PART I – OVERVIEW AND STATEMENT OF FACTS

Overview

1. This Appeal is a necessary step in shaping the law to address the evolving nature of police tactics. Specifically, it is about the permissible limits of police power in circumstances where the state dons the guise of a person not in authority. It also concerns the parameters of the principle against self-incrimination and the right to silence.

2. The Respondent submits that:

(a) The state is not given *carte blanche* to extract so-called confessions from suspects in circumstances where its agents are posing as persons not in authority;

(b) Depending on the facts of a specific case, state conduct in such circumstances may be limited by more than simply the common law doctrine of abuse of process;

(c) Circumstances wherein agents of the state pose as persons not in authority sometimes attract *Charter* protection. In such cases, the conduct of the state is restrained by the principle against self-incrimination and the right to silence;

(d) When state conduct crosses a line which so obviously opens the gate to the well-worn path to false confessions and wrongful convictions, *Charter* protections must be engaged;

(e) The current state of appellate authority in Canada suggests that the right to silence under section 7 of *Charter* is engaged not only upon detention by a person in authority, but also in circumstances "functionally equivalent" to detention.

(f) The analysis developed by this Court in *R. v. White*, [1999] 2 S.C.R. 417 has been employed by courts in various provinces to determine whether the principle against self-incrimination is engaged in the context of a Mr. Big operation. This Court ought to adapt the *White* analysis for use in the specific context of Mr. Big operations.

(g) Independent of the violation of the principle against self-incrimination, the statements obtained in the Mr. Big operation ought to be excluded on the basis of abuse of process. The conduct of the police in this case would "shock the community".

3. This Court is also asked to confirm the proper interpretation and application of section 486(1) of the *Criminal Code* or other requests to exclude the public from the courtroom.

4. The Respondent submits that the trial judge in this case predicated his discretion to exclude the public on a misstatement and misapplication of the open court principle.

The Respondent's Exposition of Facts

5. The Respondent has reviewed the factum filed by the Appellant and is in substantial agreement with the chronology of the facts outlined in paragraphs 8, 9, 10, 11, 12, 17 and 18.

6. The Respondent notes that the evidence referenced in paragraphs 13, 14, 15, 16 19, 20, 21, 22, 23, 24, 25, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51 was not before the trial Judge during the voir dire but was provided at the trial proper some months later. For purposes of considering the trial judge's decision to admit the evidence at trial appellate scrutiny must be confined to consideration of the evidence on the voir dire.[1] Moreover, the testimony of the police officers differs between the voir dire and trial proper in many important ways. No civilian witnesses except Mr. Hart testified at the voir dire. The Respondent notes the following evidence at the voir dire.

Evidence on the Voir Dire

7. From September 30, 2002 onward the RCMP was aware that Mr. Hart suffered from epilepsy and that his driver's licence had been revoked due to his having seizures.[2]

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[1] *R v. Blackman*, [2006] O.J. No. 5041 (C.A.): Respondent's Book of Authorities (RBA), tab 2, paragraph 76; *R v. Johnson* 2004 NSCA 91: RBA, tab 3, paragraph 35.

[2] Transcript of September 30th conversation between Nelson Hart and [redacted] Appellant's Record, Volume IV, tab 9, pages 62,69-72, 75 and 92, entered in the voir dire Appellant's Record, Volume VII, tab 21, page 42. It is worth noting that at the trial proper it was revealed that in August 2002 RCMP had reported Mr. Hart's seizures to the Motor Vehicle Registrar for medical review – see the Appellant's Record, Volume XVII tab 42, pages 155-157. The RCMP was of the opinion he would therefore be "a danger to the general public if he is to continue to drive a motor vehicle".

8. The RCMP investigation into the deaths of [redacted] stalled from September 2002 until November 2004 when [redacted] of the RCMP proposed conducting a "Mr. Big" operation targeting Mr. Hart.

9. During the preliminary phase of the operation, the RCMP conducted in depth 'lifestyles" surveillance in order to discover Mr. Hart's habits, financial situation, needs, activities and vulnerabilities. Among the information that they gathered was that Mr. Hart was socially isolated. He did not leave his house "a whole lot" and "when he did leave his residence he was usually in the company of his wife". [3] The RCMP were aware of how important Mr. Hart's relationship was with his wife, and factored it into the construction of the scenarios.[4]

10. The "active" portion of the 'Mr. Big' operation lasted from February 14th, 2005 until June 13th, 2005.

11. The first 14 scenarios between February 14th and March 3rd were intended to establish that the undercover operators, in particular [redacted] ("Steph") and [redacted] ("Pat") were legitimate business men establishing a legitimate business on the island portion of Newfoundland and Labrador (hereinafter "Newfoundland") .[5]

12. In the first four days of contact (February 14th-17th) Mr. Hart was paid $370 for his work. On the 20th and 21st of February he was given $100 for expenses, put up for a night in a hotel in St. Johns, taken to dinner, given a further (and undisclosed) sum for expenses and provided further pay of $300. He was given a cell phone and offered a chance to fly to Halifax for a further week of work.[6] Right from the start Mr. Hart was asked to phone the undercover officers "all the time" for work using that phone.[7] Later the officers would characterise following this instruction as evidence of Mr. Hart's enthusiasm.

