Court File No. 35049

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR NEWFOUNDLAND AND LABRADOR)

B E T W E E N

HER MAJESTY THE QUEEN

Appellant (Respondent)

– and –

NELSON LLOYD HART

Respondent (Appellant)

– and –

MARIE HENEIN (*AMICUS CURIAE*)

Amicus Curiae

– and –

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[*Rules of the Supreme Court of Canada,* Rules 37 and 42]

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PART I: STATEMENT OF FACTS

1. The Criminal Lawyers Association ("CLA") accepts the facts as summarized in the facta of the parties and *amicus curaie*.

PART II: THE CLA'S POSITION ON THE QUESTIONS IN ISSUE

2. The "Mr. Big" investigative technique is very effective at eliciting confessions. This only advances the cause of justice, however, if the confessions so elicited are *true*. The Mr. Big technique depends on the use of extraordinary inducements, offered against a backdrop of implicit menace. Targets are systematically duped into believing their confessions will be lavishly rewarded, and in many cases are also promised that confessing will enable the fictitious criminal organization to shield them from prosecution and punishment. As a result, targets are put in a position where it appears overwhelmingly in their interests to confess, *whether or not* they are actually guilty. A growing body of research demonstrates that admissions obtained under such circumstances are especially fraught with reliability concerns, and that jurors have great difficulty disregarding confession evidence even when they know a confession has been induced and is unreliable.[1]

3. Under the law as envisioned by the Appellant, the only legal mechanisms for excluding Mr. Big confessions would be the abuse of process and "community shock" doctrines, which both focus on the impropriety of the police conduct rather than the unreliability of the ensuing evidence. The result would be an anomaly: trial judges would be left with *no* power to exclude a manifestly unreliable confession *for that reason* in order to prevent a miscarriage of justice. The CLA's position is that this conception of the law is both indefensible on principle and unacceptable as policy. The Mr. Big technique is so inherently dangerous that something must be done: trial judges cannot be left powerless to exclude unreliable confessions in order to prevent wrongful convictions. This goal could be accomplished in a number of different ways, but the CLA's position is that the best legal route is through s. 7 of the *Charter*. The CLA takes no position on the *in camera* proceedings issue or on the disposition of this appeal.

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[1] See the factum of the Intervener AIDWYC, at ¶4-5.

4. This Court has directed the public interest interveners to "consult to avoid repetition". The CLA will accordingly focus on two specific points: (i) the psychological evidence casting doubt on the reliability of Mr. Big confessions, and (ii) how a legal rule permitting trial judges to exclude unreliable confessions can best be situated within the s. 7 *Charter* jurisprudence.

PART III: ARGUMENT

A. The danger of wrongful convictions based on Mr. Big confessions

1) Induced confessions are unreliable

5. Confessions have a special persuasive force. As Iacobucci J. said in *R. v. Oickle*:

> [I]t may seem counterintuitive that people would confess to a crime that they did not commit and indeed, research with mock juries indicates that people find it difficult to believe that someone would confess falsely.[2]

The law traditionally treats confessions as reliable because they are "against interest": in ordinary circumstances falsely confessing brings the confessor no positive benefit, just shame and punishment. Even so, it is beyond dispute that innocent people *do* sometimes falsely confess. Research has shown that false confessions can be elicited by promises or threats even when it is obvious that the confession will trigger a prosecution and even when the inducements seem trivial compared to the impending punishment. Academic studies of false confessions and the underlying psychological issues[3] confirm the wisdom of the law's safeguards against confessions obtained by inducements. As Iacobucci J. observed in *Oickle, supra* (at para. 44):

> [T]he literature bears out the common law confessions rule's emphasis on threats and promises. Coerced-compliant confessions are the most common type of false confessions. These are classically the product of threats or promises that convince a suspect that in spite of the long-term ramifications, it is in his or her best interest in the short- and intermediate-term to confess.

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[2] *R. v. Oickle,* [2000] 2 S.C.R. 3 at ¶34. Iacobucci J. also cited the "large body of literature [that] has developed documenting hundreds of cases where confessions have been proven false by DNA evidence, subsequent confessions by the true perpetrator, and other such independent sources of evidence." (at ¶35). This literature has grown substantially in the thirteen years since *Oickle* was decided.

