MBO targets should be deemed to be detained such that their s. 7 *Charter* rights apply. Doing so recognizes that generating a confession can impermissibly come "at a cost to human dignity, personal autonomy and the administration of justice."[237] The police using their powers to create a fictitious world equates to virtual control – for months if not years on end – and a breach of the suspect's right to silence. This "affects not only the reliability of the evidence obtained, but also the suspect's autonomy and raises issues regarding the state's abuse of power."[238] State agents are "not rendered impotent simply because they are pretending *not* to be state agents."[239]

The rights to silence and against self-incrimination are breached, and "the fairness of the trial is affected," whenever "there are concerns regarding autonomy, reliability, and police conduct."[240] Indeed, threats and inducements employed by MBOs may greatly exceed those which, if employed by a traditional person in authority, would render a statement involuntary.[241] The risk of a false confession may be even greater with MBOs "because the suspect does not appreciate the adverse consequences of [their]

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232 *Lafrance*, *ibid* at para 79.
233 *Oickle*, *supra* note 210 at paras 65-71.
234 Iftene, *supra* note 9 at 37, 39-40.
235 *Ibid* at 37.
236 Hunt & Rankin, *supra* note 228 at 334.
237 *Hart*, *supra* note 1 at para 167.
238 *Ibid* at para 173.
239 Moore et al, *supra* note 10 at 378.
240 Adelina Iftene, "The 'Hart' of the (Mr.) Big Problem" (2016) 63 Crim LQ 178 at 187.
241 Moore et al, *supra* note 10 at 359.

admissions."[242] Steven Smith, Veronica Stinson, and Marc Patry compiled a helpful chart comparing standard in-custody versus non-custodial Mr. Big interrogation tactics, reproduced below:[243]

Interrogation Strategy	*Standard interro-gation*	*Mr. Big interro-gation*
Situation is clearly a police interrogation	Yes	No
Suspect knows interrogator is a person of authority	Yes	No
Suspect given explicit/direct inducement to confess	No	Yes
Suspect warned of their right to remain silent	Yes	No
Suspect given option to contact lawyer	Yes	No
Suspect is explicitly threatened by interrogators	No	Yes
Interrogators use minimization tactics	Yes	Yes
Interrogators use confrontation tactics	Yes	Yes
Interrogators use isolation tactics	Yes	Yes
Interrogators deceive suspect about evidence	Yes	Yes
Interrogators explicitly offer lenient legal treatment	No	Yes
Interrogators offer quid pro quo to suspect	No	Yes
There is disclosure of holdback evidence	No	Yes
Police involve suspect in illegal activity	No	Yes

The lack of s. 10(b) right to counsel protections is especially troubling. Operatives can effectively dissuade suspects from seeking legal advice, as they did in *Knight*,[244] without consequence. It is a modest step to ask for s. 10(b) to apply in the MBO context such that the state is precluded from interfering with a suspect's right to understand their legal jeopardy.

The right to silence should also be applicable to MBOs and MBO operatives should be considered "persons in authority", triggering a

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242 *Ibid* at 378.

243 Smith et al, *supra* note 31 at 182.

244 *Supra* note 15 at paras 106-110, 126-127.

requirement that the voluntariness of MBO admissions be proven beyond a reasonable doubt.[245] Determining who is a person in authority should also change from a subjective to an objective standard.[246] This approach would better protect s. 7 principles of fundamental justice, including prohibiting the use of self-incriminating evidence obtained by coercive methods.[247] MBOs are unlike other undercover operations and more akin to in-person interrogations. The purpose is to elicit a confession, and significant power and influence are used to that end. The police – and by extension the state – retain control of the target throughout the MBO, a "legal loophole" prone to exploitation.[248] Functional detention should be assumed given that substantial state control is at the "heart of such operations," and without it MBOs cannot succeed.[249] Timothy Moore, Peter Copeland, and Regina Schuller aptly summarize this point:

> While the target of a Mr. Big investigation may not perceive [themselves] to be subject to the coercive power of the state, the fact remains that the state is engaging in highly invasive behaviour and exercising a significant degree of control over the suspect through the creation and manipulation of the scenarios. With respect to issues of reliability, it is not persuasive that the interrogation context provides a unique or exclusive opportunity for the creation of false confessions through coercive techniques. The threats and inducements employed in the latter stages of Mr. Big operations may greatly exceed those which, if employed by a traditional person in authority, would render any subsequent statement involuntary...The significant exercise of state control over the suspect, coupled with the use of substantial inducements to elicit information, justifies a degree of judicial supervision of the technique to ensure that the goals of fairness and reliability underlying the confessions rule are achieved...From a psychological perspective, the custodial bright line can be illusory in terms of the exercise of control.[250]

CONCLUSION

Nearly a decade on, *Hart* has failed to meaningfully alter either court analyses or the actual scripting of MBOs. The operational changes appear limited to making the organization's criminality an optional detail and implying violence more so than outright demonstrating it. As the suspect is

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245 See e.g., Moore & Keenan, *supra* note 24 at 98.
246 Lutes, *supra* note 78 at 243.
247 Poloz, *supra* note 206 at 238.
248 *Ibid* at 241.
249 Iftene, *supra* note 240 at 201-204.
250 Moore et al, *supra* note 10 at 359-360, 378.

still induced by the money, prestige, stable employment, and friendships of quasi-criminal and legitimate organizations, criminality is a red herring regarding prejudicial effect and abuse of process. As for violence, the line between witnessing it and knowing it has occurred, or that the organization is capable of it, is illusory. Each conveys a threat of danger and induces fear. Until the spectre of reprisal for non-acquiescence with Mr. Big and/or the organization is removed, suspects will continue to be unduly influenced to confess if only to avoid the possible negative consequences of not doing so. Focusing on criminality and violence as the problematic elements of MBOs misses the bigger point: MBOs are excessively coercive mainly because of their highly effective soft pressure techniques, not their hard ones.

As these soft pressure techniques continue to be used post-*Hart*, with no indication of removal from standard MBO scripting, there may be no way to regulate MBOs as *Hart* suggested they could. The recent cases of *Johnson* and *Quinton* provide some measure of hope, but it may be that the only way to prevent false confessions, wrongful convictions, and abuses of process which flow from MBOs is to abolish the technique altogether. The continued tolerance of MBOs without significant legal or policy reform is, simply put, untenable. Such reforms could include (1) greater external oversight; (2) re-invigorating the abuse of process analysis; and (3) treating MBOs as akin to in-person interrogations. Meanwhile, developments in how MBOs are legally analyzed and scripted should continue to be tracked to see if there is indeed any cause for optimism or, as has appeared to date, that MBOs are beyond repair and in need of abolition.