13. Mr. Hart made comments to "Steph" about how bad his past was and that one day he would tell him about it. [redacted], who was present for this conversation said that if Mr. Hart wanted to "tell how bad he, how bad his past was" he could – but she would not talk about it

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[3] Testimony of [redacted] Appellant's Record, Volume VII, tab 21, page 51.
[4] Testimony of [redacted] Appellant's Record, Volume VIII, tab 23, page 114.
[5] Testimony of [redacted] Appellant's Record, Volume VII, tab 21, pages 56, 57, 59, 60, 61, 63, and 68.
[6] Testimony of [redacted] and [redacted] Appellant's Record, Volume VII, tab 21, pages 59, 60, Tab 22, pages 153, 157-161 , 163 and 164.
[7] Testimony of [redacted] Appellant's Record, Volume VIII, tab 23, page 111.

herself. There is nothing to suggest that in context this conversation was referring to criminality.[8] This was one of many allusions to Mr. Hart's crushing poverty, embarrassing illness and difficult life.[9]

14. At this time in Newfoundland and Labrador a couple living together on the island without children would receive a total of $968 in monthly income and rent from social services, which amount was then subject to various deductions.[10]

15. In his second week of legitimate employment Mr. Hart was flown to Halifax, paid $1000 for his work, received expense money in the amount of $160, was given $100 in casino chips, was taken to a casino, stayed in a hotel in Halifax for two nights and was given a further undisclosed sum for expenses. Mr. Hart drove a truck from Halifax, Nova Scotia to St. John's, Newfoundland where he arrived with only $200 left from the undisclosed expense money and spent two further nights in a hotel. As with his last trip to St. John's Jennifer Hart accompanied him. According to "Pat" it was "always clear" to Mr. Hart that "he could get all the room services he want, all the movie he wanted in the room". The hotels were pre-paid for by his employer. On this and all future prolonged trips they bought him dinners in addition to the unlimited room service and expense money. "Pat" also made a point of stopping for gas at Canadian Tire and giving the Canadian Tire money to Mr. Hart. Not surprisingly Mr. Hart told "Steph" that "he loves his job" and "it's like a dream come true". It was on this first Halifax trip, a mere two weeks into the operation and before criminality was introduced, that he began to hug "Steph" and tell him that he "loved him"[11]. On this trip he was also introduced to "Pat" whose role was to become Nelson Hart's "best friend".[12] As of this point, two weeks into the operation, Mr. Hart had received in excess of $2200 in cash plus the listed benefits and further undisclosed sums of cash.

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[8] Testimony of [redacted] Appellant's Record, Volume VII, tab 22, page 163.
[9] Testimony of Nelson Hart, Appellant's Record, Volume X, tab 27, page 30.
[10] Income and Employment Support Regulations, Newfoundland and Labrador Regulation 144/04: RBA, tab 11, sections 13 and 14.
[11] Testimony of [redacted] and [redacted] Appellant's Record, Volume VII, tab 21, pages 63-66, tab 22, pages 165-168, Evidence of [redacted] Volume VIII, tab 23, pages 99-103, 106, 109 Volume VIIII, tab 24, page 24.
[12] Testimony of [redacted] Appellant's Record, Volume VIII, tab 23, page 97.

16. Mr. Hart evinced a clear desire to have his wife accompany him on these business trips and had to be admonished twice not to bring her. He was told that bringing his wife showed a "lack of trust".[13]

17. The third week of Mr. Hart's employment commenced with him traveling to St. John's on March 2nd, to deliver a truck containing an ATV. He once again had an all- expense paid night in a hotel and was taken to dinner after which he drove to Clarenville, Newfoundland and met "Pat". He was then paid a further $450 for his services. It was at this point he learned his beloved benefactor "Steph" and his putative best friend "Pat" were involved in a lucrative but unlawful business.[14] "Pat" also told Mr. Hart that "I would kill a rat if someone rat out on me." Knowing the importance of Mr. Hart's relationship with his wife to him "Pat" explained how he kept the "weight" of his secrets off his girlfriend's shoulders. He didn't tell her anything. "Pat" told Mr. Hart that expected the same from Mr. Hart with respect to his wife.[15]

18. On March 10th a single day return trip was made to Corner Brook Newfoundland during which a rescue / retrieval of "Steph's" drug addicted sister was staged. "Pat" gave Nelson a hug and thanked him for his help.[16]

19. On March 11th Mr. Hart traveled to St. John's with a truck again, accompanied by his wife. He was given $90 for expenses and pay of $200. He spent an expensed night in a hotel in St. John's and received the balance of his pay in the amount of $250 the next day.[17] The total of benefits received by Mr. Hart in this first month was $3060, plus undisclosed amounts of cash, seven nights in hotels, meals, a flight, cell phone and an undisclosed amount of Canadian Tire money. For a person without a bed or furniture, relying on social assistance and food banks[18] this was unimaginable wealth.

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[13] Testimony of [redacted] Appellant's Record, Volume VII, tab 22, page 159, Testimony of [redacted] Appellant's Record, Volume VIII, tab 23, pages 106 and 108.

[14] Testimony of [redacted] Appellant's Record, Volume VII, tab 21, pages 67 and 68, Testimony of [redacted] Appellant's Record, Volume VIII tab 23, page119. It is worth noting this is one of the numerous occasions in which there is a discrepancy between the officers as to the amount of cash given to Mr. Hart. It appears [redacted] did not have an accurate picture of all cash given to Mr. Hart, making it difficult to assess the inducements offered.

[15] Testimony of [redacted] Appellant's Record, Volume VIII, tab 23 pages 114 and 115.

[16] Testimony of [redacted] Appellant's Record, Volume VIIII, tab 24, pages 6-8.

[17] Testimony of [redacted] Appellant's Record, Volume VIIII, tab 24, pages 11-14.

[18] Testimony of [redacted] Appellant's Record Volume VIII, tab 23, pages 32 and 33, Testimony of Nelson Hart, Appellant's Record, Volume X, tab 27, pages 30-32.