[3] See, *e.g.,* Kassin, S, S.A. Drizin, T. Grisso, G.H. Gudjonsson, R.A. Leo and A.D. Reidlich, "Police-Induced Confessions: Risk Factors and Recommendations", *Law. Hum. Behav.* (2010) 34:3-38 at pp. 15-16. This apparently irrational behavior is consistent with psychological research showing that in general people's "behaviour is influenced more by perceptions of short-term than long-term consequences" and that "people tend to be impulsive in their orientation" (Kassin *et al., supra* at p. 15). Researchers have also suggested that some innocent suspects discount the risks of falsely confessing because they believe independent evidence will establish their innocence: See Kassin et al., *supra* at pp. 22-23. The authors cite as an example the US case of Jeffry Deskovic, who falsely confessed to raping and murdering a high school classmate in part because he believed he would be exonerated by DNA evidence. The DNA evidence did indeed exclude him but he was nevertheless prosecuted and convicted based solely on his confession, and was exonerated only16 years later when further DNA tests identified the actual killer.

6. Academic study of false confessions – like the confessions rule itself – has focused mainly on custodial interrogations, and researchers have identified certain risk factors specific to this context, such as isolation and sleep deprivation.[4] Mr. Big confessions occur out of custody where these particular risk factors are absent, but where new and patently more dangerous elements are introduced. Most notably, the defining feature of the Mr. Big technique is the employment of extremely potent inducements that go far beyond what would be permitted in a custodial interrogation. Targets are led to believe they are being recruited by a powerful criminal organization offering them a life of wealth, status and privilege – a life to which they can gain admission only if they first confess to the crime under investigation. The belief that membership in the group is conditional on confessing is instilled by various ruses.[5] Typical examples include:

- The target may be told that the organization already knows that he or she committed the crime and that continued denials of guilt will be seen as proof of the target's untrustworthiness and disqualify him or her from membership,[6] or something worse;[7]
- In a variation on this approach, targets are sometimes told the organization has inside police sources who have disclosed the existence of conclusive new proof of the target's guilt;[8]
- The target may be told that the organization requires all new members to confess to serious crimes to give the organization something to hold over their heads and ensure their loyalty;[9]
- In a variation, the target may be made to witness a staged crime and be told that since this gives the target leverage over the organization he or she must now confess to a similarly serious crime in order to ensure mutual trust;[10]
- The target may be led to believe that the organization especially values people capable of killing and that admitting to a murder will strengthen the target's case for admission and/or secure his or her advancement within the group;[11]

By means such as these a "confession" to murder is transformed into a ticket for gaining entry to the group and the life that it brings.

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[4] See, *e.g.,* Kassin *et al.,* "Police-Induced Confessions", *supra* at p. 16.
[5] See Keenan, K.T. and J. Brockman, *Mr. Big: Exposing Undercover Investigations in Canada,* at pp. 58-64.
[6] See, *e.g., R. v. Mentuck,* 2000 MBQB 155 at ¶77, 80; *R. v. Skiffington,* (2004) 186 C.C.C. (3d) 314 at ¶34 (B.C.C.A.)
[7] See, *e.g.,* Respondent's factum at ¶24. See also *Dix v. Canada (Attorney General),* 2002 ABQB 580 at ¶130; *R. v. Skiffington, supra* at ¶36.
[8] See, *e.g.,* the investigation in *Burns and Rafay,* discussed in Keenan and Brockman, *supra,* at pp. 60-61. As Kassin *et al.* note, "[t]the forensic literature on false confessions … indicat[es] that presentations of false evidence can lead people to confess to crimes they did not commit" ("Police-Induced Confessions", *supra* at p. 17).
[9] See, *e.g., R. v. Osmar,* (2007) ONCA 50, 217 C.C.C. (3d) 174 at ¶11.
[10] See, *e.g., Dix, supra.*
[11] See *Amicus Curiae's* Factum at ¶15; See also *R. v. N.R.R.,* 2013 A.B.Q.B. 288, in which the target, a 16 year old youth, was told that the members who "do murders" were paid the most, and that if NRR confessed to the murders under investigation this "might result in his advancing ahead of others who at that point were ahead of him in the organization" (see ¶212, 233, 254, 282).

