Beyond Finality: *R v Hart* and the Ghosts of Convictions Past

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ABSTRACT

In July 2014, the Supreme Court of Canada released its decision in *R v Hart*, in which it confronted the controversial police investigatory tactic knows as a "Mr. Big Operation" (MBO). MBOs are undercover operations wherein police officers assume the role of organized crime figures seeking to recruit the accused into their organization. Using inducements, threats, and/or an atmosphere of oppression, the officers elicit incriminating statements from the accused, which prior to *Hart* were admissible in subsequent criminal prosecutions. In *Hart*, however, the Supreme Court recognized the risk of false confessions as a result of the investigatory tactics used, and consequently, the risk of a wrongful conviction. The Court formulated a new common law rule: that an MBO-generated confession will be presumptively inadmissible unless the Crown can demonstrate that the probative value of the statement outweighs its prejudicial effect.

The new rule is a fundamental reversal from the way MBO-generated evidence has previously been considered. In this article, we argue that while

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this rule will be considered in cases going forward, it should also be considered in past cases where the decision is no longer subject to appeal. In doing so, we confront the principle of finality, and examine when cases that are no longer before the courts should be re-examined for a retrospective application of a new law. In our view, the notion of finality must give way where strong indicia suggests that a wrongful conviction due to problematic methods of evidence procurement may have occurred. To that end, we argue that past cases where individuals were convicted on the basis of MBO-generated evidence should be reviewed in order to determine whether the evidence would be admissible under the framework from *Hart*, and by extension, whether there is a risk that a wrongful conviction occurred. Finally, we examine different options of how closed cases could be re-examined, and posit that the most appropriate course of action is an inquiry headed by a Canadian judge.

> "One of the overriding concerns of the criminal justice system is that the innocent must not be convicted."[1]
> - Justice Frank Iacobucci

> "Unreliable confessions present a unique danger. They provide compelling evidence of guilt and present a clear and straightforward path to conviction. Certainly in the case of conventional confessions, triers of fact have difficulty accepting that an innocent person would confess to a crime he did not commit. And yet our experience with wrongful convictions shows that innocent people can, and do, falsely confess. Unreliable confessions have been responsible for wrongful convictions — a fact we cannot ignore."[2]
> - Justice Michael Moldaver

I. INTRODUCTION

In many ways, time plays a central role in the life of the law. Laws are not only culturally contingent but also temporally dependent. When new norms are created, whether via legislation, the development of a new constitutional or common law rule or interpretation, the intended effects are often (though not exclusively) prospective. To the extent that a new rule is applied retrospectively, it is usually in connection with a case that is still

1 *R v Oickle*, 2000 SCC 38 at para 36, [2000] 2 SCR 3 [*Oickle*].
2 *R v Hart*, 2014 SCC 52 at para 6, [2014] 2 SCR 544 [*Hart*].

subject to appeal. However, when a legal case is final and no longer subject to appeal prior to the new norm coming into effect, parties are typically unable to avail themselves of the new norm. Courts will generally not permit retroactive applications of the new rule(s) to the already concluded case. Finality wins. The "tyranny" of time prevails.

And yet, there is a value to having finality and closure to cases, including within the criminal justice system. Disputes with respect to criminal liability and related punishment need resolution. This is important for the accused, the victim(s) of a crime and/or their families as well as the state. For those who are party to criminal litigation, there may be little desire to let cases fester along with the uncertainty and anxiety that normally attend many criminal cases. Defendants often seek to resolve matters through plea agreements, endure any punishments and move on. As it is, there is a seemingly never-ending supply of criminal cases before the courts. The conveyor belt must press forward. When a trial takes place, a person is convicted of a crime and the appellate process has run its course, there may be little left to be done except to accept the outcome and the finality of the judgment.

Notwithstanding the benefits of finality, we may ask ourselves whether any exceptions should be made to avoid a seemingly harsh result. One such exception to this might be where an individual has been wrongfully convicted, or there has been a substantial likelihood of this. The possibilities of a wrongful conviction or miscarriage of justice are not academic. As United States Federal Appellate Court Judge Alex Kozinski writes, there are numerous circumstances that may render a conviction suspect or wrongful.[3] One set of circumstances that is particularly relevant to this article is the procurement and admission of false confessions.[4] Whatever virtue lies in the finality of convictions, this is considerably diminished, if not superseded, when they are secured on the basis of unreliable confessions. If the retroactive application of a new norm plays a key role in addressing a miscarriage of justice, this should be viewed as a benefit.

In this article, we turn our attention to what are oftentimes viewed as a controversial police investigative technique, Mr. Big operations (MBOs). MBOs are undercover operations whereby law enforcement officials masquerade as organized crime figures endeavouring to recruit an accused

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3 Alex Kozinski, "Criminal Law 2.0" (2015) 44 Geo LJ Ann Rev Crim Proc iii at iii-xiii.

4 *Ibid* at vii.

into their organization. Employing the use of inducements, threats and/or the creation of an atmosphere of oppression, undercover agents actively elicit incriminating statements. As a result of these techniques, we contend, as others have, that MBOs produce serious risks of generating false confessions and, consequently, wrongful convictions.[5] Although Canadian courts traditionally admitted incriminating statements elicited during MBOs into evidence, in 2014 the Supreme Court of Canada in *R v Hart* held that such statements were presumptively inadmissible unless the Crown could prove on a balance of probabilities that the probative value of the impugned statements outweighed their prejudicial impact.[6] The Court also determined that where undercover state actors employed the use of force, the incriminating statements as a result of such tactics could be excluded as an abuse of process, regardless of any reliability surrounding them.[7] Within several months of *Hart*, the Supreme Court in *R v Mack* also provided that in the event that confessions arising from such operations bore sufficient indicia of reliability, jurors should be advised or cautioned concerning issues of reliability surrounding such confessions.[8]

The *Hart* Court established a significant new common law rule[9] to govern a practice that had otherwise been left largely unhindered.[10] Despite the significance of the *Hart* rule, in only a few cases decided since *Hart* was released have statements procured through MBOs been excluded[11] or have

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5 See e.g. David Milward, "Opposing Mr. Big in Principle" (2013) 46:1 UBC L Rev 81.

6 *Hart*, *supra* note 2.

7 *Ibid* at paras 11, 78, 86, 89, and 111-118.

8 *R v Mack*, 2014 SCC 58 at paras 52-54, [2014] 3 SCR 3 [*Mack*].

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

10 One of the reasons that the Hart case drew significant attention was because the Newfoundland and Labrador Court of Appeal excluded the MBO confessions procured by the undercover officers on the basis that the tactics infringed Hart's s.7 right to silence. This was despite the Supreme Court's earlier rulings which clearly limited the scope of the right to silence to detention. *R v Hart*, 2012 NLCA 61, 327 Nfld & PEIR 178. Subsequent to the Court of Appeal's decision in *Hart*, but prior to the Supreme Court's decision in July 2014, one trial court released its decision which excluded evidence in MBOs cases. See *R v Smith*, 2014 ONSC 3939, OJ No 3054.

11 See e.g. *R v Sharples*, 2015 ONSC 4410, [2015] 124 WCB (2d) 252. See also *R v SM*, 2015 ONCJ 537, OJ No 5173. In SM, police officers used the father of the accused (the

charges been altogether dropped by the Crown.[12] The *Hart* Court's comments regarding the creation of an oppressive atmosphere and the applicability of the abuse of process doctrine has also resulted in the exclusion of statements in at least two cases.[13] By contrast, it is worth noting that in most other cases, MBO-generated statements have been admitted under the *Hart* framework.[14] As actors in the legal system and academics rightly turn necessary attention to the development of the jurisprudence concerning MBOs going forward, the ghosts of earlier MBO cases tug and gnaw at the present. What should the legal system do with those cases decided prior to *Hart* which did not benefit from its holding – cases where police conduct may very well have breached the standards that *Hart* set out? Does *and should* the tyranny of time and the principle of finality, as well as the non-retroactive application of new norms, prescribe that those whose cases were final and no longer subject to appeal prior to the release of *Hart* have no right to benefit from the protections the Court set out? Drawing from both the facts and the new common law rule articulated in *Hart*, we contend that a serious examination of pre-*Hart* MBO cases should be undertaken in light of the *Hart* Court's new established standards and conclusions. If such earlier decisions were decided after the advent of *Hart*, would the confessions still be admitted? Given that many convictions may have relied almost exclusively on the confessions, alternative outcomes may have been the consequence. While the *Hart* Court acknowledged the potential for MBOs to solve cold cases, it observed that, "[s]uspects confess to Mr. Big during pointed interrogations in the face of powerful inducements and sometimes veiled threats — and this raises the spectre of unreliable confessions."[15] It added that "[w]rongful convictions are a blight

accused was a minor) as a state agent to elicit incriminating statements. Decided within the framework of the *Youth Criminal Justice Act*, the court used the factors set out in *Hart* to exclude incriminating statements made by the accused.

12 "Murder charge against N.S. man dropped after Mr. Big ruling", *CTV News* (24 September 2014), online: CTV News <http://atlantic.ctvnews.ca/murder-charge-against-n-s-man-dropped-after-mr-big-ruling-1.2022286>.

13 *R v Derbyshire*, 2016 NSCA 67, 31 CR (7th) 263; *R c Laflamme*, 2015 QCCA 1517, 23 CR (7th) 137.

14 See e.g. *R v Randle*, 2016 BCCA 125, 129 WCB (2d) 204; *R v Wruck*, 2016 ABQB 370, 132 WCB (2d) 132; *R v Subramaniam*, 2015 QCCS 6366, 130 WCB (2d) 297.

15 *Hart, supra* note 2 at para 5.

on our justice system and we must take reasonable steps to prevent them before they occur."[16] If our Supreme Court views wrongful convictions in such light – as it should – and takes seriously the need to take reasonable steps to prevent them before they occur, we should equally be concerned about any that may have already taken place before the Court imposed the basic standards set out in *Hart* and the scrutiny it demands. This means taking steps to revisit older cases based on the new standards established in *Hart*.[17]

In this article, we do the following. First, we examine the *Hart* decision to detail the new rule articulated by the Court and how the facts of the case illustrate the rather broad and protective approach its holding portends. Second, drawing from *Hart*, we revisit several earlier pre-*Hart* decisions to suggest that under the new rule adopted by the Court and with the facts of *Hart* as backdrop, the incriminating evidence might not have been admitted leading, at least in some cases, to an acquittal. In arguing for the revisiting of pre-*Hart* MBO cases, we address the problematic notion of applying newer protections retroactively, and in doing so, undermine the concept of finality. In our view, the sometimes suffocating grip of finality must be loosened where strong indicia suggests a wrongful conviction due to problematic methods of evidence procurement. Lastly, assuming a revisiting

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16 *Ibid* at para 8.

17 It is worth noting perhaps that while many acknowledge that *Hart* was a step in the right direction, there are still reasonable criticisms. For instance, Adelina Iftene argues that *Hart* did not go far enough toward limiting the power of the police. She contends that the *Charter* right to silence should have been deployed to protect an accused's right to choose to speak to the authorities, as well as protect the overall fairness of the trial. Chris Hunt and Micah Rankin posit that rather than create a new common law evidentiary rule that is specific to one particular type of investigative technique, the common law confessions rule should be deployed to address the admissibility of MBO confessions. Amongst other reasons, they argue that under the confessions rule, the Crown must prove the voluntariness of the impugned statements beyond a reasonable doubt (rather than on a balance of probabilities under the current rule). Each provides compelling arguments for their proposals. However, given the length of time the Court took to come up with its rule in *Hart* (two and a half decades) since the time the technique was really deployed in the early 1990s, and its reluctance to adopt these approaches when it had the opportunity to do so, we will proceed on the basis that the standards set in *Hart* are going to be the operating norms for years to come. Adelina Iftene, "The *Hart* of the (Mr.) *Big* Problem" (2016) 63 Crim LQ 178; Chris Hunt & Micah Rankin, "*R v Hart*: A New Common Law Confession Rule for Undercover Operations" (2014) 14:2 OUCLJ 321.

of earlier cases is justified, we examine different options of how governments may undertake this endeavour. Drawing from current models, chief in our minds is the use of an inquiry headed by a Canadian judge.

II. *HART* AND THE GHOSTS OF CONVICTIONS PAST

The Supreme Court's decision in *Hart* was noteworthy for several reasons. The first is readily apparent: the Court crafted a new common law rule to determine the admissibility of evidence obtained by way of an effective and widely-used investigatory tactic.[18] For this reason alone, *Hart* will shape Canadian jurisprudence for years to come, as there is no indication that police have any intention of ceasing MBOs.[19]

Hart stands for more than the formation of a new common law rule, though. It also represents a significant attitudinal shift away from the way MBOs have previously been viewed by the Supreme Court of Canada. Indeed, previously it was content to allow police to exploit the gap in procedural protection between the *Charter* and the common law confessions rule, at one point going so far as to label MBOs "skillful police work."[20] In *Hart*, however, the Court recognized that the law did not provide sufficient protection to accused persons who confess under MBOs.[21] This is far from the incremental development in the common law that the Court is known for.[22]

Finally, it must be recognized that the *Hart* Court displayed significant apprehension with respect to the tactics used by the police investigators. In

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18 *Hart*, *supra* note 2 at para 56.