20. On March 15th Mr. Hart traveled to St. John's once again understanding that he would be on the road for approximately a week.[19] After his arrival Mr. Hart was told he would be traveling to Halifax the next day. He was given $180 for "expenses" and $20 for the slot machines before being dropped at his hotel in St. Johns.[20] He flew to Halifax the next day (March 16th), was picked up and transported to check into his hotel. At this time he asked "Pat" if he could possibly get a room closer to the casino because he liked to play the machines.[21] After their simulated criminal offence "Pat" gave him $50 gambling money, dropped him at the casino and went home. The next day (March 17th) when picked up Mr. Hart would not say how late he had stayed. "Pat" believed he had not slept much and had probably gambled all night. [22] They drove to Fredericton, New Brunswick where Mr. Hart was given $60 for expenses and put up in a hotel.[23] The next day they returned to Halifax airport for Mr. Hart to fly back to St. John's. He was paid $1500 for his work and given $40 for expenses that night. It was noted that this way he would have money for "the machines" that night in St. John's. [24]

21. On March 21st Mr. Hart flew from St. John's to Halifax and was driven to Fredericton where he was dropped at his hotel. The next morning (March 22nd) Mr. Hart and "Pat" drove to Woodstock New Brunswick where he took a package via bus to Moncton, New Brunswick.[25] When the scenario ended he was dropped at his hotel for the evening, paid $500 and given a further $200 for "expenses".[26]

22. On April 1st Mr. Hart drove another truck to St. John's and spent the night there at the Holiday Inn.[27]

23. On April 7th Mr. Hart flew from Gander to Halifax. Mr. Hart was confronted with the fact that a hotel he stayed at had charged "Pat" for stolen towels. Mr. Hart was warned not to steal

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[19] Testimony of [redacted] Appellant's Record, Volume VIIII, tab 24, pages 15 and 16.
[20] Testimony of [redacted] Appellant's Record, Volume VIIII, tab 24, pages 21 and 22, 24.
[21] Testimony of [redacted] Appellant's Record, Volume VIIII, tab 24, page 24.
[22] Testimony of [redacted] Appellant's Record, Volume VIIII, tab 24, pages 28 and 29.
[23] Testimony of [redacted] Appellant's Record, Volume VIIII, tab 24, pages 34 and 35.
[24] Testimony of [redacted] Appellant's Record, Volume VIIII, tab 24, page 42.
[25] Testimony of [redacted] Appellant's Record, Volume VIIII, tab 24 pages 49-51.
[26] Testimony of [redacted] Appellant's Record, Volume VIIII, tab 24, page 52. Again, it appears when he is counting what Mr. Hart is given and totalling it [redacted] is excluding anything considered "expense" money, which includes amounts for use in the "machines". Testimony of [redacted] Appellant's Record, Volume VII, tab 21, page 88
[27] Testimony of [redacted] Appellant's Record, Volume VIIII, tab 24, pages 54 and 55.

towels in the future as all the hotels were reserved under the company name and such acts would draw attention. Mr. Hart admitted he was not used to staying in hotels and he thought the towels would be thrown out. He later told "Steph" that this was a lie. Mr. Hart lied frequently to the "Steph", "Pat" and "Mr Big" when necessary to maintain his employment and relationships. He was paid for his previous weeks work in the amount of $450. "Pat" then bought him new clothing worth $250.[28]

24. That evening "Pat" observed Mr. Hart behave in a bizarre fashion and become unresponsive. "Pat" believed it was a seizure. He was concerned and contacted [redacted] for directions. The directions received were not stated at the voir dire. The scenarios continued without any apparent changes due Mr. Hart's seizure. [29] Despite the known danger Mr. Hart was offered large sums of money to drive vehicles, including large cube vans, long distances on highways in five different provinces. Shortly after this Mr. Hart witnessed "Pat" ask a client in that day's scenario if he knew how to swim – because if he told anyone where the illegal product came from "he would have to learn to swim fucking fast". [30] Mr. Hart was paid $300 for this last task.[31] "Steph" later told Mr. Hart that people who are informants (rats) should be killed, by drowning.[32]

25. Following these interactions Mr. Hart and "Pat" met "Steph" at a pub. Mr. Hart was very excited to see "Steph". During that meeting "Steph" said he knew what "Pat" and another officer there for the meeting [redacted] had done in the past and what they shown they were capable of, but he did not know what Mr. Hart was capable of. According to [redacted] "What I meant by that is we were talking about killing people". "Steph" identified himself, "Pat" and [redacted] to Mr. Hart as individuals that, based on past circumstances, he knew could commit murder. [33] He was dropped at his hotel after this meeting.

26. The next day (April 8th) Mr. Hart was picked up by "Pat" and prepared for a train trip to Montreal, Quebec, to deliver contraband. Mr. Hart told him all these things were new for him – fancy hotels and train rides – he was not used to it. He lied to "Pat" about what had happened the

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[28] Testimony of [redacted] Appellant's Record, Volume VIIII, tab 24, pages 56, 57 and 60.
[29] Testimony of [redacted] Appellant's Record, Volume VIIII, tab 24, pages 61-64.
[30] Testimony of [redacted] Appellant's Record, Volume VIIII, tab 24 page 66.
[31] Testimony of [redacted] Appellant's Record, Volume VII, tab 21, page 90.
[32] Testimony of [redacted] Appellant's Record, Volume VIII, tab 23, page 12 -13.
[33] Testimony of [redacted] Appellant's Record, Volume VIII, tab 23, page 13.

night before (ie, the seizure), showing him an altered pill bottle, saying it was antibiotics he was taking and his "headache" the previous night was probably a side effect. He hugged "Pat" upon departure.[34] "Pat" paid for the train ticket.[35]

27. On April 9th Mr. Hart arrived in Montreal and was picked up by "Pat". They had a discussion about the client in the previous scenario that "Pat" had threatened. "Pat" advised Mr. Hart that "no one fucks with us – they know better". "Pat" took Mr. Hart to a tailor to get his clothes purchased by "Pat" adjusted. On the way to his hotel Mr. Hart asked questions about the local casino. "Pat" dropped him at his hotel and gave him $50 to use if he wanted to go to the casino. When he went to pick Mr. Hart up for dinner that evening he found that he had gone across the street to a pool hall with slot machines. [36] That evening Mr. Hart told "Steph" he and the two officers were like brothers. He was returned to his hotel for the evening. The next day when speaking of the evening he became very emotional, repeated that he and the two officers were like brothers and told them he loved them.[37] Rather than continue to list every occasion on which Mr. Hart professed his love to "Pat" and "Steph" the Respondent simply notes that [redacted] testified: "It was pretty constant theme, like I love you guys and it's not all about the money but 'cause being with you and not all about the money was another one. And he said often that he was poor."[38] And later: "if you put all this together I do believe he would've killed for me."[39] [redacted] said he may have told Mr. Hart he loved him back, but only once and to be "courteous".[40]

28. On April 10th "Steph" took Mr. Hart to dinner and they discussed "Steph's" business. Mr. Hart was advised that the organization controlled 70 percent of the prostitution in Montreal and "Steph" personally got part of each "call out". He also explained he had just assaulted two prostitutes who lied to him about money. As a result they would not be able to open their mouths or work for some time. He also related a story about how he had been arrested and placed in jail but the boss had fixed it so a few days later he was free and making money. "Steph" advised Mr.