7. In many Mr. Big investigations the basic inducement of joining the group is supplemented by other powerful incentives. For instance, many targets are promised that the organization will shield them from prosecution and punishment, but only if they first make a full confession to the crime under investigation. This ruse also has several variations:

- The target may be told that the organization has learned from police sources that a new or renewed prosecution of the target is imminent, sometimes purported to be based on newly discovered or secret evidence;[12]
- In a variation, the target may be told that the police are corruptly interfering with exculpatory evidence, making his or her conviction a certainty unless the organization intervenes;[13]
- The target may be told that the organization has arranged for someone else (often described as a terminally ill person) to take responsibility for the crime if the target provides sufficient details to make this false confession believable;[14]
- In many Mr. Big cases the organization's offer to immunize the target from prosecution is linked back to the inducement of membership. For instance, the target may be told that he or she cannot be granted entry to the group while still under police investigation.[15]

Undercover investigators may also take advantage of targets' poverty, social isolation and poor self-esteem.[16] Targets with no evident skills may be led to believe – however implausibly – that the organization perceives them as uniquely talented.[17] Targets sometimes form strong emotional attachments to undercover officers[18] that are exploited to create further inducements to confess.[19]

8. In summary, the Mr. Big technique conjures into existence a looking-glass world where the ordinary disincentives to confessing to a crime are all replaced by positive inducements. The stigma, opprobrium and fear that ordinarily inhibit people from confessing to murders they did not commit are replaced in Mr. Big's amoral world with praise, admiration and admission to a

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[12] See, *e.g., R. v. O.N.E.,* [2001] 3 S.C.R. 478, 2001 S.C.C. 77 at ¶6; *R. v. Bonisteel,* 2008 BCCA 344, 236 C.C.C. (3d) 17 at ¶17; *R. v. Forknall and Copeland,* 2000 B.C.S.C. 1694 at ¶9

[13] See, *e.g.,* the *Rose* prosecution in British Columbia, discussed by Professor G.H. Gudjonsson's discussion in *The Psychology of Interrogations and Confessions,* at pp. 573-82) and by K.T. Keenan and J. Brockman in *Mr. Big: Exposing Undercover Operations in Canada* at pp. 7-11

[14] See, *e.g., R. v. Mentuck, supra* at ¶80; *R. v. Fliss,* [2002] 1 S.C.R. 535, 2002 S.C.C. 16 at ¶22; *R. v. O.N.E., supra* at ¶6, *Bonisteel, supra* at ¶17.

[15] See, *e.g., R. v. Forknall and Copeland, supra* at ¶7.

[16] See, *e.g.,* Respondent's Factum, ¶9-35.

[17] For example, in *R. v. NRR, supra* the accused youth – a high school dropout with a learning disability – was led to believe that the criminal organization was importing counterfeit video game consoles and needed someone with his extensive video game-playing experience to verify their quality (*N.R.R., supra* at ¶151)

[18] See Respondent's Factum, ¶27, 38; see also *R. v. N.R.R., supra*; *R. v. Evans,* [1996] B.C.J. 1341 (S.C.)

[19] For instance, in *R. v. Mentuck, supra* the target was led to believe that if he did not confess not only would his own membership application fail but his "sponsor" – the undercover officer who had first recruited him – would also be kicked out. The officer pleaded with Mentuck not to cause him to lose his job (see ¶80-82, 99).

privileged circle. While this is undeniably an effective way to elicit confessions, it raises grave concerns that any confession so elicited may be as much a fabrication as the deceptions inducing it. In *R. v. Mentuck,* the trial judge examined the inducements used in that case – all commonplace in Mr. Big operations – and concluded:

> Overall, when one analyzes the position that the accused found himself in by reason of the sting operation, I conclude that the inducement for him to admit the offence was positively overwhelming. There was nothing but upside for him to admit and nothing but downside for him to deny the offence.[20]

The same may be said of this case. The Respondent was led to believe that he had everything to gain by telling Mr. Big and his underlings that he had killed his daughters, and in the inverted moral universe the police had created it is hard to identify a single reason for him *not* to do so. As Professor Gudjonsson has observed, "the risk of false confessions being obtained under such conditions *may on occasions* be even greater than during custodial interrogation"[21] To adopt terminology used in the psychological literature,[22] there are compelling reasons to question the "diagnosticity" of the Mr. Big technique. Plying suspects with inducements may be an effective way of eliciting confessions, but there is good reason to consider it a very poor method of distinguishing the guilty from the innocent.