19 See e.g. "Top cop says undercover police operation Mr. Big is here to stay", *Ottawa Citizen* (25 August 2014), online: <http://ottawacitizen.com/storyline/top-cop-says-undercover-police-operation-mr-big-is-here-to-stay>.

20 *Hart*, *supra* note 2 at para 114; *R v Fliss*, 2002 SCC 16 at para 21, [2002] 1 SCR 535 Binnie J.

21 *Hart*, *supra* note 2 at para 67.

22 See e.g. The Rt Hon Beverley McLachlin CJC, "Preface" in Mary Arden, *Common Law and Modern Society: Keeping Pace with Change* (Oxford: Oxford University Press, 2016) ("It is the role of judges to develop the common law - their home turf - incrementally, in conformity to changing values and needs, and to interpret legislation in a manner that reflects current realities." at 7); see also John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) ("The culture of common law is of incremental development on a case-by-case basis" at 113).

what was characterized as "an extremely intensive Mr. Big operation,"[23] both the majority decision written by Justice Moldaver and the decision by Justice Karakatsanis, concurring in the result, comment with great concern on specific aspects of the MBO waged against Mr. Hart and the impact those aspects had on the circumstances and reliability of Hart's confessions, the potential for abuse of process, and the Court's concern for the administration of justice. In this section, we will examine the *Hart* decision in detail, demonstrating the extent of the protection put in place by the new common law rule.

A. The *Hart* Decision

The Supreme Court in *Hart* issued three concurring decisions. The majority decision authored by Justice Moldaver, which dealt with the additional issue of whether Mr. Hart should have been permitted to testify in camera, primarily concerned itself with the formation and application of the new common law rule for MBO-generated confessions. Although Justice Moldaver explained the factors[24] that might give rise to an MBO confession being deemed inadmissible, he did not address whether the police conduct in *Hart* amounted to an abuse of process, since it was not necessary for the appeal's disposition under the majority's reasons.[25] Justice Cromwell, concurring with the majority, only differed in that he would have referred the matter back to a trial court so that the presiding judge could evaluate the admissibility of the evidence in the first instance.[26]

Justice Karakatsanis differed substantially in terms of how MBO-generated evidence should be evaluated. Her concurring opinion argues that the majority's new rule "fails to consistently take into account broader concerns that arise when state agents generate a confession at a cost to human dignity, personal autonomy and the administration of justice."[27] In her view, protection of an accused's interests in these circumstances is

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23 *Hart*, *supra* note 2 at para 148.

24 *Ibid* at paras 111-118.

25 *Ibid* ("Given my conclusion that [Hart's] confessions must be excluded under the common law, it is not necessary to consider whether the police conduct in this case amounted to an abuse of process" at para 148).

26 *Hart*, *supra* note 2 at para 152.

27 *Ibid* at para 167.

properly provided for by way of the principle against self-incrimination in section 7 of the *Charter*.[28]

While the *Hart* Court was not in complete agreement as to how confessions resulting from MBOs should be evaluated, all members of the Court raised serious concerns with the nature of the operation. It is clear throughout the decision that the Court is alive to the potential for a wrongful conviction to arise from an unreliable confession, and appropriately so. This recognition concerning the dangers of wrongful convictions has been recognized by the courts as well as by the executive branch of the federal government. As noted in the Department of Justice's 2004 *Report on the Prevention of Miscarriages of Justice*, "[a] wrongful conviction is a failure of justice in the most fundamental sense."[29]

A confession, as courts have acknowledged, is evidence unique in the justice system as it is accepted that an accused may be convicted based solely on a confession with no confirmatory evidence.[30] Not only may a confession provide a sufficient evidentiary basis to support a determination of guilt beyond a reasonable doubt, numerous studies utilizing mock juries have shown that people are hesitant to believe that a person might confess wrongfully.[31] The Supreme Court in *R v Oickle* acknowledged this where Justice Iacobucci described the phenomenon of a false confession as "counterintuitive", but nonetheless recognized that there have been hundreds of cases where a confession was later proven false.[32] This counterintuitive phenomenon, however, still has the power to result in a

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28 *Ibid* at para 168; *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

29 Canada, Department of Justice, *Report on the Prevention of Miscarriages of Justice* (Ottawa: 2004) at 2.

30 *R v Pearce*, 2014 MBCA 70 at para 50, 310 Man R (2d) 14; see also *Kelsey v The Queen*, [1953] 1 SCR 220 at 227-28, 105 CCC 97; *R v Singh*, 2007 SCC 48 at para 29, [2007] 3 SCR 405 [*Singh*].

31 See Saul M Kassin & Lawrence S Wrightsman, "Coerced Confessions, Judicial Instructions, and Mock Juror Verdicts" (1981) 11:6 J Applied Soc Psych 489; Saul M Kassin & Katherine Neumann, "On the Power of Confession Evidence: An Experimental Test of the Fundamental Difference Hypothesis" (1997) 21:5 Law & Hum Behav 469; see also Richard A Leo & Richard J Ofshe, "The Consequences of False Confessions: Deprivations of Liberty and Miscarriages of Justice in the Age of Psychological Interrogation" (1998) 88:2 J Crim L & Criminology 429.

32 *Oickle*, *supra* note 1 at paras 34-35.

wrongful conviction. As Bruce MacFarlane, a specialist in the area of wrongful convictions explains:

> False confessions easily lead to miscarriages of justice because of the significant impact they have on the decision-making process of justice officials and lay juries. Except in the rare situation where a perpetrator is actually caught in the act of committing the crime, a confession is regarded as the most powerful, persuasive, and damning evidence of guilt that the state can adduce. It follows, therefore, that a *false* confession is the most prejudicial evidence that can arise at trial. Judges and juries tend to disbelieve claims of innocence in the face of a confession, and are usually unwilling to accept that someone who has confessed did not actually commit the crime.[33]

Because of the powerful sway that a confession holds, it is vital that a confession only be admissible where it is clear that it is both reliable and offered voluntarily. As previously stated, it is clear from *Hart* that the Court is aware of the potential dangers of false confessions, as preventing the admission of a false confession is a paramount theme throughout the decision.

In considering reliability, courts are directed to first consider the circumstances in which the statement was made, then to consider surrounding circumstances for indications of reliability, such as confirmatory evidence. The factors to be considered are the length of the operation, the number and nature of interactions between the police and the accused, the nature and extent of the inducements, the presence of threats, the conduct of the interrogation, and the personality of the accused, including age, sophistication, and mental health. Indicators of reliability may include the level of detail in the confession, whether it leads to the discovery of corroborating evidence, or if it includes information that either has not been made public or that the accused would not have known if he had not been involved in the crime.[34]

A major consideration in evaluating the reliability of a confession is the presence and nature of any inducements or threats. It is well accepted in jurisprudence that the presence of these factors may lead to an unreliable

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[33] Bruce A MacFarlane, "Convicting The Innocent: A Triple Failure of the Justice System" (2006) 31 Man LJ 403 at 474. In a more recent article MacFarlane examines the role that decision-making processes among prosecutors may lead to wrongful convictions. Bruce A MacFarlane, "Wrongful Convictions: Drilling Down to Understand Distorted Decision-Making by Prosecutors" (2016) 63 Crim LQ 439.

[34] See *Hart*, *supra* note 2 at paras 102-105.

confession; for this reason, the presence of either may be fatal under the common law confessions rule.[35] Unlike a conventional police investigation, however, the confessions rule provides no protection in an MBO.[36] Also unlike conventional investigations, blatant inducements and veiled threats are often an integral part of MBOs; they are employed not only to create the environment to draw in the target of the investigation, but ultimately to draw out the confession itself.

Even by MBO standards, though the inducements in *Hart* were substantial: the Court described them as "powerful", "overwhelming" and "life changing".[37] Far from a simple offer of money or a mere convincing talk from a potential business partner, when the surrounding context of Hart's life was considered they were designed to be so life-altering as to be irresistible. Over $15,000 was given to Hart during the investigation, an amount that lifted him out of poverty, in addition to the expensive new clothes and dinners at upscale restaurants purchased by the undercover officers. The operation transformed Hart's life from a position where he was unable to pay for a bed to sleep on to one of luxury, and promised him even greater rewards and a prosperous lifestyle if he was accepted into the organization in the future.[38]

Even more compelling, though, was the social acceptance and camaraderie offered by the officers. Knowing that he was socially isolated, and by extension vulnerable, the officers sought to become his best friends, even separating him from his wife, a tactic that permitted them to deeply imbed themselves in his life. In this, the police were spectacularly successful. Hart repeatedly told the officers that he loved them, that he considered

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35 See *Oickle*, *supra* note 1 at paras 48-57

36 The common law confessions rule only provides protection when a person makes incriminating statements to an individual whom they subjectively believe is a person in authority. Such belief must also be reasonable. A person in authority is generally accepted as meaning a person formally engaged in "the arrest, detention, examination or prosecution of the accused." *R v Wells,* [1998] 2 SCR 517 at para 14, 163 DLR (4th) 628. Since the target of an MBO has no knowledge of the undercover officers' status as state actors or persons in authority, the confessions rule does not apply. See *R v Grandinetti*, 2005 SCC 5 at para 44, [2005] 1 SCR 27 [*Grandinetti*]. See also *Erven v The Queen*, [1979] 1 SCR 926 at 931, 44 CCC (2d) 76 [*Erven*]; *R v Hodgson*, [1998] 2 SCR 449 at paras 32-34, 127 CCC (3d) 449 [*Hodgson*].

37 *Hart*, *supra* note 2 at paras 5, 13, 134, 147, 206 and 224.

38 *Ibid* at paras 134-35.

them family and that he was willing to do anything – even leave his wife and move away from Newfoundland, if that was what was necessary to join the organization. As Justice Moldaver noted, the "depth of the respondent's commitment to the organization and the undercover officers can hardly be exaggerated."[39]

The result of these inducements was that when Hart eventually met "Mr. Big", he knew "that his ticket out of poverty and social isolation was at stake."[40] When confronted about the death of his daughters, and his explanation of having a seizure being dismissed as a lie, the "circumstances left [Hart] with a stark choice: confess to Mr. Big or be deemed a liar by the man in charge of the organization he so desperately wanted to join."[41] As Justice Moldaver stated, "these circumstances, considered as a whole, presented the respondent with an overwhelming incentive to confess — either truthfully or falsely."[42]

While strong inducements pervaded the *Hart* investigation, there was a noticeable lack of direct threats. It is common in MBOs for the undercover officers to "cultivate an aura of violence by showing that those who betray the criminal organization are met with violence."[43] This was accomplished by one of the officers telling Hart "that if prostitutes were dishonest, the organization had to deal with them" and going on to claim that he had assaulted a prostitute personally. The officer also slapped another undercover investigator in Hart's presence, ostensibly for having revealed their business dealings to outsiders.[44]

Despite the facts of the above police conduct, it must be noted that the trial judge, in response to a defence argument that the officers' threatening conduct was oppressive, found as a fact that Hart had not felt threatened. Indeed, the trial judge found that Hart had bonded with the undercover officers and made no effort to leave the operation.[45] However, while these findings were accorded deference, the Court was still cognizant of the effect that threats may have, noting that "[n]o matter how reliable the confession,

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39 *Ibid* at paras 136-38.

40 *Ibid* at para 139.

41 *Ibid* at para 140.

42 *Ibid.*

43 *Ibid* at para 9.

44 *Ibid* at paras 29-30.

45 *Ibid* at para 41; see also *R v Hart*, 2007 NLTD 74, 265 Nfld & PEIR 266 (*voir dire* ruling of Dymond J).

the courts cannot condone state conduct - such as physical violence - that coerces the target of a Mr. Big operation into confessing."[46]

In addition to considering the circumstances surrounding a confession, *Hart* also reinforces the need to examine whether the statement itself contains "indicators of reliability."[47] Such an examination looks at whether the incriminating statement fits with other established facts, whether it gives rise to further evidence, or whether it can itself be confirmed by other evidence discovered. In his evaluation, Justice Moldaver bluntly stated that the statements at issue in *Hart* did not contain any of these indicators. He noted that Hart's description of how the crime was committed was inconsistent, proceeding from an outright denial to a verbal description that would have been illogical in the circumstances, ending with a physical demonstration that was different from any previous account. In addition to the inconsistencies, there was also a "complete lack of confirmatory evidence." Accordingly, he pronounced that the reliability of the confessions was "in serious doubt."[48]

In applying the Court's new rule to the factual findings, Justice Moldaver determined that the minimal reliability of the confessions meant that they had a low probative value. Recognizing that the prejudicial effect of the statements would be significant, he held that the confessions must be excluded.

In formulating the rule as it did, and providing a clear illustration of how it is to be applied, the Court has truly shifted the balance with respect to MBO-generated statements from favouring the Crown to providing greater protections to the accused than what has previously existed. This is done in two ways: the first is the presumption of inadmissibility; the second is the crafting of the rule itself and the direction given in the evaluation of the underlying factors. Weighing probative value and prejudicial effect is a familiar exercise for trial judges, as it is the fundamental rule to apply when faced with the prospect of excluding relevant evidence.[49] Of course, it has always been within the prerogative of trial judges to exclude MBO-generated confessions as being more prejudicial than probative, but that was only done

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46 *Hart*, *supra* note 2 at para 11.

