RECENT DEVELOPMENTS: CRIMINAL PROCEDURE
PART I

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A New Legal Regime for the Admissibility of “Mr. Big” Confessions

A major new development in Canadian criminal law has occurred in R. v. Hart, in which the Supreme Court of Canada recognized that some limitations on “Mr. Big” operations are required. When the police have otherwise been stymied in their investigations, they have sometimes resorted to “Mr. Big” operations under which undercover operatives pretend to the suspect that they are organized crime linchpins. Over time, after cultivating the suspect’s confidence and loyalty, they ask him or her to prove bona fides by admitting to a crime. In some, perhaps most, instances, subsequent investigation may show that the resulting confession was true and therefore the technique has proven to be effective in crime detection. However, especially when there is no corroborating evidence, such as the discovery of the body in a murder case, there can be significant concerns both about the truthfulness of the confession and about the police conduct. As the Supreme Court noted in R. v. Hart, this investigative technique is apparently a Canadian invention that has been used in more than 350 cases in this country.

“Mr. Big” operations, until Hart, fell outside the control of the judiciary in any meaningful way. This is because the suspect is not detained so as to trigger the Charter right to remain silent and the right to counsel. The common law confession rule does not apply because the suspect does not know that the undercover operatives are police officers, hence, persons in authority. Unless the police trickery is so extreme that it would shock the community, the discretion to exclude the evidence as provided by R. v. Rothman has no application. Thus, until Hart, the existing doctrines as a means of avoiding false
confessions and wrongful convictions were inadequate. As at least a measure of control over these operations, prior to *Hart*, some courts had begun to mandate cautions to juries about the incidence of false confessions.\(^5\)

In the vast majority of “Mr. Big” operations so far litigated, the suspect has eventually led the undercover operatives to highly probative and incriminating evidence, such as the body in a murder case, and this both helped in the generally positive assessment of the technique and in arguably avoiding false confessions. However, absent confirming evidence or where the police conduct is more debatable, concerns have remained about the technique. It took *Hart* to lead to changes in this position.

In *Hart*, the police investigation into the drowning deaths of Hart’s daughters had been unable to show that a crime had even been committed so that the only evidence against the accused came from admissions to the “Mr. Big” operatives. The accused was poor, socially isolated, and therefore vulnerable. A majority of the Newfoundland and Labrador Court of Appeal held that the statements were inadmissible and ordered a new trial. This ruling was upheld by the Supreme Court of Canada and, in a judgment delivered by Justice Moldaver, the Court established a new common law regime for assessing whether confessions derived from “Mr. Big” operations should be admitted into evidence.\(^6\)

In coming to this position, the Court identified three major problems with the technique: the risk of false confessions, the almost inevitable evidence that the accused participated in criminal behaviour at the behest of the operatives, thus besmirching the character of the accused and risking prejudice in the fairness of the trial, and the conduct of the police operatives, especially whether they have resorted to unacceptable behaviour in seeking a confession. Thus, the Court decided that, henceforth, the admissibility of such confessions will be judged under a two-pronged approach.

The new regime begins with the presumption that confessions derived from “Mr. Big” operations are inadmissible unless the Crown can prove on a balance of probabilities
that the probative value outweighs the prejudicial effect of the confession. Probative value will be a function of the reliability of the confession and the enquiry will focus on the circumstances under which the statement was made and whether the confession itself indicates reliability. In considering the circumstances, a court must look to the length of the operation, the number of interactions, the relationship that develops between the undercover police and the accused, the existence of inducements and/or threats, the interrogation itself, and the personality of the accused with particular emphasis on age, sophistication, and mental health.\(^7\) The confession itself should be examined for confirmatory evidence since this “can provide a powerful guarantee of reliability.”\(^8\)

Balanced against the probative value is the prejudicial effect of the evidence. That the accused was prepared to commit crimes at the behest of a criminal organization leads to what Justice Moldaver referred to as “moral prejudice” and, where the accused seeks to repudiate the confession by testifying that it is false, it entails the accused testifying that lies were told to Mr. Big because of the desire to participate in the criminal organization. There is also an issue of “reasoning prejudice” in that the jury may be distracted from its fact finding in respect of the offence by the detailed evidence of the operation. As a safeguard against prejudice, Justice Moldaver has recommended that trial judges may exclude prejudicial evidence that is not essential to the narrative of the case and that limiting instructions might be given to the jury.