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[34] Testimony of [redacted] Appellant's Record, Volume VIIII, tab 24, pages 67 and 68.
[35] Testimony of [redacted] Appellant's Record, Volume VII, tab 21, page 90.
[36] Testimony of [redacted] Appellant's Record, Volume VIIII, tab 24, pages 70 and 71.
[37] Testimony of [redacted] Appellant's Record, Volume VIII, tab 23, pages 14 and 15.
[38] Testimony of [redacted] Appellant's Record, Volume VIII, tab 23, page 91.
[39] Testimony of [redacted] Appellant's Record, Volume VIII, tab 23, page 94.
[40] Testimony of [redacted] Appellant's Record, Volume VIII, tab 23, page 90.

Hart that he regarded the ability to assault women as a special and positive skill that not everyone had.[41]

29. On April 11th Mr. Hart travelled from Cornwall, Ontario to Montreal driving a cube van of cigarettes. That evening Mr. Hart and "Pat" went for dinner at an expensive restaurant where Mr. Hart told "Pat" once again he was not used to "restaurants and fancy things". At the conclusion he was given $50 for a cab to the casino. [42]

30. The next day (April 12th) Mr. Hart was picked up at the pool hall where he had been gambling and went to the train station. From there he was sent to Ottawa by train to deliver a package.[43] It was during the delivery of the package that "Steph" slapped [redacted] assaulting and humiliating him with apparent impunity and confirming his self-reported fearsome reputation. After this Mr. Hart was sent back to Newfoundland with $2500 in pay. [44] At the conclusion of his second month he had spent between 17 and 19 days in hotels (it appears there were extra nights in St. John's after flights) at the expense of the "organization", all but two of those away from his wife.

31. Between April 19th and May 7th Mr. Hart participated in a further nine scenarios that involved multiple simulated criminal offences, three flights (including a two night trip to Halifax with his wife), three trips to casinos, seven nights in hotels, and one train trip. In addition he drove vehicles great distances over highways in Newfoundland, Nova Scotia and New Brunswick on these assignments. [45]

32. On May 11th Mr. Hart began a nine day sequence of scenarios when he flew to Halifax and stayed in a hotel for the night. In the morning (May 12th) he was tasked to fly a package to Montreal where he met "Steph", "Pat" and their fictitious lady friends for dinner at an expensive restaurant. The next day (May 13th) they wanted Mr. Hart to know "Steph" was capable of violence. "Steph" was directed to talk about a collection where violence was used to collect

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[41] Testimony of [redacted] Appellant's Record, Volume VIII, tab 23, pages 17 and 19.
[42] Testimony of [redacted] Appellant's Record, Volume VIIII, tab 24, pages 76-80.
[43] Testimony of [redacted] Appellant's Record, Volume VIIII, tab 24, pages 80 and 81.
[44] Testimony of [redacted] Appellant's Record, Volume VIII, tab 23 pages 20 - 22, Testimony of [redacted] Appellant's Record, Volume VII, tab 21, page 96.
[45] Testimony of [redacted] Appellant's Record, Volume VII, tab 21, pages 96-102.

money as a part of a criminal organization.[46] "Steph" showed Mr. Hart his scratched knuckles and explained that he had to "take care of business", meaning assault, someone that day.[47]

33. Mr. Hart remained in Montreal transporting packages around town by bus and cab until May 16th when he was flown to Vancouver, British Columbia.[48] Upon arrival "Steph" took Mr. Hart to his hotel and from there to the casino located right next to it. In this heady atmosphere Mr. Hart was told of an upcoming big job that would "set him financially". In response to Mr. Hart's questions and guesses that the job is to kill someone "Steph" eventually told him "the big job was not to kill somebody". They then met a "biker". "Steph" told him the biker's patch, which said "iceman", meant he had a special skill, he makes people "go cold". When asked by defence counsel in the voir dire if he meant that "ice-man" was an assassin [redacted] replied "Good at that". To put this in further perspective "Steph" then told Mr. Hart that compared to their boss's organization the Hells Angels were "flunkies".[49]

34. On May 18th Mr. Hart and "Steph" went to meet the boss at his yacht in Vancouver. The boss "wasn't too happy" that "Steph" had brought Mr. Hart to his boat as he did not know him. In front of Mr. Hart they "talked lots about the fact that Mr. Hart was not a rat". Mr. Hart was assured after the meeting that it had gone well as the boss "could've just said dump him and don't use him any more". They discussed the "big job" and how it could "set him for life" as Mr. Hart "used to be very poor". [50]

35. Mr. Hart told "Steph" that he used to get food from the Salvation Army, that he sometimes had to decide if he is going to eat or pay the light bill and that Mr. Hart and his wife had slept on the floor as they had no bed. He further advised that his wife used to make her own hygienic serviettes as he did not have enough money to buy them. Mr. Hart admitted he had taken the towels from the hotel because he and his wife needed them, they did not have any. Mr. Hart stated he was very poor and "doesn't want to go back to that lifestyle". After being told "Steph" had his "neck on the log" for Mr. Hart he was given $4000. He flew home on May

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[46] Testimony of [redacted] Appellant's Record, Volume VII, tab 21, pages 102 – 103.
[47] Testimony of [redacted] Appellant's Record, Volume VIII, tab 23, page 25.
[48] Testimony of [redacted] Appellant's Record, Volume VII, tab 21, pages 103-108.
[49] Testimony of [redacted] Appellant's Record, Volume VIII, tab 23, pages 28-30, 87 and 88.
[50] Testimony of [redacted] Appellant's Record, Volume VIII, tab 23, pages 33 and 92.