B. Mr. Big confessions and section 7 of the *Charter*

9. The Appellant objects to the Court of Appeal's decision to exclude the Respondent's statements under ss. 7 and 24(2) of the *Charter* and argues that the majority justices erred in "expanding" the scope of s. 7 "beyond the parameters established by this Honourable Court".[23] The CLA submits that the threshold issue for this Court is not whether the majority's decision can be reconciled with existing authority but, rather, whether the *Charter should* provide protections against unreliable Mr. Big confessions. If this requires modifications to existing s. 7 doctrine, so be it. When precedent and principle conflict, principle must prevail.

10. Like the rest of the *Charter*, s. 7 must be interpreted purposively. The principles of fundamental justice are closely intertwined with the right to a fair trial; indeed, this court has

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[20] *Mentuck, supra* at ¶99.
[21] Gudjonsson, *The Psychology of Interrogations and Confessions, supra,* at p. 582 (italics in original). See also Moore *et al.,* "Deceit, Betrayal and the Search for Truth: Legal and Psychological Perspectives on the "Mr. Big" Strategy, (2009), 55 C.L.Q. 348 at p. 351.
[22] See Moore *et al., supra* at pp. 392-93.
[23] Appellant's Factum, ¶3 and ¶4.

recognized that an unfair trial violates s. 7 as well as s. 11(*d*).[24] In *R. v. Evans,* McLachlin J. (as she then was) noted that "[t]here can be no greater unfairness to an accused than to convict him or her by use of unreliable evidence".[25] This Court has not yet specifically identified protection from unreliable evidence as a principle of fundamental justice, but the groundwork for this step can be found in the existing jurisprudence. In the *BC Motor Vehicle Act Reference* Lamer J. (as he then was) held that:

> The principles of fundamental justice are to be found in the basic tenets and principles not only of our judicial process but also of the other components of our legal system. … Whether any given principle may be said to be a principle of fundamental justice within the meaning of s. 7 must rest on an analysis of the nature, sources, *rationale* and essential role of that principle within the judicial process and in our evolving legal system.[26]

A s. 7 principle against the use of unreliable evidence can be derived by reasoning similar to that this Court has used in its s. 7 self-incrimination jurisprudence.[27] Many existing legal rules are directed wholly or partly at preventing convictions based on unreliable evidence. Examples range from the hearsay rule to the confessions rule to the rules of evidence prohibiting the admission of polygraph test results and post-hypnosis testimony.[28] These specific rules can be seen as linked and unified by a broader general principle against the use of unreliable evidence in criminal cases, much in the same way as the principle against self-incrimination serves as "a general organizing principle of criminal law from which particular rules can be derived".[29] Professor Kent Roach has persuasively argued that the time is ripe for the Court to recognize a general s. 7 *Charter* "right to have inherently unreliable evidence excluded", having regard to the judicial system's improved understanding of the link between unreliable evidence and wrongful convictions.[30]

11. The CLA endorses and adopts Professor Roach's analysis and arguments, but recognizes that this appeal may also be resolved on the basis of an established s. 7 principle of fundamental justice, namely, the principle against self-incrimination. As Lamer C.J.C. observed in *Jones*:

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[24] See, *e.g., R. v. Harrer,* [1995] 3 S.C.R. 562 at ¶13.
[25] *R. v. Evans,* [1991] 1 S.C.R. 869 at p. 896.
[26] *Re B.C. Motor Vehicle Act,* [1985] 2 S.C.R. 486 at pp. 512-13.
[27] See, *e.g., R. v. Jones,* [1994] 2 S.C.R. 229; *R. v. R.J.S.,* [1995] 1 S.C.R. 451 at pp. 486-512; *R. v. White* [1999] 2 S.C.R. 417 at ¶40-41.
[28] See, *e.g., R. v. Khelawon,*[2006] 2 S.C.R. 787, 2006 S.C.C. 57 at ¶47; *Oickle, supra* at ¶32, 96; *R. v. Trochym,* [2007] 1 S.C.R. 239, 2007 S.C.C. 6.
[29] *Jones, supra* at p. 249.
[30] K. Roach, "Unreliable Evidence and Wrongful Convictions: The Case for Excluding Tainted Identification Evidence and Coerced Confessions", (2006) 52 C.L.Q. 210.