47 *Ibid* at para 141.

48 *Ibid* at paras 141-44.

49 See *R v Seaboyer*; *R v Gayme*, [1991] 2 SCR 577, 83 DLR (4th) 193.

on one occasion.[50] By implementing a rebuttable presumption, the Court not only provides a starting point in the analysis, but also sends a clear signal to trial judges that the protection must lean in favour of the accused and toward exclusion of the confession.

The Court's decision also provides guidance with respect to the evaluation itself. The majority clearly states that the prejudice attached to MBO-generated confessions exceeds that of standard confessions because of the attached facts that go against the accused's character. Both the principles of moral prejudice and reasoning prejudice are stated as being substantial concerns, especially when combined with the possibility of unreliable confessions.[51] The effect of this analysis is to send a second message to trial judges: that the prejudice faced by an accused is substantial, and must not be underestimated. The combination of the presumption of inadmissibility with the emphasis of the significant prejudice results in substantial protection for an accused.

Hart makes it clear that MBOs are to be treated very differently going forward. In doing so, the Court expressed great concern about the nature of the evidence presented, as guilty verdicts based on similar circumstances would carry a substantial risk of a wrongful conviction. These concerns included inducements and threats, inconsistent statements and those for which there is lack of confirmatory evidence, and the particular vulnerabilities of an accused that may contribute to a false confession. We will now consider how these factors have been viewed in several previously decided MBO cases and discuss how the evidence in each would have been evaluated under the *Hart* framework. Before doing so, however, we will briefly examine the Supreme Court's decision in *R v Mack* in order to illustrate how an MBO may be conducted in a manner that results in admissible evidence.[52]

B. The *Mack* Case

While *Mack* was heard in conjunction with *Hart*, the *Mack* Court issued its judgement just under two months following the *Hart* decision. *Mack* is valuable in that it clearly illustrates a situation where the probative value of

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50 See *Hart*, *supra* note 2 at para 65; *R v Creek*, 1998 CanLII 3209 (BCSC), BCJ No 3189.

51 *Hart*, *supra* note 2 at paras 76-77.

52 *Mack*, *supra* note 8.

the MBO-generated statements does outweigh the prejudicial effect. Indeed, Justice Moldaver, writing for a unanimous court in *Mack*, recognized that while the lower courts did not have the benefit of *Hart*, it is of no issue because "[the] confessions would clearly be admissible under that framework."[53]

Dax Mack was accused of murdering his roommate, Robert Levoir. Police commenced an investigation after receiving a tip from one of Mack's friends that he had confessed to shooting Levoir and burning the body. The MBO lasted four months, during which time Mack carried out a number of jobs for the organization, and eventually told the officers that he had shot Levoir five times before burning the body on his father's property. Following his confession, Mack took one of the undercover officers to the precise location where the body had been burned.[54]

In evaluating the reliability of Mack's statements the Court noted both a lack of strong inducements or threats and a plethora of confirmatory evidence. While Mack was paid, the amount was relatively small: $5000 over the four-month investigation. At the time, Mack was working, and this legitimate work continued to be available to him. There were no threats made against him; in fact, he was told that he could make no admissions and remain in the organization. In contrast to Hart's various accounts, which changed with each telling, Mack's confessions were consistently conveyed to three separate parties, including the investigating officers. He provided the same motivation for the killing to both his friends and the police, and indicated to all that he had burned the body. Subsequent to Mack's arrest, police located Levoir's remains in the fire pit he had shown to the officer, as well as shell casings fired from a gun located in Mack's apartment.[55]

Conversely, there was limited prejudice. The accused's involvement with the organization involved no violent actions and revealed nothing prejudicial about his background. Given the surrounding circumstances of the confessions, the Court noted any prejudicial effect was "easily outweighed by their probative value."[56]

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53 *Ibid* at para 32.

54 *Ibid* at paras 4-16.

55 *Ibid* at paras 33-34 and 36.

56 *Ibid* at para 35.

While *Hart* seems to represent the quintessential example of how police should not execute an MBO, *Mack* illustrates how undercover police officers may engage in MBOs and remain within the parameters set out in *Hart*. *Mack* provides a definitive declaration that MBOs will produce admissible evidence so long as it complies with the *Hart* framework, and an illustration of what such evidence may look like. Put simply, statements gained by neither strong inducements nor threats, that are internally consistent and are consistent with surrounding circumstances and other available evidence will likely be viewed as reliable. Taken together, *Hart* and *Mack* provide a helpful standard of comparison for the previously decided cases that follow.

Though the Court determined that the circumstances and the conduct of the police in *Mack* satisfied the *Hart* test, it also indicated that in MBO cases heard by juries, courts should also provide sufficient warnings and proper instructions to jurors concerning the nature of the evidence, how it was acquired and whether there are sufficient indicators of reliability and the existence of confirmatory evidence.[57] In other words, even where circumstances surrounding MBO confessions provide sufficient indicia of reliability for the purpose of admissibility, juries should still be given guidance related to the evidence nonetheless. The failure of a court to provide such guidance may result in the ordering of a retrial.[58]

C. Inducements and Threats

It is difficult to imagine a successful MBO that does not incorporate inducements or threats in any way. Indeed, the presence of either, or both, factors is often an integral part of the operation, since officers will very likely portray themselves as a financially lucrative criminal organization that does not tolerate disloyalty in order to appear authentic. However, as *Hart* and *Mack* made clear, it is not merely the presence of inducements or threats that will be a factor in judicial decision-making, but also the circumstances that surround them.

Inducements are typically thought of in terms of material gain: money, vacations, or cars. Sometimes these are inducements by themselves while to others these are symbols of an enhanced lifestyle that they desire. In *Hart*, the Court acknowledged an alternative form: the social inducement. It was not, however, the first time social inducements had been recognized, as they

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57 *Ibid* at paras 51-54.

58 See *R c Perreault*, 2015 QCCA 694, [2015] JQ No 3389.

played a significant role in the case of *R v Unger*. In 1990, Kyle Unger was charged with the brutal murder of Brigitte Grenier, a 16-year-old high school student. Prior to the conclusion of his preliminary hearing, however, the Crown entered a stay of proceedings with respect to the charges. It was only after an MBO that resulted in Unger confessing to the murder that the Crown proceeded - this time by direct indictment.[59] Unger was convicted, but later brought an application for release pending a ministerial review by the Federal Minister of Justice of his conviction. Both his application for release and later his application for ministerial review, were accepted.

During the period subsequent to the initial stay of proceedings, when the RCMP initiated the MBO, Unger became socially isolated. Despite the charges being stayed, his arrest was well-known in the community, and he experienced difficulty seeking employment. In this isolated state, he was "wined, dined and shown large sums of money."[60] He testified that he lied to police when he confessed to the murder because he wanted to impress the officers, join their organization and make lots of money.[61]

The substance of Unger's statements will be discussed below. However, while the trial judge rejected Unger's assertion that he lied in order to be accepted by a criminal organization, it is clear that the statements were made with the motivation of benefitting from the inducements held out to him. Ultimately, the result of those statements was a conviction, followed by fifteen years incarceration before it was acknowledged that a miscarriage of justice "may" have occurred.[62]

Hart and *Unger* are hardly the only cases to feature strong inducements. In *R v Skiffington*, defence counsel characterized the options faced by the accused as follows:

> I mean he's got two choices (...) [h]e can say, "I killed her," or he can say, "I didn't kill her." (...) Now, if he says, "I did it," what's going to happen? (...) when you say, "I did it," we've got some wonderful gifts here. You can get a new home, you can get a new car, you can get $50,000 in cash. You'll have enough money to retire to your villa in France, and as an extra special bonus, behind curtain number one,

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59 *R v Unger*, [1993] 85 Man R (2d) 284 at paras 1 and 16-25, 83 CCC (3d) 228 [*Unger* MBCA].

60 *R v Unger*, 2005 MBQB 238 at para 17, 196 Man R (2d) 280 [*Unger* MBQB].

61 *Ibid.*

62 *Ibid* at para 51.

> you'll never be, ever be convicted of this offence. And as an extra extra special bonus behind curtain number one, W. won't blow your brains out. (...).
> Or you can persist in saying you didn't do it, and then you get curtain number two. Well, what's behind curtain number two? Not very much, there's no home, no car, no $50,000, a life of poverty, and there's W. standing there with the gun, ready to blow your brains out. Because that's what you get behind curtain number two because behind curtain number two is where the liars go.[63]

Skiffington, faced with the options articulated by his lawyer, chose to say he killed his wife. He was convicted, and despite the trial judge not instructing the jury on the several exculpatory statements he made throughout the police investigation as well as the lack of an instruction regarding the unreliability of induced statements, his conviction was upheld on appeal.

The flip side of inducements is the use of threats. These may be direct, in that the subject may be threatened by words or actions specifically directed at them, or indirect, such as when the investigating officers create a threatening or oppressive environment.[64] The case of *R v Terrico* illustrates not only the lengths that some police officers will go to in order to coerce a confession, but also the extent to which the courts were prepared to overlook such behaviour.[65] When the courts willingly accept such tactics, police will continue to push the boundaries in order to determine where the limits are. The investigatory tactics in *Terrico* clearly demonstrate this, as the statements at issue were compelled by the creation of an oppressive environment and threats of violence, and in our view could not be admitted under the criteria from *Hart*.

William Terrico was charged with first-degree murder for hiring B.B., at the time a juvenile, to kill his father in December 1989. B.B. pled guilty as a young offender to committing the murder in 2002, and was sentenced to three years. The evidence against him consisted of testimony from B.B., and from a number of undercover police officers involved in the MBO.[66] B.B.'s credibility was vigorously challenged on cross-examination, and he admitted his account of the murder had changed on a number of occasions over the years, that he routinely lied to police and that he had been involved

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63 *R v Skiffington*, 2004 BCCA 291 at para 36, 186 CCC (3d) 314.

64 See e.g. *Oickle*, *supra* note 1 at para 51.

65 *R v Terrico*, 2005 BCCA 361, (2005) 199 CCC (3d) 126, leave to appeal ref'd [2005] SCCA No 413 (QL) [*Terrico*].

66 *Ibid* at para 2.

in illegal gun-running.[67] It is important to note that, aside from the MBO-generated statements by Terrico, B.B.'s testimony was the only evidence against him.

The MBO began in a manner similar to others, with Terrico being approached by an undercover officer who offered him money in exchange for casual work. In this case, it was enlisting Terrico's assistance in order to locate the officer's ex-girlfriend. Unlike in *Hart* or *Unger*, however, the operation focused not on inducements, but on threats of violence. Specifically, the operation was designed to present the appearance that the officers were involved in organized crime and that they were ruthless men who turned to violence whenever necessary.[68]

The turning point of the operation was when the undercover team staged the beating of an officer in a hotel room. The room was set up to appear as though a fight had occurred, and fake blood was applied to the officer to simulate injuries. While the "beating" occurred, Terrico was in an adjoining room with a female undercover officer playing the officer's girlfriend; she submitted evidence that at this time Terrico appeared "very scared" as the two waited.[69] The purpose of the exercise was to drive home that the "biker gang" had no tolerance for falsehood, and to scare him into believing he would be beaten if he did not tell them about his criminal history. In this, they succeeded. Terrico subsequently admitted his involvement to "Mr. Big."[70]

Terrico testified during his trial that over the course of the investigation, he became progressively more scared and intimidated. He stated that he lied to the officer who first contacted him first to impress, and second to continue making money. Over time his motivation shifted to lies of self-preservation. Referring to the operation, he said it was "all very real. You don't walk away from that."[71]

Based on *Hart*, the probative value of statements will directly correlate to their reliability. Conversely, the substantial prejudice attached to an

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67 *Ibid* at para 7.

68 *Ibid* at para 8.

69 *Ibid* at para 10.

70 *Ibid* at para 13; see also Amar Khoday, "Scrutinizing Mr. Big: Police Trickery, the Confessions Rule and the Need to Regulate Extra-Custodial Undercover Interrogations" (2013) 60:2 Crim LQ 277 at 295-96 [Khoday].

71 *Terrico*, *supra* note 65 at para 18.

MBO-coerced statement is present. In *Terrico*, the trial judge was not required to consider a challenge to the admissibility in the context of a challenge to the MBO itself; rather, the judge conducted a threshold reliability analysis as the Crown and defence agreed that the confession was hearsay and a principled approach to the exception of hearsay evidence was applicable.[72] In his view, the threatening environment created by the police officers worked in the opposite way to what Terrico testified. Rather, that as a result of the officers repeatedly admonishing Terrico of the importance of honesty, any fear present would have resulted in a truthful, reliable statement.[73] Accordingly, the trial judge found that threshold reliability had been met.