19th.[51] During this cross country trip he had spent nine days living in hotels and being fed at the expense of the organization. It is not clear how much undisclosed "expense" or gambling money he was given.

36. On May 25th Mr. Hart flew to Halifax and took a package by train to Montreal. On May 26th in Montreal his "assignment" was to gamble a hundred dollars at a casino. He was paid $800 and returned home after a further night in his hotel. On May 31st he drove a rental vehicle to St. John's where he spent the night in a hotel with his wife and met "Pat" and his girlfriend for dinner. [52]

37. On June 1st he flew out for another nine day trip with the organization. He flew from St. John's to Halifax, then took a train to Toronto, Ontario, where, as result of an unexpected police search on the train [redacted] purported to authorize a warrantless entry into Mr. Hart's room to conceal diamonds in the handle of his luggage. Mr. Hart was shown money in amounts of $75,000 and $100,000 related to "the big deal" and taken to the horse races at Woodbine race track. He was paid $500, then sent by bus to Ottawa with another bag and from there on to Montreal to meet "Steph.".[53]

38. While in Montreal "Steph" involved him in activities related to the big job. Mr. Hart told him more about his abject poverty and how "the boss brought him up". Mr. Hart expressed his belief "the job and that would set him for life." This occurred just before the "Mr. Big" meeting with the alleged confession. "Steph", the violent man who had bragged he, "Pat" and [redacted] had a past that proved they were capable of murder, kept telling Mr. Hart he was worried about bringing him to the boss because he was putting his "head on the log for him". Just before entering the room "Steph" hugged Mr. Hart and told Mr. Hart not to let him down. [54]

39. Early in the "Mr. Big" meeting the boss told Mr. Hart that he knew "heat" was coming from the police regarding the deaths of his daughters but the boss could take care of it. The "confession" occurred only after the "boss" confronted Mr. Hart three times, cutting off Mr. Hart's explanation that he had a seizure by telling him not to lie. The boss also said Mr. Hart was

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[51] Testimony of [redacted] Appellant's Record, Volume VIII, tab 23, pages 32 to 35.
[52] Testimony of [redacted] Appellant's Record, Volume VII, tab 21, pages 127-129.
[53] Testimony of [redacted] Appellant's Record, Volume VII, tab 21, pages 129-135, Testimony of [redacted] Appellant's Record, Volume VIIII, tab 24, page 88.
[54] Testimony of [redacted] Appellant's Record, Volume VIII, tab 23, page 39 -47.

lying when he tried to tell him about the seizure.[55] Mr. Hart later referred to the children as having fallen over the wharf and was corrected by the officer. He then described how he "struck", not pushed, the children.[56] Pressed for details of the "murder" Mr. Hart demonstrated a single push from a standing position, using his legs as if pushing something heavy, clarifying verbally that he used his shoulder to push the children in. At the boss's prompting he verbally described the single push he had demonstrated as two separate pushes. [57] After the boss was satisfied with the details provided Mr. Hart was asked why he did not take a polygraph. Rather than state the obvious for a guilty person, that had not taken it because he was guilty, he explained he had seen a show where people "went to jail for polygraphs and it turned out that polygraphs had been wrong". Not surprisingly the officer found this puzzling and sought clarification but was interrupted by his bodyguard entering the room.[58] Mr. Hart explained that the motive for the murder was to prevent his children from being taken from him and given to his brother. He then lied about telling "Steph" he had confessed the murders to his mother.[59] He finished by explaining he had used the money he had been paid to date to purchase a headstone for the girls. He recited the inscription.[60]

40. On June 11th Mr. Hart attended the scene with "Steph" to show how the murders were done. Upon careful review of the video it is clear that when "Steph" asked "How did you get them to fucking lid[sic] down?" Mr. Hart demonstrated a push with his upper body saying: "They were there like this and then I just went like this [shoulder or chest gesture] and they went out [into the water]." When "Steph" knelt and asked for a demonstration Mr. Hart showed how he used his knee to push the girls in.[61]

41. The "confession" was rife with internal and external inconsistencies as to the actus reus, contained statements suggesting the children fell in and Mr. Hart feared being falsely found to have committed murder.

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[55] Appellant's Record, Volume V, tab 11, pages 159 and 15; Video , June 9, 2005, Respondent's Record, tab 2.
[56] Appellant's Record, Volume V, tab 11, page 156.
[57] Appellant's Record, Volume V, tab 11, pages 154, 153; Video , June 9, 2005, Respondent's Record, tab 2, at approximately 14:50.
[58] Appellant's Record, Volume V, tab 11, page 135.
[59] Appellant's Record, Volume V, tab 11, pages 157, 156, 142 and 141.
[60] Appellant's Record, Volume V, tab 11, page 142.
[61] Video of June 11th , 2005, Respondent's Record , tab 3.

42. Mr. Hart was arrested on June 13th, 2005. He never adopted these statements to a person he knew to be a police officer. He denied the statements were true at every possible opportunity.