> The modern-day rationale for the principle against self-incrimination is found in the two fundamental purposes for the principle that have been recognized by this Court: (1) protection against unreliable confessions; and (2) protection against the abuse of power by the state.

Both rationales are squarely engaged by Mr. Big confessions, which present serious reliability concerns and involve extraordinary exercises of state power with a high potential for abuse.[31]

12. The majority decision on appeal framed the s. 7 analysis in terms of the *Hebert* "right to silence".[32] Since *Hebert* limits the "right to silence" to suspects in detention, the majority was driven to consider whether the *Hebert* right "could possibly be extended to situations 'where the accused, although not in detention, was nevertheless under the control of the state in circumstances functionally equivalent to detention and equally needing protection from the greater power of the state'".[33] While the CLA agrees with substantial portions of the majority's analysis, it is respectively submitted that framing the s. 7 issue in Mr. Big cases in terms of the *Hebert* rule is neither doctrinally necessary nor analytically helpful. It is unnecessary because this Court's subsequent decisions have clarified that the s. 7 principle against self-incrimination is not limited to the *Hebert* rule, which is merely a specific rule designed to safeguard the broader principle in a particular context. It is unhelpful because the *Hebert* rule is directed against fundamentally different concerns than those presented by the Mr. Big technique. The CLA submits that rather than trying to repurpose *Hebert* to serve a new function for which it was not designed, the better course is to establish a new rule, based in s. 7 and tailored specifically to the challenge at hand. As Professor Lisa Dufraimont has written:

> What good is a constitutional principle against self-incrimination that does not apply where the state exploits its overwhelming resources to wage a relentless and intrusive campaign of deception to manipulate, bribe and terrify an individual into complying with its demands for a confession to a serious crime? … [I]f no existing legal rule applies to Mr. Big operations, surely the overarching principle against self-incrimination demands that some new safeguard be created.[34]

13. The post-*Hebert* s. 7 self-incrimination jurisprudence has analysed the *Hebert* "right to silence" as merely one particular context-specific manifestation of the broader principle. As Iacobucci J. explained in *R. v. White*:

> The jurisprudence of this Court is clear that the principle against self-incrimination is an overarching principle within our criminal justice system, from which a number of specific

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[31] See L. Dufraimont, "The Patchwork Principle against Self-Incrimination under the Charter" (2012), 57 S.C.L.R. (2d) 241 at p. 259.
[32] *R. v. Hebert,* [1990] 2 S.C.R. 151. In so doing, the majority followed the lead of the Ontario Court of Appeal in *R. v. Osmar, supra.*
[33] Judgment on appeal at ¶182, quoting Rosenberg J.A. in *R. v. Osmar*, *supra* at ¶42.
[34] Dufraimont, *supra* at pp. 260-61.

> common law and *Charter* rules emanate, such as the confessions rule, and the right to silence, among many others. The principle can also be the source of new rules in appropriate circumstances.[35]

The *Hebert* "right to silence" was created to address certain specific self-incrimination dangers faced by suspects held in state custody, and was limited to detainees on the basis that "[u]ndercover operations prior to detention do not raise the same considerations".[36] However, neither the broader s. 7 principle itself nor the other specific legal rules that have been derived from it are subject to this limitation,[37] which in most other contexts would make no sense. Undercover operations of non-detainees may not "raise *the same* considerations" that animate the *Hebert* rule, but may nevertheless raise *separate* self-incrimination concerns that engage s. 7. The particular dangers a certain undercover technique presents and the corresponding need for s. 7 protections must be determined contextually, having regard to the underlying purposes of the principle against self-incrimination. It would be bad judicial policy – a drastic pruning of the constitution's "living tree" – to treat an *obiter* comment in an early *Charter* case as forever pre-empting the development of the law in this area and immunizing all future police undercover techniques from s. 7 *Charter* scrutiny.[38]