We hardly need to state that we take issue with the trial judge's decision. It flies in the face of decades of jurisprudence, all of which says the presence of threats undermines the reliability of any statements made.[74] However, it has been held that where the confessions rule does not apply, the presence of violence does not act to exclude a confession as it likely would under the confessions rule.[75] Despite this, the decision in *Terrico* sets a dangerous precedent. Taking the trial judge's reasoning to its logical extension, police should be free to threaten suspects at will: so long as they induce sufficient fear, any confessions should be reliable. This reasoning, however, has long been rejected; even before the adoption of the *Charter* the dangers of threats on the reliability of the statement were acknowledged.[76] Further, this reasoning ignores a fundamental part of MBOs: that any denials from the subject of the investigation are dismissed, with an urging that the suspect tell "the truth" - that is, what the organization wants to hear. Finally, it also directly contradicts the Supreme Court's comment in *Hart* that, "[n]o matter how reliable the confession, the courts cannot condone state conduct — such as physical violence — that coerces the target of a Mr. Big operation into confessing."[77] Nor does the fact that the threat was not made

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72 *Ibid* at para 14.

73 *Ibid* at paras 16 and 26.

74 See e.g., *Oickle*, *supra* note 1 at para 53; see also *Hodgson*, *supra* note 36 ("...there can be no doubt that there may well be great unfairness suffered by the accused when an involuntary confession obtained as a result of violence or credible threats of imminent violence by a private individual is admitted into evidence" at para 26).

75 *R v Wells*, [1998] 2 SCR 517, 163 DLR (4th) 628.

76 See *Erven*, *supra* note 36 at 930-31.

77 *Hart*, *supra* note 2 at para 11.

explicitly to Terrico negate its effect; as Amar Khoday has noted, "it was made abundantly clear to him what happens to individuals who were not honest and loyal."[78] Since it was clear that "honest" meant admitting to the murder, Terrico's testimony that he was "stuck between a rock and a hard place" seems apropos.[79]

It is worth noting that even though the tactics used in *Terrico* were effective in drawing out incriminatory statements, they were not direct threats of violence, but rather implied through the construction of a threatening atmosphere. It is tempting to believe that is the proverbial line in the sand; unfortunately, such beliefs are dashed by cases such as *R v Hathway*.[80]

Wilfred Hathway was investigated for the murder of his landlord. After conventional investigation techniques were ineffective, the Saskatoon City Police Service requested the assistance of the RCMP, who initiated an MBO. Contact was made between Hathway and the undercover officers that resulted in Hathway being offered various jobs that escalated in frequency and remuneration over time.[81]

Hathway had eventually become suspicious that his new associates were involved in illegal activities. It was subsequently revealed to him that his associates were involved in a nationwide criminal organization. One of the major operatives in the organization told him that, if he did anything they did not approve of, he would disappear.[82] The undercover agents later staged a beating of a female in Hathway's presence. In addition to the assault, officers threatened the life of the woman, her spouse and their two-year-old child. This caused Hathway to fear not only for his life, but also for that of his daughter.[83]

The rest of the MBO played out predictably: Hathway met Mr. Big after being told he had to admit that he was involved in the murder. At first he denied it, but ultimately admitted he was involved. Interestingly, the details provided by Hathway in his confession were said to be inconsistent with the details of the actual crime scene.[84] Despite the direct threat, the implied

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78 Khoday, *supra* note 70 at 296.

79 *Terrico*, *supra* note 65 at para 18.

80 *R v Hathway*, 2007 SKQB 48, 292 Sask R 7.

81 *Ibid* at paras 7-12.

82 *Ibid* at paras 14-15.

83 *Ibid* at para 19.

84 *Ibid* at paras 21 and 23.

threat and the inconsistencies, his confession was admitted and he was convicted of first-degree murder. Under the *Hart* rule, though, the court would have had to consider the prejudice to Hathway resulting from his admission, and the effects on the reliability of his admission from the inconsistencies between his inculpatory and exculpatory statements, the threats to both Hathway and his daughter, and a lack of confirmatory evidence. Ultimately, we contend that Hathway's confession would not be admitted under the standards set out in *Hart*.

It is clear that both inducements and threats may have a substantial impact on an individual who is the target of an MBO. Indeed, in all but the rarest of cases, it can be argued that the only reason a person provides a confession is as a result of either, or both, of these two factors. It is also clear that the mere presence of them will not result in automatic exclusion of the statements, but that a detailed analysis must be performed in order to carefully determine whether the reliability of the confession is undermined.

D. Inconsistent Statements

There are two ways that statements can present inconsistencies. First, in the case of multiple statements made by an individual, the information in one may be inconsistent, or even directly contradict the information in another. The second way is that, regardless of how many statements are made, the information given may be inconsistent with, or contradict, independent physical evidence or other established factual circumstances. In some cases, both forms of inconsistency may be present.

The presence of either or both forms of inconsistency should be an immediate area of concern when evaluating the reliability of an incriminating statement. This should be readily evident: by definition, when two statements contradict each other in material ways, one statement is unreliable. Similarly, when a statement purports to report facts that are contradicted by physical evidence or factual circumstances indicating the information in the statement is physically impossible, the statement simply must be considered unreliable.

The confessions in *Hart* are a clear illustration of unreliable information due to inconsistencies between multiple statements. Hart's description of how the crime was committed proceeded from an outright denial to a verbal description that would have been illogical in the circumstances, eventually ending with a physical demonstration that was different from any previous account. The danger in proceeding while relying on such statements is that

on some level the Crown has to base its case on one statement being factual, effectively conceding any remaining statements are not, but still asking the jury to accept the chosen one as true. In effect, the Crown is forced to choose which set of facts it wants to prove occurred, argue that the accused should be believed in that instance, but that the same accused should not be believed with respect to any other instances. This is particularly dangerous when the confession is uncorroborated by any independent evidence.

Just as *Hart* provides a clear illustration of inconsistencies between multiple statements, *Unger* illustrates how a statement can be inconsistent with physical evidence or surrounding circumstances. Unger's confession included several details, namely, that Unger had committed the murder alone, that he had thrown sticks used in the murder into a nearby creek and that the murder was committed near a bridge, which he later took one of the officers to.[85] As Justice Beard, then of the Manitoba Court of Queen's Bench, noted, none of these details were true. The Crown rejected the notion that Unger acted alone, and charged Timothy Houlahan as a co-accused in the matter. The sticks Unger claimed to have disposed of were left protruding from Grenier's body, and the bridge Unger identified had not even been built until months after the murder was committed.[86] Far from Unger's confession being in accordance with the evidence, it was, on its face, patently contradictory and unreliable.

The MBO-generated statements in *Unger* are comparable to those in *Hart*, both in that they came after inducements made even stronger by social isolation, and by the inherent unreliability of the statements themselves. Hart's confessions, which the majority deemed unreliable in part because they were inconsistent with each other, at least had the benefit of not being directly contradicted by physical evidence - even if they suffered from other shortcomings. As Justice Beard so aptly pointed out, however, Unger's confession contained marked contradictions to the factual circumstances: his account simply could not be true with respect to at least two major determinative points. These considerable inconsistencies call into question the reliability of Unger's statement as a whole; regardless, this induced, physically impossible confession grounded a conviction for murder.

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85 *Unger* MBQB, *supra* note 60 at para 18.

86 *Ibid* at para 19.

E. Particular Vulnerabilities of the Accused

The Supreme Court in *Hart* recognized that the social acceptance and camaraderie offered by the undercover officers had great effect on Nelson Hart, due in no small part to his social isolation. In fact, recognizing that this made him vulnerable, they sought to isolate him even further.

Like Nelson Hart, Kyle Unger was isolated and vulnerable to social inducements: he was nineteen years old, naïve, and uneducated, living in a small town in which many residents believed him a murderer. He was unable to find employment. It was when he was in this state that he met police investigators who offered him the answers to all his problems: they provided him employment, the prospect of money, and friendship. All they wanted in return was a confession. For a broke young man acknowledged by his mother and acquaintances, respectively, as a "story teller" and more candidly, a "bullshitter", falsely confessing to a crime must have seemed too good to be true.[87] In retrospect, it certainly was.

While social isolation may be one factor contributing to a person's incentive to confess, it is by no means the only vulnerability that may be exploited. Gisli Gudjonsson, an internationally renowned authority on suggestibility and false confessions, first proposed the idea of interrogative suggestibility in the 1980s, defining it as "the extent to which, within a closed social interaction, people come to accept messages communicated during formal questioning, as the result of which their subsequent behavioural response is affected."[88] Recognizing that people vary in how suggestible they are, he developed the Gudjonsson Suggestibility Scale to measure how suggestive an individual is to coercive interrogation.[89]

We would not suggest that every person, who is under police scrutiny should be evaluated to determine how suggestible they might be under interrogation (or in a coercive environment such as that created by an MBO). Certainly, such a requirement would be entirely impractical and place an impossible burden on police investigators. However, as Christopher Sherrin states, there has been extensive research conducted to comprehend the individual factors that may cause an individual to falsely

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87 *Ibid* at paras 21-22.

88 Gisli H Gudjonsson & Noel K Clark, "Suggestibility in Police Interrogation: A Social Psychological Model" (1986) 1:2 Social Behaviour 83 at 84.

89 Gisli H Gudjonsson, "A New Scale of Interrogative Suggestibility" (1984) 5:3 Personality & Individual Differences 303.

confess, and the law can benefit from understanding the findings that have been made.[90] At a minimum, courts should understand that several specific factors have been shown to have a substantial impact on an individual's suggestibility.[91]

Research also suggests an existing link between interrogative suggestibility and false confessions.[92] Among the subjects of this research, perhaps the most instructive involves the most well known group of test subject: the infamous Birmingham Six. Sherrin summarizes the findings aptly:

> Here is a group of undoubtedly innocent people, who were questioned in the same time period about the same offence by the same police task force, yet who responded differently to the interrogations. Significantly, the four false confessors all scored higher on suggestibility and compliance than the two non-confessors. The two non-confessors scored quite low in terms of suggestibility while two of the confessors scored quite high; the other two confessors scored in the average range.[93]

It is not our intention to argue that an individual's interrogative suggestibility is conclusive proof that they would falsely confess, given the opportunity. Indeed, such a conclusion would vastly overreach the data itself. Not only can it be said that not every suggestible person would falsely confess, it is equally certain that not all false confessions will come from a person who is highly suggestible.[94] As Sherrin states, it is "probably impossible to devise a psychological test that can conclusively differentiate

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90 Christopher Sherrin, "False Confessions and Admissions in Canadian Law" (2005) 30:2 Queen's LJ 601 at 630 [Sherrin].

91 *Ibid* at 633. Factors include youth, intelligence, memory, anxiety, impulsivity, sleep deprivation, the employment of coping strategies, self-esteem, mood, and withdrawal from intoxicants. For more information on the research leading to these conclusions, see Gisli H Gudjonsson, *The Psychology of Interrogations and Confessions: A Handbook* (Chichester, UK: Wiley, 2003) at 380-90, 395-98, 400-402, 423-25, 428-30; Gisli H Gudjonsson et al, "The Relationship of Alcohol Withdrawal Symptoms to Suggestibility and Compliance" (2004) 10:2 Psychol Crime & L 169; R Pollard et al, "Interrogative Suggestibility in a US Context: Some Preliminary Data on Normal Subjects" (2004) 37:5 Personality & Individual Differences 1101; Gisli H Gudjonsson et al, "Confessions and Denials and the Relationship with Personality" (2004) 9 Leg & Criminological Psychol 121.

92 Sherrin, *supra* 90 at 634-35.

93 *Ibid* at 636-37 (citations omitted).

94 *Ibid* at 638.

between innocent and guilty people."[95] Despite this, interrogative suggestibility "appears to be connected to some of the other characteristics commonly found in false confessors (...). As a result, it is only appropriate that the law take interrogative suggestibility into consideration when regulating police questioning and assessing confessions and admissions."[96]

We would argue that courts should consider degrees of suggestibility, both in connection with conventional interrogation techniques and in MBOs. Hart was recognized as being highly suggestive, resulting from social isolation, and Unger provides another example of someone who was likely influenced by the same factor, but courts would do well to acknowledge the other factors listed above that may indicate interrogative suggestibility, and by extension may call any confessions' reliability into question.

In this section, we have discussed several particular cases that illustrate how police techniques may very well have run afoul of the new standards in *Hart*. The review was not intended to be exhaustive but to provide a sampling of notable cases. We would also add that not every MBO confession would lead to a trial. Based on the pre-*Hart* jurisprudence, it is not inconceivable that many individuals would have felt compelled to plead guilty rather than pursue a defence at trial. Certainly, they may have been advised by learned counsel to do so given the established unavailability of the confessions rule and the *Charter* right to silence with respect to considering the admission of incriminating statements arising from MBOs.[97] Those subjected to more aggressive MBOs will not necessarily have challenged the confessions in court, preferring to just settle the matter through a plea agreement with the Crown. This does not alleviate concerns that such those who pleaded guilty were also wrongly convicted.

Assuming that the confessions elicited in such pre-*Hart* decisions might have been excluded under the rule articulated in *Hart*, the next question one might need to address is how to confront the concept of finality once guilt has been adjudged and all opportunities for appeal have been exhausted. In the following section, we examine how the notion of finality should be bypassed in favour of revisiting finalized cases and overturning a wrongful conviction.

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95 *Ibid* at 634.

96 *Ibid* at 638-39.