Even if the confession passes this test, it may still be excluded or the charge stayed under the doctrine of abuse of process. At this stage, the focus is on the police behaviour. The Court has left room for inducements and threats but not to the point of overcoming the will of the accused through coercion. Justice Moldaver defined coercion in this context as including physical violence or threats of violence but he also mentioned preying on any particular vulnerability of the accused, such as age, mental health issues, or addictions. Moreover, absent coercion, an abuse of process may be found in other ways such as through entrapment.
It will take some time for the implications of the *Hart* approach to be determined. In future, the police may well be able to adapt “Mr. Big” operations to follow the prescriptions of the Supreme Court. In the meantime, there will also be the problem for cases in which the technique has already been used. For those cases still “in the system,” there will be the opportunity to re-visit the admissibility of such confessions, even if on appeal, just as occurred in the aftermath of the decision in *R. v. Vaillancourt* in which the Court struck down constructive murder provisions. For older cases no longer in the system, those affected may have to resort to the powers of the Minister of Justice under sections 696.1-696.6 of the Criminal Code.

As time goes on, the police will undoubtedly find new techniques for investigating crime and interrogating suspects. To a great extent, this is a good thing but safeguards will always be needed. The regime established in *Hart* is a welcome addition to the arsenal of the judiciary to guard against both false confessions and unacceptable police conduct. Nevertheless, time will tell whether the line has been drawn in the right place. The Supreme Court has yet to make a definitive statement about the extent to which the police may engage in lies and trickery to obtain evidence. That remains a project for future determination.

**Warrant Required to Obtain Internet Protocol Address**

In *R. v. Spencer*, the Supreme Court of Canada held that the obtaining of an Internet Protocol (IP) address from the Internet Service Provider (ISP) constitutes a search and requires a warrant or production order. The Court indicated that informational privacy has three components: as secrecy, as control, and as anonymity. Moreover, the Court rejected the arguments that either the terms of the contract with the ISP or the Personal Information Protection and Electronic Documents Act, (PIPEDA) negated the reasonable expectation of privacy.
In the same case, although affirming the total of circumstances test that is applicable to section 8 analysis, the Court formulated the test somewhat differently as including (1) the subject matter of the alleged search; (2) the accused’s interest in the subject matter; (3) a subjective expectation of privacy that is (4) objectively reasonable. Since *Spencer* dealt with a computer search, it is not clear whether the Court intended to modify the *R. v. Edwards*¹³ approach to determining whether there is a reasonable expectation of privacy in a more general sense.

**Terminology for Prosecutorial Discretion Clarified**

Our criminal justice system depends a great deal on prosecutorial discretion in a wide variety of contexts. Nevertheless, sometimes it is alleged that the Crown conduct in the exercise of a discretion amounts to an abuse of process. The Supreme Court has restricted the review of prosecutorial decisions in the past by resort to the terminology of “core discretion” to distinguish some types of discretionary decisions from others.¹⁴ However, the distinction has been difficult to apply and therefore the Supreme Court clarified in *R. v. Anderson*¹⁵ that the term should no longer be used. In the course of holding that it is not a principle of fundamental justice that a prosecutor consider the Aboriginal status of an offender when deciding whether to tender a notice of increased penalty, the Court held that all prosecutorial discretions falling within the *Krieger* definition¹⁶ are reviewable only through the doctrine of abuse of process. On the other hand, tactics and conduct before the court are within the control of the judiciary as a part of the inherent jurisdiction to control the process. Where a Crown discretion is involved, the defence must establish an evidentiary foundation before the exercise of the discretion is subjected to scrutiny by the judiciary.
About the Author


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1 2014 SCC 52.
2 Ibid., at para. 56.
3 R. v. Hodgson (1998), 18 C.R. (5th) 135 (S.C.C.) held that a person in authority is someone that the accused reasonably believes is in authority over her or him.
6 Justice Moldaver ruled that the confessions in Hart should be excluded and expressed doubt that there would remain any admissible evidence upon which to possibly convict Hart on a re-trial. However, he left that decision to the Crown. Justice Cromwell concurred in the result but opined that the admissibility of the accused’s statements should be determined at the new trial. Justice Karakatsanis concurred in the result but she would have resorted to the principle against self-incrimination under s. 7 of the Charter as a means of providing for exclusion of confessions where the principle has been violated.
7 Supra, note 1, at paras. 102-104.
8 Supra, note 1, at para. 105.
9 The Supreme Court has held that a person may rely on subsequently decided cases only if he is “still in the judicial system:” Wigman v. The Queen (1987), 56 C.R. (3d) 289 (S.C.C.); R. v. Thomas (1990), 75 C.R. (3d) 352 (S.C.C.). A person remains in the system if he has launched an appeal to the Supreme Court, launched an application for leave to appeal to that Court, or sought an extension of time within which to launch a leave application.
12 S.C. 2000, c. 5.
16 As established in Krieger, supra, note 30.