14. As noted above, the principle against self-incrimination has been recognized as serving two main purposes: (i) protection against unreliable confessions; and (ii) protection against the abuse of power by the state. The *Hebert* rule is directed almost entirely at the second concern. As McLachlin J. (as she then was) explained, it is designed:

> … to preserve for the detained person the right to choose whether to speak to the authorities or to remain silent, notwithstanding the fact that he or she is in the superior power of the state. On this view, the scope of the right must extend to exclude tricks which would effectively deprive the suspect of this choice. [39]

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[35] *R. v. White, supra* at ¶44 (emphasis added).
[36] *R. v. Hebert,* [1990] 2 S.C.R. 151 at pp. 176, 184.
[37] Examples include the right to "derivative use immunity" in relation to compelled testimony (see *R.J.S., supra*; *British Columbia Securities Comm'n v. Branch,* [1995] 2 S.C.R. 3); the right to "use immunity" in relation to statutorily compelled motor vehicle accident reports (see *R. v. White, supra*); the right to resist statutory compulsion when its "predominant purpose" is to elicit self-incriminatory evidence (see *Branch, supra*; *R. v. Jarvis,* [2002] 3 S.C.R. 757, 2002 S.C.C. 73); and the s. 7 based restrictions on the Crown's ability to reopen its case "once the defence has started to answer the case against it" (see *R. v. P.(M.B.),* [1994] 1 S.C.R. 555).
[38] As Green C.J.N.L. noted in the decision on appeal, "at the time [*Hebert*] was decided, the Mr. Big technique was not widely used and its implications and potential frailties may not have been even contemplated when the language used in *Hebert* to describe the scope of the right to silence was employed". See also *Amicus Curiae*'s factum at ¶34.
[39] *Hebert, supra* at p. 180.

That is, *Hebert* protects detainees against the use of undercover police jailhouse plants because this particular technique is seen as *unfair and abusive*, not because statements elicited in this way are thought to be especially unreliable. In contrast, *unreliability* is at the heart of concerns about the Mr. Big technique, although its fairness can also be questioned.[40] The s. 7 self-incrimination dangers in Mr. Big cases are at least as serious as those in the detention context, but are of a fundamentally different character. The CLA submits that it makes little sense to take a legal rule designed to address one specific danger and try to recast it to address different concerns in a different setting. It would be better to start with the underlying principle and craft a new rule tailored to address the particular self-incriminatory dangers in Mr. Big cases.[41]

10 15. As this Court recognized in *R. v. White, supra*:

> The principle against self-incrimination demands different things at different times, with the task in every case being to determine exactly what the principle demands, if anything, within the particular context at issue."[42]

In *White* and its earlier decision in *R. v. Fitzpatrick,*[43] this Court decided whether the principle against self-incrimination was engaged by considering four factors: (i) the existence of coercion; (ii) the existence of an adversarial relationship between the accused and the state; (iii) the "prospect of unreliable confessions"; and (iv) whether permitting the use of the self-incriminatory evidence "would increase the likelihood of abusive conduct by the state". However, both cases were addressing statutory legal compulsions to speak rather than
20 undercover trickery. In this latter context the significance of the first two *Fitzpatrick/White* factors is diminished: the relationship between the police and undercover targets is inherently "adversarial" and people who speak to undercover officers are necessarily "coerced" as this term is used in the self-incrimination jurisprudence, where "coercion" has been defined to mean "the denial of free and informed consent".[44] Since s. 7 plainly does not prohibit the use of *all* statements obtained by undercover operations, the task of distinguishing when an undercover operation has crossed the line is borne entirely by the third and fourth factors. Since these factors

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[40] See, *e.g., Amicus Curiae's* Factum at ¶22; Dufraimont, *supra* at p. 259; Moore *et al., supra* at pp. 356-57, 373-78, 398-99; *R. v. Evans* (1996 B.C.S.C.), *supra*; *Dix v. Canada, supra.*
[41] See also Dufraimont, *supra* at pp. 260-61.
[42] *R. v. White,* [1999] 2 S.C.R. 417 at ¶45.
[43] *R. v. Fitzpatrick,* [1995] 4 S.C.R. 154 at ¶33-48.
[44] See *Jones, supra* at p. 249; *White, supra* at ¶42; *Fitzpatrick, supra* at ¶33; *R. v. Brown,* [2002] 2 S.C.R. 185, 2002 S.C.C. 32 at ¶92; *R. v. S.A.B.,* [2003] 2 S.C.R. 678, 2003 S.C.C. 60 at ¶59.

also dovetail with the two recognized main purposes of the principle against self-incrimination, it is submitted that they serve as the appropriate focus for the s. 7 analysis.