Evidence in the Trial Proper

43. The RCMP reported Mr. Hart's suspected renewed seizure activity to the Motor Vehicles Registrar in August 2002. They were of the opinion he because of his seizures he would be "a danger to the general public if he is to continue to drive a motor vehicle". As a result of their report Mr. Hart lost his licence on September 3, 2002.[62]

44. Despite the motive expressed in the "confession" to kill the children to prevent Mr. Hart's brother from obtaining custody of them the possibility of apprehension had existed only when the Harts lacked a place to live. This was resolved months prior to the children's death.[63]

45. While the undercover officers repeatedly referred to the goal of the operation as being to get the truth from Mr. Hart, [redacted] clarified this point when the RCMP was seeking additional funds for more "scenarios". After a meeting with [redacted][64] he made the request writing "[redacted] expects that we will need another 27 in order to meet the objectives of the operational plan, to obtain a confession".[65]

46. Dr. Hutton performed the autopsies on [redacted] on August 5th, 2002. The cause or manner their death was determined to be accidental drowning. He found no evidence to suggest injury or trauma (other than trauma of medical intervention in [redacted] case) and there was no evidence to suggest any other conclusion as to the cause or manner of death. [66]

47. Upon review of the file, Dr. Avis, the Chief Medical Examiner for the Province of Newfoundland and Labrador, felt that he did not have enough information to classify the death as

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[62] Testimony of [redacted] Appellant's Record, Volume XVII, tab 42, pages 155-159.
[63] Testimony of [redacted] Appellant's Record, Volume XII, tab 34, page 26.
[64] As of the date of the voir dire he had been promoted to [redacted]
[65] Testimony of [redacted] Appellant's Record, Volume XIII, tab 36, p. 108.
[66] Testimony of Dr. Hutton, Appellant's Record, Volume XII, tab 35, pages 107-110, 114-119.

accidental and changed the death certificate to reflect that the cause of death was "undetermined." He gave no evidence to suggest that he the cause of death was "homicide".[67]

48. Dr. Button confirmed that Mr. Hart had a long history of severe epilepsy from the age of about nine months onward. He had witnessed at least one seizure and brain surgery was contemplated on a number of occasions. He further testified that over excitement, over stimulation and stress could trigger seizures. [68] Mr. Hart's diagnosis of epilepsy was confirmed by Dr. Ogunyemi's testing and who also described the symptoms of various types of seizures, including confusion, blackouts and memory loss.[69] Dr. Ogunyemi also testified that the period required to "normalize" from a seizure varied depending upon a number of factors including the intensity and cause of the seizure.[70] This evidence was not challenged in cross examination or contradicted by other evidence.

49. Mr. Hart testified that "I gets frustrated and confused and all tangled up with a crowd. I'm no good, I was never no good to be able to talk in front of a crowd or be in front of a crowd, I black out and this is what causes this, when I gets frustrated I ends up blacking out". [71] In cross examination Mr. Hart testified he can't always tell when a seizure is about to occur, nor can he predict how long it and its effects will persist. He testified his most recent grand mal seizure was two and a half months prior to trial and he had had multiple other seizure as well. He did not agree that his wife, mother or family doctor could identify a seizure when it was imminent or in its early stages. [72] No evidence was lead to contradict this. Dr. Ogunyemi testified that patients could not always tell when a seizure was about to happen.[73]

50. [redacted] testified that when Mr. Hart had seizure he would call out for her and she would take care of him until he recovered. Mr. Hart was embarrassed by these seizures, his children were frightened by them and he would attempt to hide them. She gave the example that

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[67] Testimony of Dr. Avis, Appellant's Record, Volume XII, tab 35, pages 129-133.
[68] Testimony of Dr. Button, Appellant's Record, Volume XVII, tab 42, pages 116-118, 120.
[69] Testimony of Dr. Ogunyemi, Appellant's Record, Volume XVII, tab 42, pages 129-132.
[70] Testimony of Dr. Ogunyemi, Appellant's Record, Volume XVII, tab 42, page 136.
[71] Testimony of Nelson Hart, Appellant's Record, Volume XVIII, tab 44, page 61.
[72] Testimony of Nelson Hart Appellant's Record, Volume XVIII, tab 44, pages 66-68.
[73] Testimony of Dr. Ogunyemi, Appellant's Record, Volume XVII, tab 42, page 139.

he would go to the bathroom to hide the seizure. Sometimes he would make it, sometimes he would not. [74]

PART II – QUESTIONS IN ISSUE

51. The Appellant raises the following legal issues:

(a) Did the Supreme Court of Newfoundland and Labrador, Court of Appeal err in its interpretation and application of this Honourable Court's decisions in *R. v. Hebert*, [1990] 2 S.C.R. 151 and *R. v. White*, [1999] 2 S.C.R. 417, by finding that the Respondent's rights under section 7 of the *Charter* were violated?

(b) Did the Supreme Court of Newfoundland and Labrador, Court of Appeal err in law by finding that the Respondent was "detained"?

(c) Did the Supreme Court of Newfoundland and Labrador, Court of Appeal err in law by finding that the Respondent's right against self-incrimination was violated?

(d) Did the Supreme Court of Newfoundland and Labrador, Court of Appeal by failing to accord deference to the findings of the Trial Judge?

(e) Did the Supreme Court of Newfoundland and Labrador, Court of Appeal err in law in its interpretation and application of section 486(1) of the *Criminal Code* and/or the Respondent's request not to have the public physically present in the courtroom during his testimony?

52. The Respondent's submissions on these issues are as follows:

(a) The Court of Appeal did not err in its interpretation and application of *Hebert* and *White*. The principle against self-incrimination, is not necessarily limited to persons 'detained' in the traditional sense. Its application ought to be governed by the principles and values upon which it is based. The principle may, in circumstances such as those present in this case, be engaged to extend protection to persons under state control, but not "detained" by agents of the state. The factors from *White* are used to identify such circumstances.

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[74] Testimony of [redacted] Appellant's Record, Volume XIII, tab 36, pages 50-58.

(b) The ruling of the majority of the Court of Appeal did not turn on a finding that Mr. Hart was "detained". Detention is no longer required to engage the principle against self-incrimination under s. 7 of the *Charter*.

(c) The Court of Appeal properly found the principle against self-incrimination to be violated in this case. The finding was made following an analysis of the facts though the framework of recent developments in the law regarding the principle against self-incrimination.

(d) The Court of Appeal did not fail to accord deference to the trial judge. The trial judge's findings of fact were made through the lens of an incorrect legal analysis. Other facts referred to by the majority of the Court of Appeal were not referenced by the trial judge in his decision and appear unchallenged and uncontroverted on the record.

(e) The Court of Appeal committed no error in its interpretation and application of s. 486(1) of the *Criminal Code*. The trial judge predicated his exercise of discretion on a misstatement and misapplication of the open court principle.