97 See *Grandinetti*, *supra* note 36; *R v McIntyre*, [1994] 2 SCR 480, 153 NBR (2d) 161 [*McIntyre*]; *Hart*, *supra* note 2 at para 173, Karakatsanis J concurring.

III. Finality and the Limits of Retroactivity

The premise of this article is that the common law rule first articulated in *Hart* concerning the presumptive inadmissibility of incriminating statements procured through MBOs should be applied retroactively to cases decided prior to *Hart*. This would extend to cases where the decisions are final and no longer subject to further appellate review. Though we shall discuss in the next section the appropriate fora through which to engage in a re-examination of such earlier decisions in light of the *Hart* rule, we shall first tackle here how our proposition confronts the concept of finality and the presumption against retroactive application of new rules.[98] In the first part of this section, we discuss how the traditional position does not favour retroactive applications of the law to cases that are final and no longer subject to appeal. We then discuss instances where the norm against retroactivity has been countered and some of these bases underlying such exceptions.

A. Upholding Finality

In a variety of judgments, both civil and criminal in nature, courts have expressed the importance of finality with respect to judicial decision-making. The principle of finality seeks to uphold the idea that there is a societal and state interest in having litigation come to an end at some point. The importance of finality appears to be particularly underscored in civil litigation. For parties that have been successful at trial, such litigants should be entitled to rely on the principle of finality, and furthermore such reliance becomes increasingly stronger as the years pass.[99] The British Columbia Court of Appeal has asserted that the principle of finality is important because, "[i]t is in the interests of society and of the litigants themselves that all points should be raised before judgment so that when judgment is

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[98] In some of the fora suggested in the next section, surpassing finality, and retroactive application of new norms is not a technical requirement. Nevertheless, even where finality and non-retroactive application of law are not strictly applicable, these are enduring principles at the conceptual level. As such, we feel it behooves us to provide a rationale for why finality should be set aside and the *Hart* rule should be applied retroactively.

[99] *Marché D'Alimentation Denis Thériault Ltée v Giant Tiger Stores Limited*, 2007 ONCA 695 at para 38, 87 OR (3d) 660.

delivered there is an end in the courts of this Province to the matters in issue. *Interest reipublicae ut sit finis litium*."[100] The importance connects to economic and psychological interests of the parties and the community at large. As the Ontario Court of Appeal states:

> Without a discernible end point, the parties cannot get on with the rest of their lives secure in the knowledge that the issue has finally been determined, but must suffer the considerable economic and psychological burden of indeterminate proceedings in which their respective rights and obligations are revisited and reviewed as circumstances change. Under our system for the adjudication of personal injury claims, that end point occurs when a final judgment has been entered and has either not been appealed, or all appeals have been exhausted.[101]

The principle of finality also plays an important role in criminal cases. The Supreme Court of Canada has asserted that, "[f]inality in criminal proceedings is of the utmost importance but the need for finality is adequately served by the normal operation of *res judicata*: a matter once finally judicially decided cannot be relitigated."[102] The ability of an individual convicted of a crime to challenge that conviction on the basis of a new rule or interpretation coming into existence after the conviction typically arises where the individual is "still in the judicial system."[103] Specifically, the conviction is not truly final if it is still subject to further appeal.[104] In *Wigman*, the accused was convicted of attempted murder in late 1981. Following an unsuccessful appeal before the British Columbia Court of Appeal, he appealed to the Supreme Court of Canada. After leave to appeal was granted, but before the scheduled hearing date, the Supreme Court released its decision in *R v Ancio*.[105] In *Ancio*, the Court departed from earlier decisions and concluded that the requisite fault standard for convicting someone of attempted murder is nothing less than the specific intent to commit murder. Prior to *Ancio* and following the Court's decision in *R v Lajoie* in 1974, the requisite fault standard for attempted murder was the intention to kill or the intention to cause bodily harm knowing that death may result and was reckless as to whether death ensued or not.[106] During Wigman's trial, the jury was appropriately instructed in accordance

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100 *Johnson v Laing*, 2004 BCCA 642 at para 11, 248 DLR (4th) 239.

101 *Tsaoussis v Baetz*, (1998), 41 OR (3d) 257 at para 16, 165 DLR (4th) 268 (CA).

102 *R v Wigman*, [1987] 1 SCR 246 at 257, 33 CCC (3d) 97 [*Wigman*].

103 *Ibid.*

104 See *R v Sarson*, [1996] 2 SCR 223 at 237, 107 CCC (3d) 21 [*Sarson*].

105 *R v Ancio*, [1984] 1 SCR 225, 6 DLR (4th) 577.

106 *R v Lajoie*, [1974] SCR 399, 10 CCC (2d) 313; *Wigman*, *supra* note 102 at 252.

with the older *mens rea* standard from *Lajoie*, which was the prevailing standard in effect at the time. As a consequence of a more restrictive *mens rea* standard set out in *Ancio*, Wigman sought its application on appeal. Against the arguments of the Crown, the Court determined as long as an accused was "still in the system", he or she was "entitled to have his or her culpability determined on the basis of what is held to be the proper and accurate interpretation of the *Code*."[107]

The ability to rely upon a new constitutional, statutory, or common law rule or interpretation appears to expire once an individual is no longer "in the system". Once a case is considered final, which is to say, it is no longer subject to further appeal to the Supreme Court of Canada, the resort to new rules or interpretations that come into existence after a case has become final is no longer possible. This applies even in cases where an individual has been convicted of a crime that is later determined to be unconstitutional.[108]

There are several rationales in support of the general presumption against retroactivity. In *Retroactivity and the Common Law*, Ben Juratowich articulates some of these rationales.[109] First, the presumption against retroactivity affirms the idea of certainty concerning legal norms and/or their interpretation. Juratowich argues that "when the meaning of a law is settled at the time of an event to which that law applies, that law should not later be altered in a way that vitiates the existing certainty about the law's application to that past event."[110] Connected to this notion of certainty is the idea that persons can have the ability to rely on the law that existed at

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107 *Wigman*, *supra* note 102 at 261.

108 See *Sarson*, *supra* note 104, where a *Charter Habeus* claim could be applied to "ongoing" issue rather than a retrospective one. As noted below, the availability of post-conviction relief may be available in the United States where, for example, a norm which was valid at the time of conviction is later deemed unconstitutional even after the case is otherwise no longer subject to further appeal. This applies as well in cases where an individual has served their sentence and has been released and seeks to have their record expunged. See e.g. Tony Gonzales, "How Nashville Man Cleared Of 'Homosexual Acts' Conviction Paves The Way", *National Public Radio* (16 November 2016), online: NPR <http://www.npr.org/2016/11/16/502208745/how-nashville-man-cleared-of-homosexual-acts-conviction-paves-the-way>.

109 Ben Juratowich, *Retroactivity and the Common Law* (Oxford: Hart Publishing, 2008) [Juratowich].

110 *Ibid* at 44.

the time the events occurred.[111] Certainty is also important in facilitating human autonomy.[112] With respect to certainty and human autonomy within the criminal law context, there is a "desire to ensure that individuals are reasonably free to maintain control of their lives by choosing to avoid conduct which will attract criminal sanction."[113] Consequently, the application of retroactive norms to conduct and events that transpired prior to the promulgation of the new rule leads to uncertainty and disrupts an individual's choice to conduct their affairs.

A second rationale against retroactive application of new norms, which Juratowich identifies, is their impact on liberty (and is indeed tightly connected to certainty). He argues that the application of retroactive laws impacts on liberty in two ways. First, it results in a deprivation of security in connection with past events which were previously legal. Indeed, he posits that "[t]here is a sense of finality and security that comes with knowing how the law applied to past events–the impact of state regulation on that aspect of life is known and in the past."[114] Because the state has a monopoly on changing the legal consequences of past events, non-state actors and entities "should generally be entitled to feel, think and act as though the state will not alter the legal consequences of past events with that change being deemed to have been operative in the past. There should generally be no need to devote thought or resources to such past events."[115]

Second, Juratowich asserts that retroactive laws impact liberty by removing an actual freedom. He argues that it is not simply that one is being deprived of a choice as to whether to follow the law or a lawful path. The freedom to act that previously existed or was unimpeded has now been altered. This may have an impact that results in a pecuniary disadvantage where the penalty involved includes fines.[116]

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111 *Ibid* at 44. This is regardless of whether there was actual reliance. As Juratowich raises, one of the problems with using actual reliance is that it would benefit those who had actual knowledge of the law as against those who did not. *Ibid* at 44-48.

112 *Ibid* at 48.

113 See *Polyukhovich v Commonwealth of Australia*, (1991), 172 CLR 501 at 688, cited in Juratowich, *supra* note 109 at 48.

114 Juratowich, *supra* note 109 at 50.

115 *Ibid* at 50. For an example of the state exercising its power to retroactively change legal consequences to insulate its liability for its own misfeasance; see *Authorson v Canada*, 2003 SCC 39, [2003] 2 SCR 40.

116 Juratowich, *supra* note 109 at 51.

The relationship between negative liberty and retroactivity has particular salience to criminal law. As Juratowich articulates, the distaste for retroactive law is identifiable with two maxims embedded in both international and domestic law: (1) *nullum crimen sine lege antea exstanti*; and (2) *nulla poena sine lege antea exstanti*.[117] These principles are textually enshrined, at least in part, in section 11 of the *Charter* as well as article 15 of the *International Covenant on Civil and Political Rights*.[118] The first maxim, *nullum crimen sine lege antea exstanti*, is that a person should not be found guilty of committing acts that were not considered crimes at the time the acts were committed. The second principle, *nulla poena sine lege antea exstanti*, is that a person shall not be subjected to a heavier penalty than one which was applicable at the time of the commission of the crime. This of course does not prevent all retroactive applications of law but is focused on protecting a criminal defendant from particular applications in the context set out. Noticeably, the concern here is that defendants are not to be disadvantaged by the application of retroactive laws that impose criminal liability or more serious punishments than would have been applicable at the time certain acts were committed. However, where a law imposes a lighter penalty than that which existed at the time a crime was committed, the accused shall benefit. These norms are protective of the liberty of individuals affected or potentially affected by retroactive law or punishments. As we shall discuss in greater detail below, where the new

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117 *Ibid* at 52.

118 *Charter*, *supra* note 28, s 11(g) ("Any person charged with an offence has the right not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations"); *Charter*, *supra* note 28, s 11(i) ("Any person charged with an offence has the right if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment"); see also *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 art 15 (entered into force 23 March 1976, accession by Canada 19 May 1976) ("No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby").

norm does not impose criminal liability or a more serious punishment, but in fact provides greater legal protections rooted in a constitution or at common law, retroactive applications of such new norms or interpretations should be considered in cases even where finality has been reached. They do not inhibit or impinge upon individual liberty or autonomy, but rather the new rule places restrictions on questionable state action in evidence gathering. We next look into the reasons why finality and the presumption against retroactivity may be overcome.

B. Breaking the Hold of Finality

While there are many reasons for the presumption against retroactivity continuing to resonate within legal systems, there are exceptions – or instances where there should be exceptions. Juratowich articulates certain instances where the presumption is defeasible to countervailing reasons of sufficient strength.[119] One countervailing reason is that if the presumption against retroactivity exists to preserve certainty with respect to the law, then such presumption is defeated where certainty did not previously exist in the first place. *Ergo*, if certainty did not exist, there is none to preserve by applying a new norm retroactively. Juratowich explains that, "where the law at the time of acting is uncertain, that uncertainty means that a person cannot know how her liberty is constrained."[120] In the case of admitting confessions elicited through MBOs, prior to the Newfoundland and Labrador Court of Appeal's decision concerning *Hart*, and subsequently the Supreme Court's ground breaking decision, there had not been any uncertainty that the typical rules governing the admission of incriminating statements permitted their inclusion. As discussed earlier, Supreme Court precedent demonstrated that neither the common law confessions rule nor the *Charter* right to silence applied to the admission of MBO confessions.[121]

While the presumption against retroactivity affirms the principle of finality, some courts in the United States, unlike their Canadian counterparts, have carved out exceptions, particularly where constitutional rules are in play. This includes cases that are no longer subject to direct appeal. While such cases are of course not binding on Canadian courts, they may provide some guidance about when it is appropriate to circumvent the presumption against retroactivity. In *Teague v Lane*, the United States

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119 Juratowich, *supra* note 109 at 60.

120 *Ibid* at 62.

121 *Grandinetti*, *supra* note 36; *McIntyre*, *supra* note 97.