16. The CLA submits that in the Mr. Big context the two critical factors – the prospect of unreliable confessions and concerns about abusive state conduct – can best be assessed by considering three main factual circumstances:

(i) the nature of the inducements and threats made by the undercover officers to the target;

(ii) the target's particular circumstances and vulnerabilities;

(iii) other circumstances bearing on the reliability of the confession, including: (a) the presence or absence of independent corroborating or conflicting evidence;[45] (b) the use of suggestive or leading questions by the undercover officers; (c) whether the target made prior exculpatory or prior inconsistent statements; and (d) whether the target's account changed in response to specific inducements.

The factors relied on by the Court of Appeal majority to find a s. 7 breach in the case at bar are all compatible with this framework, but the proposed approach avoids comparing the target's situation to that of a detainee, which tends to distract attention from what should be the real issues: (1) are there significant reasons to question the reliability of the accused's confession; and (2) were the police tactics and inducements abusive?

PARTS IV & V: SUBMISSIONS ON COSTS AND REQUEST FOR PERMISSION TO PRESENT ORAL ARGUMENT

17. The CLA does not seek costs and asks that none be awarded against it. The CLA seeks leave to make oral submissions of not longer than 10 minutes.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 7th DAY OF OCTOBER, 2013.

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[45] The CLA acknowledges and adopts the concerns expressed by AIDWYC (Factum, ¶14)and the CCLA (Factum, ¶10) about the potential misuse of "holdback evidence". The CLA adds that the inclusion in a Mr. Big confession of details that are demonstrably false (see, *e.g., R. v. Unger*, 2005 MBQB 238 at ¶18-22, *Osmar, supra,* at ¶13 and *Mentuck, supra),* patently absurd (see, *e.g., R. v. N.R.R., supra* at ¶67-76, 260, 274, 286, 313) or that change over time will ordinarily weigh strongly against the reliability of the confession and favour its exclusion.

PART VI: LIST OF AUTHORITIES

Paragraph

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Kassin, S, S.A. Drizin, T. Grisso, G.H. Gudjonsson, R.A. Leo and A.D. Reidlich, "Police-Induced Confessions: Risk Factors and Recommendations", *Law. Hum. Behav.* (2010) 34:3-38 [*AMICUS CURIAE'S* BOOK OF AUTHORITIES, VOL. II, TAB 46]..... 5-6

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Roach, K., "Unreliable Evidence and Wrongful Convictions: The Case for Excluding Tainted Identification Evidence and Coerced Confessions", (2006) 52 C.L.Q. 210 10-11

PART VII: LIST OF RELEVANT STATUTES

***Charter of Rights and Freedoms*, ss. 7, 11(d), 24(1) & (2)**	***Charte Canadienne des Droits et Libertés*, ss. 7, 11(d), 24(1) & (2)**
7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.	**7.** Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.
11. Any person charged with an offence has the right	**11.** Tout inculpé a le droit:
…	…
(*d*) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;	*d*) d'être présumé innocent tant qu'il n'est pas déclaré coupable, conformément à la loi, par un tribunal indépendant et impartial à l'issue d'un procès public et équitable;
24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.	**24.** (1) Toute personne, victime de violation ou de négation des droits ou libertés qui lui sont garantis par la présente charte, peut s'adresser à un tribunal compétent pour obtenir la réparation que le tribunal estime convenable et juste eu égard aux circonstances.
(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.	(2) Lorsque, dans une instance visée au paragraphe (1), le tribunal a conclu que des éléments de preuve ont été obtenus dans des conditions qui portent atteinte aux droits ou libertés garantis par la présente charte, ces éléments de preuve sont écartés s'il est établi, eu égard aux circonstances, que leur utilisation est susceptible de déconsidérer l'administration de la justice.