PART III – STATEMENT OF ARGUMENT

"Mr. Big" and The Principle against Self-Incrimination

The Principle against Self-Incrimination

"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".[75]

53. The principle against self-incrimination is a principle of fundamental justice under s. 7 of the *Charter*. It is an overarching principle within our criminal justice system from which a

[75] *R. v. White,* [1999] 2 S.C.R. 417: RBA, tab 1, paragraph 45.

number of specific common law and *Charter* rules emanate, such as the confessions rule and the right to silence. The principle can also be a source of new rules in appropriate circumstances.[76]

54. The two fundamental purposes for the principle against self-incrimination are the: (1) protection against unreliable confessions; and (2) protection against the abuse of power by the state. Concern about the abuse of state power is at the heart of the principle against self-incrimination.[77]

55. This appeal is not about whether the Respondent was "detained" and what rights he may have been engendered with as a result. The principle against self-incrimination has evolved so that physical detention is no longer required to trigger the constitutionally protected right to silence.[78] While the cases which have contributed to this evolution bear facts unlike the present case, they demonstrate the proper approach to determining what the principle against self-incrimination might require in a given case. For example, *White, supra* was about the use of statutorily compelled traffic accident reports in a subsequent criminal prosecution. The present appeal, by contrast, *was* a criminal prosecution to begin with. The issue, *vis a vis* the principle against self-incrimination, is whether the evidence was "compelled". The significance of *White, supra*, however, is that it demonstrates that the right to silence may apply outside of "detention", if the principle against self-incrimination so requires. This Honourable Court developed a four-factor analysis for courts to employ in making such determination.

56. Although both *White, supra,* involved statutorily compelled statements, the Respondent submits that this does not close the avenue for statements compelled or coerced by other means to be subject to the same analysis. If the principle against self-incrimination is engaged in a particular case, the court must determine what it demands. The principle against self-incrimination will demand different things at different times. Following *White*, the argument that the right to silence during an investigation commences only with detention is no longer tenable. The Respondent submits that there is no justification for subjecting the conduct of the state in the present case to more limited constitutional scrutiny than was applied in *White*.

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[76] *R. v. White*, *supra*: RBA, tab 1, paragraph 44.
[77] *R. v. Jones*, [1994] 2 S.C.R. 229: RBA, tab 4, paragraph 33.
[78] *R. v. Osmar*, [2007] O.J. No. 244 (C.A.): ABA, tab 7, paragraph 4.

57. The current state of the law as regards the overarching principle against self-incrimination may be summarized as follows:

(i) Any state action that coerces an individual to furnish evidence against him or herself in a proceeding in which the individual and state are adversaries violates the principle against self-incrimination;[79]

(ii) In cases concerning the scope and operation of the right to silence as a rule under the principle against self-incrimination, the facts are all-determining. In its analysis, the court must begin "on the ground", with a concrete and contextual analysis of the circumstances, in order to determine whether the principle against self-incrimination is actually engaged on the facts. Statements regarding the application of the principle in previous cases cannot be applied in a mechanical or literal manner;[80]and

(iii) The scope and application of the principle against self-incrimination, that is, determining what the principle against self-incrimination "demands" in a given case, is to be determined by the contextual consideration of the four *White* factors: (1) existence of coercion; (2) presence of an adversarial relationship; (3) prospect of an unreliable confession; and (4) possibility for abusive conduct by the state.[81]

58. Fundamental rights guaranteed by the *Charter* are not "cast forever in the straitjacket of the law as it stood in 1982".[82] The developing principle against self- incrimination may mean and require different things at different times. The task for the Court is to determine what the principle demands in the context of case.[83] This Court has already relied upon the principle against self-incrimination to extend the right to silence beyond detention and into the

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[79] *R. v. Jones*, *supra:* RBA, tab 4*,* paragraph 29; *White, supra*: RBA, tab 1, paragraph 42.
[80] *R. v. Fitzpatrick*, [1995] 4 S.C.R. 154: ABA, tab 11, paragraphs 21-25; *White, supra:* RBA, tab 1, paragraph 46; *R. v. Hart*, [2012] N.J. No. 303 (C.A.): Appellant`s Record , Volume VI, tab 16, paragraph 191.
[81] *R. v. White*, *supra*: RBA, tab 1, paragraphs 53-66.
[82] *R. v. Hebert*, *supra*: ABA, tab 1, paragraph 16.
[83] *R. v. R. J.S.*, [1995] 1 S.C.R. 451: RBA, tab 5, paragraph 95.

investigative stage of a criminal proceeding. The question facing the Court in the present appeal is: what does the principle against self-incrimination require in the context of *this* Mr. Big operation?

Analysis of the Trial Judge

59. The trial judge failed to engage in a full contextual analysis of the *White* factors. As such, he misstated and misapplied the law as it has developed since *R. v. Hebert*, [1990] 2 S.C.R. 151, which held that only "detention" triggered protection under the section 7 right to silence.

60. *Hebert, supra* concluded that the right to silence applied to a suspect at the investigation stage.[84] It contemplated the right to silence in relation to a person in the power of the state, as in physical detention.[85] It suggested that police power cannot be such as to deprive a suspect of free choice to exercise his or her rights. However, it presupposes that a person is only in the power of the state upon "detention":

> The scope of the right to silence must be defined broadly enough 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. To permit the authorities to trick the suspect into making a confession to them after he or she has exercised the right of conferring with counsel and declined to make a statement, is to permit the authorities to do indirectly what the Charter does not permit them to do directly. This cannot be in accordance with the purpose of the Charter.[86]

61. The right to silence in the context of police undercover operations, as they were understood at the time, was also addressed in *Hebert*:

> In an undercover operation prior to detention, the individual from whom information is sought is **not in the control of the state**. There is no need to protect him from the greater power of the state. After detention, the situation is quite different; the state takes control and assumes the responsibility of ensuring that the detainee's rights are respected.[87]

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[84] *R. v. Hebert*, *supra*: ABA, tab 1, paragraph 56.
[85] *R. v. Hebert*, *supra*: ABA, tab 1, paragraph 42.
[86] R. v. *Hebert*, *supra*: ABA, tab 1, paragraph 66 (emphasis added).
[87] R. v. *Hebert*, *supra*: ABA, tab 1, paragraph 74 (emphasis added).