Supreme Court has held, with respect to *habeus corpus* applications brought before federal courts regarding state court convictions, that new constitutional rules will not apply in such collateral proceedings barring two exceptional circumstances.[122] The first exception looks at any new rules that render types of primary conduct "beyond the power of the criminal law-making authority to proscribe."[123] In other words, the court will ask whether the state lacked the jurisdiction to proscribe the activity in question in the first place.[124]

The second exception focuses on "watershed" rules that "implicate the fundamental fairness and accuracy of the criminal proceeding."[125] The United States Supreme Court has indicated that it was extremely rare for a rule to qualify under this category.[126] There were two essential elements. First, the new "rule must be necessary to prevent an 'impermissibly large risk' of an inaccurate conviction."[127] In one of the only examples of this, the Supreme Court in *Whorton v Bockting* identified the right to have counsel appointed for indigent defendants charged with a felony as held in *Gideon v Wainright*. The *Whorton* Court stated, "[w]hen a defendant who wishes to be represented by counsel is denied representation, *Gideon* held, the risk of an unreliable verdict is intolerably high."[128] Second, the *Whorton* Court stated that the new rule must "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding."[129] Though the Court has not spelled this element out in detail, it has offered some clarification. Such bedrock procedural elements must be based on constitutional rights. The *Whorton* Court further opined that in order to meet this requirement, "a new rule must itself constitute a previously unrecognized bedrock procedural element that is essential to the fairness of

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122 *Teague v Lane*, 489 US 288 at 311, 109 S Ct 1060 (1989).

123 *Ibid*.

124 See Paul E McGreal, "A Tale of Two Courts: The Alaska Supreme Court, the United States Supreme Court, and Retroactivity" (1992) 9:2 Alaska L Rev 305 at 313 [McGreal].

125 *Whorton v Bockting*, 549 US 406 at 416, 127 S Ct 1173 (2007) [*Whorton*]; *Danforth v Minnesota*, 552 US 264 at 303, 128 S Ct 1029 (2008) [*Danforth*].

126 *Whorton*, *supra* note 125 at 419.

127 *Ibid* at 418.

128 *Ibid* at 419.

129 *Ibid* at 418-419.

a proceeding."[130] In providing an example of this, the Court once again turned to its earlier decision in *Gideon*.

While the *Teague* ruling was originally intended to apply only to collateral attacks brought forth in federal court, state courts are, by contrast, permitted to give greater effect to retroactivity rules in such cases. Indeed, in *Danforth v Minnesota*, the United States Supreme Court held that state courts were not limited to the two exceptions set out in *Teague* when applying new federal constitutional rules retroactively in *habeus corpus* applications brought before state courts.[131] In some instances, it may be deemed mandatory for state courts to apply new norms retroactively. Last year, in *Montgomery v Louisiana*, the Supreme Court went so far as to conclude that state courts were in fact required to apply new substantive rules of constitutional retroactivity in collateral proceedings.[132] In an earlier decision, *Miller v Alabama*, the Supreme Court determined that mandatory life sentences for juvenile offenders offended the Eighth Amendment's prohibition on cruel and unusual punishment. In subsequent collateral proceedings before Louisiana courts, the Louisiana state Supreme Court refused to apply *Miller* to an individual convicted to a mandatory life sentence as a juvenile offender. The *Montgomery* Court clarified that such a required application did not extend to procedural rules of a watershed nature leaving it to state courts to determine whether the new rules should be applied retroactively.

It is worth noting that within the United States' federalist system, individual states have their own constitutions with rights enshrined therein. In addition to the fact that such rights may provide broader protections than those set out under the federal constitution, state courts are free to develop more flexible rules concerning retroactive application of state constitutional norms. As the Oregon Supreme Court expressed in *State v Fair*, "[i]n the present case since we are dealing with a new principle of law which rests entirely on our own Constitution the determination of retroactivity or prospectivity is for us alone."[133]

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130 *Ibid* at 421.

131 *Danforth*, *supra* note 125.

132 *Montgomery v Louisiana*, 136 S Ct 718, 193 L Ed 2d 599 (2016).

133 *State v Fair*, 263 Or 383 at 388, 502 P 2d 1150 (OR 1972). See also McGreal, *supra* note 124 at 305.

In an example of state courts applying new rules retroactively, Maryland offers one possibility. Article 23 of Maryland's state constitution provides that "[i]n the trial of all criminal cases, the Jury shall be the Judges of Law, as well as of fact, except that the Court may pass upon the sufficiency of the evidence to sustain a conviction."[134] Pursuant to this provision, the state issued a rule that in connection with jury instructions, jurors were advised that they are "the judges of the law and that the court's instructions are advisory only."[135] This included instructions concerning the standard of proof required to find guilt in criminal cases. A number of convictions were secured on the basis of such pronouncements. In 1980, the Maryland Court of Appeals, the state's highest appellate court, in *Stevenson v State*, interpreted the Article 23 to limit a jury's power to deciding the law to non-constitutional "disputes as to the substantive 'law of the crime,' as well as the 'legal effect of the evidence.'"[136] The court stressed that all other legal issues are for the judge alone to decide.[137] The *Stevenson* court pointed out however this interpretation was not a "new" one. This conclusion that the interpretation was not a "new" rule effectively stymied attempts by legal counsel on appeal. It did so for the following reason: after *Stevenson*, Maryland courts concluded that because the interpretation in *Stevenson* was not new, the failure of trial counsel to object to a court's jury instruction (that its instructions were wholly advisory) constituted a waiver – even where the trials took place prior to *Stevenson*. However, in *Unger v State*, a subsequent 2012 decision by the Maryland Court of Appeals, the court held that previous decisions, including *Stevenson*, indeed created a new rule and as such the failure of counsel in trials prior to *Stevenson* to object to the jury instruction did not constitute a waiver.[138] The Court of Appeals in *Unger* asserted that these holdings were to be retroactive.[139] In *State v Waine*, the Court of Appeals posited that, "[t]he *Unger* decision effectively opened the door to postconviction relief for persons tried during the era of the advisory only jury instruction—an opportunity that had been foreclosed by *Stevenson*

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134 MD Const art XXIII.

135 *State v Waine*, 444 Md 692 at 695, 122 A 3d 294 (MD Ct App, 2015) [*Waine*].

136 *Stevenson v State*, 289 Md 167 at 180, 423 A 2d 558 (MD Ct App, 1980).

137 *Ibid* at 179.

138 *Unger v State*, 427 Md 383 at 416-417, 48 A 3d 242 (MD Ct App, 2012) [*Unger*].

139 *Waine*, *supra* note 135 at 696; *Unger*, *supra* note 138 at 416.

[and subsequent decisions]."[140] In *Waine*, the defendant's trial (which took place prior to *Stevenson*) was impacted by the previously valid jury instruction. *Waine* was granted post-conviction relief further to *Unger* by way of an order for a new trial.

It is worth noting that the *Unger* and *Waine* appeals to the Maryland Court of Appeals were done pursuant to the state's *Post Conviction Procedure Act*.[141] Under the statute, there is a general time limitation, whereby a petition for post-conviction relief may not be filed more than 10 years after the sentence was imposed.[142] However, the statute allows for a court to "reopen a postconviction proceeding that was previously concluded if the court determines that the action is in the interests of justice."[143] In addition the legislation also provides for relief for the application of new constitutional standards:

> Notwithstanding any other provision of this title, an allegation of error may not be considered to have been finally litigated or waived under this title if a court whose decisions are binding on the lower courts of the State holds that:
> (i) the Constitution of the United States or the Maryland Constitution imposes on State criminal proceedings a procedural or substantive standard not previously recognized; and
> (ii) the standard is intended to be applied retrospectively and would thereby affect the validity of the petitioner's conviction or sentence.[144]

What the foregoing suggests is that while retroactive applications of the law are not generally desired, there are notable exceptions and particularly where constitutional rights are implicated. Below, we turn our attention to whether older cases where the evidence relied exclusively or heavily upon on MBO confessions should be re-evaluated in light of the new common law rule discussed in *Hart*.

C. The *Hart* Rule and Finality

Though we discuss in the next part the different possibilities through which to revisit pre-*Hart* MBO cases that are final and no longer subject to appeal, in this section, we shall examine reasons why the *Hart* rule should

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140 *Waine*, *supra* note 135 at 696.

141 *Maryland Uniform Post Conviction Procedure Act* (2014).

142 *Ibid*, s 7-103(b).

143 *Ibid*, s 7-104.

144 *Ibid*, s 7-106(c)(2) [emphasis added]. More recently, the Florida Supreme Court applied new rules retroactively. See *Walls v State*, 2016 Fla LEXIS 2328, 41 Fla L Weekly S 466.

be used when revisiting such cases. There are reasonable rationales for applying the rule in *Hart* retroactively. We deal with each in turn.

Drawing inspiration from the United States jurisprudence discussed earlier, we argue that the *Hart* rule constitutes (or is closely analogous to) a watershed rule that implicates the fundamental fairness and accuracy of the trial, as articulated in *Teague*. Though the United States Supreme Court construed the notion of watershed rules more narrowly, *Hart* could be viewed as one such rule. Prior to the decision, law enforcement officials were given largely free reign by the courts to engage in MBOs without much hindrance. The promulgation of the *Hart* rule placed a significant hurdle limiting the state's ability to advance a case based on conscriptive and self-incriminating evidence procured through these operations. Indeed, as observed above, confessions arising from MBOs are now deemed presumptively inadmissible unless the Crown can prove on a balance of probabilities that the probative value of the incriminating statement(s) outweighs its prejudicial impact. The focus of the test looks to fundamental issues of reliability given the use of inducements and veiled threats of violence. The *Hart* Court was also concerned with both the moral and reasoning prejudice that arises from these confessions. The Court stresses that moral danger arises from the potential of a jury being swayed by the implied bad character evidence of the accused. Reasoning prejudice emerges when the jury is distracted away from the offence charged and directed toward the accused's misconduct in seeking entry into the criminal organization. The Court asserts that, "[d]espite the well-established presumption that bad character evidence is inadmissible, it is routinely admitted in Mr. Big cases because it provides the relevant context needed to understand how the accused's pivotal confession came about."[145]

Furthermore, the combination of an unreliable confession paired with bad character evidence produces a toxic mix endangering the liberty of an accused. Justice Moldaver states:

> Putting evidence before a jury that is both unreliable and prejudicial invites a miscarriage of justice. The law must respond to these dangers. The fact that there are no proven wrongful convictions in cases involving Mr. Big confessions provides little comfort. The criminal justice system cannot afford to wait for miscarriages of justice before taking reasonable steps to prevent them.[146]

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145 *Hart*, *supra* note 2 at para 76.

146 *Ibid* at para 77.

One has to recognize the *Hart* ruling for what it is – a one hundred and eighty degree shift concerning the admissibility of MBO confessions. It might be argued that having freely admitted such incriminating statements in past cases without subjecting them to adequate judicial scrutiny posed a serious, substantial, and intolerably high risk of an unreliable verdict. Accordingly, it is more than reasonable to argue that the new rule established in *Hart* constitutes a new watershed rule and previously unrecognized bedrock procedural element that is essential to the fairness of a proceeding.

One question that may emerge is whether a common law rule as in *Hart*, as opposed to one rooted in constitutional law (such as in the American cases discussed earlier), can supply sufficiently a legal or conceptual basis for countering the principle of finality and non-retroactivity of new rules in connection with cases for which direct appeal is no longer available. One way to bypass this would be to subscribe to a Blackstonian view – that the common law has no temporal origin but is rooted in natural law. According to this perspective, judges do not 'create' common law rules that have existed since time immemorial, but they merely 'discover' them through common sense and reasoning. From this point of view, the rule articulated in *Hart* is not a new rule, but merely one that the Supreme Court of Canada suddenly and just recently "discovered" and revealed in 2014. Under this theory, applying the *Hart* rule is not a retroactive application of a 'new' rule. While such a theory works rather conveniently for our purposes, it nevertheless strains credulity that a common law rule conceived in specific reference to a very particular police investigative technique found in Canada has existed since time immemorial only to be discovered very recently. However, one does not need to turn to Blackstonian theory to articulate that a new common law rule developed by the Supreme Court of Canada should be applied retroactively.

While one may intuitively seek to turn to the *Charter* for protection, this does not in actuality render other sources of legal protection obsolete. Indeed, the common law serves as an independent source of protection outside of the *Charter*. The confessions rule is a particular example of such legal protections rooted in the common law. As the Supreme Court of Canada asserted in *Oickle*, the *Charter* does not subsume the common law – rather, the *Oickle* Court observed that the scope of the common law, particularly the confessions rule, is at times broader in that it does not apply solely to instances of arrest or detention, as in the case of the right to counsel

under section 10 of the *Charter*.[147] The same could be said about the common law right to silence as elucidated under *R v Turcotte*, where the Supreme Court asserted that the common law right to silence "applies any time [an accused] interacts with a person in authority, whether detained or not."[148] This is in contradistinction to the right to silence founded in section 7 of the *Charter*, which is limited to the context of detention.[149] Second, the burden and standard of proof with respect to the common law confessions rule is for the Crown to demonstrate the voluntariness of a confession beyond a reasonable doubt.[150] With respect to the *Charter*, the burden is on the accused to demonstrate on a balance of probabilities that her rights have been breached.[151] Lastly, a breach of the common law confessions rule always results in exclusion, whereas the decision to admit evidence despite a *Charter* breach is conditional upon an assessment of whether admitting the impugned evidence would bring the administration of justice into disrepute.[152] While there are differences between the *Hart* rule and the confessions rule, there are some commonalities. First, the *Hart* rule applies regardless of whether an accused is in detention, as is the case with the confessions rule. Second, the Crown has the burden to justify the inclusion of the incriminating statements. In the case of the confessions rule, the Crown must demonstrate beyond a reasonable doubt that the incriminating statements were made voluntarily. MBO confessions are presumptively inadmissible, however the Crown bears the burden of rebutting this presumption on a balance of probabilities by showing that the probative value of the incriminating statements outweighs their prejudicial impact.

In addition to being an independent source of law that is not subsumed by the *Charter*, common law norms can also have a considerable interplay with constitutional norms. In *R v Singh*, the Supreme Court of Canada concluded that the common law confessions rule and the *Charter* right to silence essentially overlap in instances where an accused made incriminating statements to an individual who he subjectively knew was a person in

147 *Oickle*, *supra* note 1 at paras 29-30.

148 *R v Turcotte*, 2005 SCC 50 at para 51, [2005] 2 SCR 519.

149 *Singh*, *supra* note 30 at para 46.

150 *Ibid* at para 25; *Oickle*, *supra* note 1 at para 30.

151 *Oickle*, *supra* note 1 at para 30.

152 *Ibid*.

authority.[153] In *Singh*, the accused asserted his wish not to speak with the police roughly 18 times during the course of a police interrogation. Eventually he relented and made incriminating statements. Though conceding the voluntariness of his statements for the purposes of the confessions rule, Singh argued that the statements were elicited in violation of his right to silence. The Supreme Court concluded that where statements were made voluntarily to a person in authority beyond a reasonable doubt for the purposes of the confessions rule, this was the functional equivalent of a determination that the *Charter* right to silence had not been breached. Indeed in *Singh*, the Court observed, "the confessions rule effectively subsumes the constitutional right to silence in circumstances where an obvious person in authority is interrogating a person who is in detention because, in such circumstances the two tests are functionally equivalent."[154]

Thus far, it is clear that the Supreme Court affirms that the *Charter* does not subsume the common law, but in some instances the common law may, however, subsume the *Charter* – or at least specific portions of it. In other circumstances, short of the common law subsuming the *Charter*, the former can influence and inform an interpretation of the latter. When the Supreme Court announced the existence of a right to silence rooted within the principles of fundamental justice within section 7, the Court drew on common law principles grounded on the confessions rule and the privilege against self-incrimination.[155] Within the context of administrative law, the Supreme Court has stated that the common law duty of fairness forms part of the basic tenets of the legal system and inform constitutional principles grounded within the principles of fundamental justice under section 7.[156] In a similar fashion, the values underlying the *Charter* can also influence the interpretation and scope of the common law in instances where the *Charter* does not directly apply. Over the past two decades, the Supreme Court has held that common rules may be adapted to be consistent with *Charter* values, stating:

> The *Charter* represents a restatement of the fundamental values which guide and shape our democratic society and our legal system. It follows that it is appropriate

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153 *Singh*, *supra* note 30 at paras 24-25.

154 *Ibid* at para 39.

155 *R v Hebert*, [1990] 2 SCR 151 at 164-175, [1990] 5 WWR 1.

156 See *Suresh v Canada*, 2002 SCC 1, [2002] 1 SCR 3.

> for the courts to make such incremental revisions to the common law as may be necessary to have it comply with the values enunciated in the *Charter*.[157]

What all this strongly suggests is that while the *Charter*, being constitutional law, is formally that body of law against which all others must typically conform, the reality is that the common law plays a significant role in the legal system. In some cases, it subsumes or informs the interpretation of the *Charter*. In others, the interpretation and/or scope of the common law is adapted to comply with the values underlying the *Charter*. While not constitutionalized in the formal sense, common law rules may be refitted, or created in light of the *Charter*.

In concluding this section, we recognize that there is a value to finality and that there are compelling reasons for its existence and application. Yet, there are countervailing considerations when the new legal rules constitute foundational norms that strike at the heart of trial fairness. The non-retroactivity of new rules traditionally applied in the criminal law context to protect accused from facing crimes that did not exist when their acts were committed. When the new rules in question are intended to be protective, the same concerns do not apply as in the case of newly created offences that are applied retroactively to conduct which took place prior to the new rules coming into effect. By applying the rules in *Hart* to earlier MBO cases, we next consider what would be the best fora to consider pre-*Hart* decisions in light of *Hart*'s standards.

IV. Some Ways Forward

If, as we have argued, pre-*Hart* MBO cases resulting in conviction should be revisited using the standards set by the *Hart* Court, how should such reviews take place? What mechanisms should be employed? What cases should be revisited and what should be the basis for selecting such cases for review? For example, should convictions based solely on a trial be examined or should a reviewing body also consider those whereby an individual pleaded guilty on the basis that the incriminating statements would be more than likely admitted under pre-*Hart* standards? What body or institution should undertake such reviews? Should such reviews take place under the auspices of the judiciary, the executive branch (particularly the Minister of

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[157] *Hill v Church of Scientology of Toronto*, [1995] 2 SCR 1130 at para 92, 126 DLR (4th) 129.

Justice), or an independent administrative review body? Should such pre-*Hart* convictions be assessed purely in isolation of one another or should they be assessed as part of broader patterns of police investigative conduct?

In this section of the article, we will canvass several possible options for undertaking reviews of pre-*Hart* convictions. They will run the spectrum from isolated individual reviews to *en bloc* review, to examining the possible merits of reviews by the judiciary, the Minister of Justice to independent reviews by specially created administrative bodies.

A. Individualized Review Processes

One approach to reviewing MBO convictions would be a more traditional and highly individualized approach to examining pre-*Hart* MBOs. Reviews would be done on a case-by-case basis. Under the two processes indicated below, individual applicants who had been convicted on the basis of an MBO confession would apply directly to an applicable body. In one instance, the body is a court, while the other is the executive branch.

1. Habeus Corpus Reviews – The Judicial Approach

Though much more hypothetical at this stage, one conceivable approach to reviewing MBO decisions that are final and no longer subject to appeal is via an application to a court for *habeus corpus*. In order for courts to be able to undertake such a review using a new standard that did not exist before the earlier decision became final, one of two possible changes would have to occur. As noted earlier, the Supreme Court of Canada has limited the application of new standards only to cases that are still subject to further appellate review (rather than being final and no longer subject to appeal). To alter this, the Court would have to change its approach, or, in the alternative, Parliament could make necessary legislative changes to permit courts to apply new standards retroactively to cases that have been finalized and are no longer subject to appeal. In order to prevent opening the floodgates and jeopardizing the principle of finality more broadly, Canadian courts could be permitted, similar to American courts, to apply certain types of new "watershed" rules retroactively. This would limit the eligibility of applications made, while still ensuring that new rules affecting the fundamental fairness of trials will apply to earlier cases. As the Supreme

Court of Canada observed in *Oickle*, "[o]ne of the overriding concerns of the criminal justice system is that the innocent must not be convicted."[158]

In the case of *habeus corpus* applications, an accused may already have been convicted, but this hardly means that the conviction should stand if at the time of the original trial, there was an absence of fundamental rules governing the admission of incriminating statements procured through rather problematic means. Courts play a vital gatekeeping role against miscarriages of justice, even though it is abundantly clear that they have not always done so.[159] It is also an independent branch of the government and is not charged with any duties or responsibilities with respect to prosecuting crimes. This being said, even if courts were authorized to revisit these older cases, there is legitimate concern about how this might swell already packed dockets and exacerbate delays in the court system. Other fora, as suggested below might be better equipped for the task.

2. Ministerial Reviews Regarding Miscarriages of Justice

Ministerial reviews performed by the federal Minister of Justice provide an executive and administrative process to review convictions that may constitute a miscarriage of justice. The *Criminal Code* and relevant regulations set out the procedures and considerations. In reviewing whether a miscarriage of justice has transpired, the Minister must take into account, among other considerations "whether the application is supported by new matters of significance that were not considered by the courts", "the relevance and reliability of information that is presented in connection with the application", and "the fact that an application under this Part is not intended to serve as a further appeal and any remedy available on such an application is an extraordinary remedy."[160] In pre-*Hart* MBO cases that are no longer subject to appellate review and for which courts did not subject the reliability of the evidence to the factors set out in *Hart*, such criteria and

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158 *Oickle*, *supra* note 1 at para 36.

159 Sometimes courts commit lapses when examining miscarriages of justice. See e.g. Nova Scotia, *Royal Commission on the Donald Marshall, Jr., Prosecution, Digest of Findings and Recommendations* (Halifax: Nova Scotia, 1989) ("While the Court did quash Marshall's conviction and enter a verdict of acquittal, it also inexplicably chose to blame Marshall for his wrongful conviction. We have concluded that the Court's conclusion in this regard represented a serious and fundamental error" at 7).

160 *Criminal Code*, RSC 1985, c C-46, s 696.4 [*Criminal Code* or *Code*].

the presumptive inadmissibility of the incriminating statements are arguably "new" matters of significance not previously considered by the courts when originally adjudicating those cases. The factors set out in *Hart* help to assess the relevance and more particularly the reliability of the incriminating information used to convict. An application in pre-*Hart* cases should not be seen as serving as a further appeal since the *Hart* test was unavailable at the time any earlier appeals to appellate courts were possible.

Under the *Criminal Code*, the Minister of Justice is granted certain powers of investigation.[161] The Minister may take it upon herself to undertake the relevant investigation. However, she may delegate such powers to "any member in good standing of the bar of a province, retired judge or any other individual who, in the opinion of the Minister, has similar background or experience the powers of the Minister to take evidence, issue subpoenas, enforce the attendance of witnesses, compel them to give evidence and otherwise conduct an investigation."[162] Lastly, the Minister may also refer to a court of appeal any question in relation to such applications on which the Minister seeks assistance of that court for the court to furnish its opinion.

There have been criticisms regarding the Ministerial review process – specifically, that as a part of the government, the Minister has final authority to decide whether to grant an application. Because governments hold the power to prosecute, there may be strong reluctance to re-open cases and second-guess past work by provincial counterparts. In order to separate the review process from the government, some have called for the creation of a permanent and independent Criminal Cases Review Commission[163] (CCRC), modeled from an administrative agency in the United Kingdom which carries the same name. The UK CCRC is an independent body which began its work in 1997. Its main objectives include reviewing convictions and/or sentences with a fresh eye and referring cases back to a court of appeal. Despite calls to create a CCRC in Canada, this move was

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161 *Ibid*, s 696.2(2).

162 *Ibid*, s 696.2(3).

163 See e.g. Kent Roach, "An Independent Commission to Review Claims of Wrongful Convictions: Lessons from North Carolina?" (2012) 58 Crim LQ 283 ("Commissions of inquiry have been recommending since 1989 that Canada create an independent commission to assume the powers of the federal Minister of Justice to refer cases of suspected miscarriages of justice for judicial re-consideration" at 283).

ultimately rejected in favour of creating certain processes that provided some distance and perceived independence. However, as some critics have argued and as noted above, the ultimate authority within the context of Ministerial review still lies with the federal Minister of Justice.[164] It is worth noting, though, that it was through the Ministerial review process, which led to Kyle Unger's conviction being quashed and a new retrial re-ordered. However, given the sheer number of possible pre-*Hart* MBOs that could be challenged, other review processes that involve *en bloc* review may be more advisable.

B. An En Bloc Administrative Review

Separate from having a government department or court revisit prior Mr. Big cases and the admission of incriminating statements, another avenue would be to create an *ad hoc* administrative review process. The federal government as well as the governments of the provinces and territories are each empowered via legislation to establish commissions of inquiry.[165] As Ruel identifies, through various sources, there are several recognized rationales for the creation of commissions.[166] A few of these are particularly relevant to the discussion here. First, because commissions of inquiry operate independently, they may act in a non-partisan way and free from institutional impediments.[167] Second, they allow for the review of events or issues of public importance.[168] Third, commissions of inquiry can devote sufficient time, resources and expertise to the study of a particular problem, and can take a long-term view.[169] Lastly, and ultimately, as Ruel posits, their role is to make recommendations and provide advice to the relevant executive with respect to a particular problem, situation or issue under review.[170]

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164 It is worth noting that there have been criticisms concerning the UK's CCRC. See Michael Naughton, "The Criminal Cases Review Commission: Innocence Versus Safety and the Integrity of the Criminal Justice System" (2012) 58 Crim LQ 207. For a more positive appraisal of the UK's CCRC relative to the Ministerial review process in Canada, see Narissa Somji, "A Comparative Study of the Post-Conviction Review Process in Canada and the United Kingdom" (2012) 58 Crim LQ 137.

165 Simon Ruel, *The Law of Public Inquiries in Canada* (Toronto: Carswell, 2010) at 2.

166 *Ibid* at 2-3.

167 *Ibid.*

168 *Ibid.*

169 *Ibid.*

170 *Ibid.*

These factors are relevant to consider when contemplating the establishment of a commission concerning pre-*Hart* MBO cases. First, the Minister of Justice and her coordinate role as Attorney General of Canada are essentially duties relating to law enforcement. There may be a certain level of unspoken resistance when reviewing claims of miscarriage of justice to those convicted of serious crimes. Second, the issue of whether past MBO cases led to convictions based on potentially unreliable evidence is a matter of significant public importance as it concerns the proper administration of justice. Third, given the potential for many possible applicants seeking relief based on *Hart*, a commission could devote sufficient time and resources to the subject matter. Furthermore, depending on who is appointed to take charge of the inquiry, they may have significant expertise or possibly develop it through a review of many cases. Finally, the commission could provide the necessary advice and recommendations to Minister or cabinet about what steps should be taken with respect to particular cases.

Jurisdictional matters may arise with respect to the construction of a commission of inquiry where the focus is on a matter outside of the jurisdiction's competence. Ruel articulates that where the subject matter touches upon the powers of more than one jurisdiction,[171] in such cases, it may be possible for two or more jurisdictions to jointly establish a commission of inquiry.[172] Given the national scope and use of MBOs across the country, and that it concerns the criminal law power of the federal government and procedures used by police officers in enforcing the *Criminal Code*, it seems appropriate that a Commission of Inquiry assume a national role. Under the *Inquiries Act*, the federal cabinet may "cause inquiry to be made into and concerning any matter connected with the good government of Canada or the conduct of any part of the public business thereof."[173] The inquiry would focus on issues concerning possible wrongful convictions arising from the admission of incriminating statements derived from MBOs. However, unlike previous inquiries such as the commissions examining specific wrongful conviction cases such as those of Thomas Sophonow or Guy Paul Morin, this would be an *en bloc* examination looking at numerous cases.

The creation of an inquiry to study a broader phenomenon is not unheard of. Commissions of inquiry have been created to study a variety of

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171 *Ibid* at 13.

172 *Ibid.*

173 *Inquiries Act*, RSC 1985, c I-11, s 2.

events and actions tied to a single theme. For instance, the Truth and Reconciliation was created to examine numerous acts and institutions of violence perpetrated against indigenous peoples in Canada over numerous decades. The Krever Commission studied the "blood system in Canada" with a focus on the safety of blood products from 1981 to 1994 with respect to HIV and AIDS as well as Hepatitis from 1965 to 1995. Within the context of criminal law, the government of Manitoba in 2003, initiated a Forensic Evidence Review Committee (FERC).[174] The goal of the FERC was to review homicide cases from the previous 15 years in which hair comparison evidence was relied upon to secure a conviction.[175] Also, in the criminal law context, an *en bloc* review was created in the mid-1990s to study concerns with respect to women who killed or attempted to kill a male partner/spouse and the availability of the defence of self-defence in their cases. In 1995, the federal government commissioned the "Self Defence Review" (SDR) and appointed Judge Lynn Ratushny to undertake the inquiry.[176] Because the SDR provides an interesting model for a Commission to follow, we shall discuss it briefly below.

The federal government created the SDR to examine whether women were able to receive the benefit of the defence of self-defence in homicide-connected trials.[177] This was prompted in significant part by the Supreme Court of Canada's decision in *R v Lavallee* in 1990.[178] The thrust of the *Lavallee* Court's holding was that in connection with their claims to self-defence, female defendants should be able to present expert testimony concerning their reasonable apprehension of death or grievous bodily harm within the context of abusive relationships. The Court also clarified that an imminent perception of death was not required. There were concerns that

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174 Government of Manitoba, *Forensic Evidence Review Committee: Final Report* (Winnipeg: 2004).

175 Through its vetting process, the FERC ultimately reviewed two cases, one of which was Kyle Wayne Unger's. While Unger's incriminating statements from the MBO were admitted, so was a hair sample alleged to be his that was found at the crime scene. Through the FERC process, it was determined through further DNA testing that it was indeed not his hair which was found. This removed any physical evidence tying Unger to the murder. See *Unger* MBQB, *supra* note 60.

176 Canada, Self-Defence Review: *Final Report*, by Judge Lynn Ratushny, (1997) [*SDR*].

177 *Ibid* at 11.

178 *R v Lavallee*, [1990] 1 SCR 852, [1990] 4 WWR 1.

women prior to *Lavallee* but also after were unable to properly access the main benefits of the decision. Through the SDR, Judge Ratushny reviewed 98 applications from women seeking review of their cases.[179] Of those, approximately 35 were cases that were decided and completed prior to the release of the *Lavallee* decision, and did not benefit from the Court's conclusions.

Following her appointment to carry out this inquiry, Judge Ratushny conducted a roundtable discussion with various experts on self-defence and abuse.[180] She also solicited legal analyses from learned legal scholars.[181] The SDR would identify potential applicants and application packages were to be sent out.[182] Judge Ratushny mailed out 236 application packages and she received 98 application forms.[183] Her Honour then requested that representatives of the Elizabeth Fry Society make personal contact with the individuals who were sent the 236 application packages and explain the process to them.[184] Once the 98 applications were received, Judge Ratushny obtained reports from the Correctional Service of Canada.[185] She then sorted the 98 applications into three groups: (1) applications where there appeared to be some evidence of self-defence in the facts surrounding the woman's offence; (2) applications where self-defence seemed unlikely under the facts; or (3) applications where there appeared to be no facts supporting a claim of self-defence.[186] Judge Ratushny proceeded to only consider those applications that fit under categories #1 and #2.[187] She invited these applicants to send her their stories in writing, explaining what happened in their own words.[188] While she received many long letters, others who did not feel comfortable doing so in writing were given the chance to call Judge Ratushny collect at any time while others expressed themselves through audio or audio-visual recording.[189] Her Honour also appointed four

179 *SDR*, *supra* note 176 at 34.
180 *Ibid* at 32-33.
181 *Ibid* at 33.
182 *Ibid* at 33-34.
183 *Ibid* at 34.
184 *Ibid* at 35-36.
185 *Ibid* at 36.
186 *Ibid.*
187 *Ibid.*
188 *Ibid* at 37.
189 *Ibid.*

regionally based legal counsel for the applicants.[190] Each applicant who had not been screened out at the earlier stage (group three) was provided their appointed counsel's address and phone number.[191] The function of counsel was to assist applicants with respect to their applications but not act in an adversarial capacity.[192] The counsel's first responsibility was to make contact with their assigned applicants, listen to their stories and provide a preliminary assessment as to the individual's eligibility for SDR.[193] Counsel were also expected to assist in addressing concerns of the applicants in addition to responding to any requests made by Judge Ratushny.[194]

Two further stages included file building and analysis. Judge Ratushny sought and received documentation from various sources with respect to cases under review. This documentation included information from defence counsel, prosecutors, court officials, police, doctors, forensic experts, and shelter workers.[195] Many lawyers sent their original files with the undertaking that they would be returned.[196] After the files were reviewed, case summaries were produced with the assistance of her assistant legal counsel.[197] Judge Ratushny then analyzed each remaining case on the basis of the relevant standard of review she set out and in light of the elements of self-defence that existed at the time.[198] Her Honour then dispatched any further questions to applicants that need responses before the review could be completed.[199] In her letters to the applicants, Judge Ratushny indicated problem areas in their claims regarding self-defence.[200] Applicants were also provided the case summaries that were prepared along with a list of sources relevant to their case.[201] In an additional stage, Judge Ratushny met and conducted interviews with 14 women.[202] She indicated

190 *Ibid* at 38-39.
191 *Ibid*.
192 *Ibid* at 39.
193 *Ibid*.
194 *Ibid*.
195 *Ibid*.
196 *Ibid*.
197 *Ibid* at 40.
198 *Ibid* at 42.
199 *Ibid*.
200 *Ibid*.
201 *Ibid*.
202 *Ibid* at 43.

that she could not provide a positive recommendation without having met with the particular women in question.[203] The overall process culminated in Judge Ratushny submitting several recommendations and her final report.

C. Selecting the Most Suitable Review Process

Of the possible options canvassed, we would argue that the most suitable option would be an inquiry that resembled, to a certain degree, the inquiry process established for the SDR and conducted by Judge Ratushny. Two of the suggestions noted above, *habeus corpus* reviews by courts and the Criminal Cases Review Commission are not available at the moment. *Habeus corpus* reviews do not cover the application of new rules to older cases that have been finalized and are no longer subject to review. As noted above, a change would need to be made to permit such appeals. Despite several calls to create a CCRC in Canada, this still has not transpired and does not appear likely to in the near future.

Applications for review by the Federal Minister of Justice may be possible options. However, unlike the Ratushny-led SDR inquiry process, applicants might not be signalled to the possibility of this. In the SDR process, Judge Ratushny made potential applicants aware of the inquiry she was undertaking and the possibility to submit applications.

The SDR process provides a potential model subject to necessary modifications for undertaking an assessment of pre-*Hart* decisions. As with applicants in the SDR process, appropriate individuals, those whose convictions were based on the admission of a MBO confession may be alerted to the review process. The review can and should be limited to those whose cases were finalized and no longer subject to appellate review before *Hart* was released. This would be different from the SDR where both pre and post *Lavallee* decisions were considered. Like the SDR, legal counsel should be assigned to assist in the application process and assist in its smoother running.

A Mr. Big review (MBR) inquiry could assess whether the techniques employed in pre-*Hart* decisions would satisfy the norms that the *Hart* Court set out. Specifically, an MBR could assess whether the probative value of admitting an MBO confession outweighs its prejudicial impact thus rebutting a presumption of inadmissibility. This determination would rely on the factors set out in *Hart*. In addition, an MBR would also assess

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[203] *Ibid.*

whether the techniques involved amounted to an abuse of process. Lastly, and following *Mack*, where the case in question involved a jury making the decision at trial, an MBR could examine the record to assess whether jurors received any form of warning relating to the reliability of the incriminating statements.

Within the framework of Judge Ratushny's vetting system noted above, she established three categories for screening purposes. They included instances where there appeared to be some evidence of self-defence, cases where self-defence was unlikely, and instances where there were no facts to support a self-defence claim. A MBR process could establish a similar type of screening system for applications in connection with each of the three categories: (1) the probative value outweighing the prejudicial impact analysis; (2) the abuse of process analysis; (3) where applicable, jury warnings concerning the reliability of the evidence. A preliminary vetting system could establish the degrees of likelihood as to whether facts found in a given case would satisfy any of these criteria. While MBOs conducted since *Hart* might account for the standards and factors set out in the Court's decision, it may also be the case that undercover police officers in pre-*Hart* decisions did not engage in conduct which would render the confessions unreliable (from the perspective that the probative value outweighed its prejudicial impact) or that the conduct did not amount to an abuse of process. Or put another way, in connection with assessing reliability, it may be that the presumption of inadmissibility concerning an MBO confession may be easily rebutted. The review process could also account for any other evidence available to support a conviction other than the confessions themselves.

An MBR inquiry process should focus not only on convictions secured through trials and verdicts rendered, but also on instances where accused have pleaded guilty. Allowing for this broader scope properly recognizes the inherent dangers of MBOs is not only in connection with trials but also in pushing or persuading an accused to plead guilty. In the pre-*Hart* period, because there was no effective means to exclude the evidence, many would have certainly been advised to negotiate a plea deal. This may have been despite the egregious nature of some MBO techniques employed.

The inquiry process established by the federal government for the SDR provides a reasonable and possible basis from which to construct a mechanism to revisit pre-*Hart* MBO cases. Depending on the powers the federal government would provide, at the very least, an MBR process could

make recommendations to the Minister of Justice with respect to which cases and convictions should be quashed and deserve a retrial.

V. CONCLUSION

Confessions secured through aggressive investigative techniques that pose serious concerns regarding the reliability of the evidence may lead to wrongful convictions. Prior to *Hart*, there was relatively little scrutiny concerning MBO confessions and their reliability. *Hart*, however, represents a fundamental shift in the consideration of MBO confessions, reversing the Court's previous characterization of the investigations as skillful police work and declaring that the procured statements are presumptively inadmissible. The *Hart* decision demonstrates the Court's understanding of the inherent dangers of investigatory tactics that involve inducements and threats, as well as the dangers of relying on statements that are inconsistent with surrounding evidence or for which there is no confirmatory evidence. The spectre of wrongful convictions loomed over the Court's decision, as it will over future MBO cases.

While attention must be paid to the ways that courts are applying the test and factors in cases going forward (and whether the *Hart* test is a sufficiently effective way to handle the admissibility of MBO confessions), it is equally important for our legal system to return to pre-*Hart* cases with a view to considering whether miscarriages of justice ensued from the failure to exclude unreliable evidence. In this article, we have considered a number of cases that, when evaluated under the *Hart* criteria, we argue would have resulted in the confessions being ruled inadmissible. While the application of new norms to cases that have been finalized and are no longer subject to appeal is in tension with the notion of finality and principle of non-retroactivity, as this article has discussed, there are exceptions – and circumstances that should be exceptions. The rule in *Hart* qualifies as an exceptional watershed rule which should have retroactive application. While the law in its current state would need to be altered in order to proceed in that manner, it is within the authority of the federal Minister of Justice to establish a formal inquiry, headed by a Canadian judge and modeled from the Self Defence Review conducted by Judge Ratushny. This would be an *en bloc* review of numerous individual cases with a view toward assessing the admissibility of their confessions under the standards set out in *Hart*. Where the reviewing judge or judges find that the impugned

admissions would not be admissible under the *Hart* criteria and there is a possibility that a miscarriage of justice occurred, the reviewing authority would forward recommendations to the Minister as to whether a retrial should be ordered. It is our view that this procedure would best identify those cases where a wrongful conviction may have occurred and provide a remedy, while still upholding the principle of finality and maintaining public confidence in the administration of justice.