62. Since *Hebert*, *supra*, however, police tactics have evolved. *Hebert* was decided before the first known use of Mr. Big in Canada.[88] Mr. Big operations have the potential to manipulate the target by placing them under a great deal of, if not total, control by the state. While not all Mr. Big operations will embody this degree state control, *Hebert* certainly cannot be used to justify the blanket acceptance of all statements made during all Mr. Big operations. Doing so would be contrary to the fundamental purposes and design of the principle against self-incrimination and right to silence as expressed by this Court in a number of decisions, including *Hebert*, *supra*. The law since *Hebert* suggests the right to silence *may* apply outside of "detention" when the principle against self-incrimination is engaged and so requires. To make the determination of *when*, a full contextual analysis of the circumstances, via the *White* factors, is required. In failing to engage the *White* analysis, the trial judge did not give proper consideration to the entire context in determining whether the principle against self-incrimination was engaged or the right to silence infringed.

63. Since Mr. Big operations have become part of the legal landscape, courts have recognized that this particular tactic may indeed place the target of the investigation under a great deal of state control outside of detention. Courts have described such circumstances as being "functionally equivalent" to detention.[89] When such circumstances arise, the concerns regarding trial fairness expressed by McLachlin, J. in *Hebert*, *supra*, supporting the rationale for triggering the right to silence become manifest, particularly when the accused's statement is the only evidence against him. In response, courts faced with alleged violations of the principle against self-incrimination in the context of a Mr. Big operation have employed the analysis developed by this Court in *White*, *supra*.

64. The Respondent further submits that the analysis of the trial judge was also too narrow and did not give proper consideration to the entire context. While the argument at trial centered around whether or not there was sufficient psychological threat, intimidation or fear to breach the principles of fundamental justice, a finding that there was not should not be determinative of the

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[88] Timothy E. Moore and Kouri Keenan, "What is Voluntary? On the Reliability of Admissions Arising from Mr. Big Undercover Operations," (2013) Investigative Interviewing – Research and Practice, Vol. 5(1), 46: RBA, tab 17.
[89] See, for example, *R. v. Osmar, supra*: ABA, tab 7; *R. v. N.R.R.*, [2013] A.J. No. 471 (Q.B.): ABA, tab 21; and *R. v. Niemi*, [2012] O.J. No. 6282 (S.C.J.): RBA, tab 6.

question. The issue of psychological coercion is only one factor that should have been analyzed in the context of section 7. Moreover, the psychological coercion considered by the trial judge focused only on threats and intimidation. Particularly in a Mr. Big operation, it is important to consider psychological compulsion, control and coercion through inducements. The trial judge appears to have ignored this aspect, rendering his analysis too narrow.

65. Since *Hebert, supra*, police tactics have evolved. The principle against self-incrimination has informed and must continue to inform a concordant evolution of *Charter* protections to ensure the principles of fundamental justice are maintained. The extension of the principle against self-incrimination and the right to silence beyond "detention" following a consideration of the *White* factors is but one such development. To analyze the section 7 arguments in this case without acknowledgment of these developments is an error of law.

Applying the White Factors to the Present Case

"We should not expect that the manifestations of the principle against self-incrimination will have any 'pre-defined scope'. Instead, we must begin 'on the ground', as it were, with a concrete and contextual analysis of the circumstances . . ."[90]

66. The extension of the right to silence from statements at trial to pre-trial statements is grounded in the principle against self-incrimination. The Principle against self-incrimination is clearly at play in the context of a Mr. Big operation given that it is "state action that coerces an individual to furnish evidence against him or herself in a proceeding in which the individual and the state are adversaries".[91]

67. The current state of appellate authority in Canada has been recognized as being that the *Charter* s. 7 right to silence is engaged in circumstances "functionally equivalent" to detention.[92]

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[90] *R. v. Fitzpatrick*, [1995] 4 S.C.R. 154: ABA, tab 11, paragraph 25.
[91] *Jones*, *supra*: RBA, tab 4, paragraphs 29 and 50.
[92] *R. v. Niemi*, *supra*: RBA, tab 6, paragraph 120, *R. v. N.R.R.*, *supra*: ABA, tab 21, paragraph 354., *R. v. Osmar*, *supra*: ABA 7, paragraph 42.

The context of each extension of the principle against self-incrimination to such situations of non-detention, however, must be carefully considered. In *White*, *supra*, Iacobucci J. notes that:

> . . . in every case, the facts must be closely examined to determine whether the principle against self-incrimination has truly been brought into play by the production or use of the declarant's statement".[93]

Thus, it is not helpful to look at the Mr. Big technique at large, but rather as it is deployed in each individual case.[94]

(i) The Existence of Coercion

68. "Coercion" means the denial of free and informed consent.[95] As noted by Green, C.J.N.L. in the court below: "free consent is impossible where the suspect is under the control of the state and the degree of pressure brought to bear on him is such that he might well have confessed even if innocent".[96]

69. The Appellant argues that "finding 'compulsion' or 'coercion' in the context of this case strains, if not distorts the meanings of 'coerced' and 'compelled' as interpreted by the jurisprudence".[97] However, the Appellant conflates the terms "compulsion" and "coercion". It is true that this Court in *White* interpreted "compulsion" to mean that the accused has an "honest belief" that the statement must be made "as a matter of law". The Appellant fails to recognize, however, that the term 'coercion' is defined differently and more broadly in the jurisprudence. The definition of 'coercion' does not appear to be limited to circumstances where the accused is subjectively aware that it is the state doing the coercing.

70. *Jones*, *supra*, holds that "**any state action** which coerces an individual to furnish evidence against himself or herself in a proceeding in which the individual and the state are

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[93] *R. v. White*, *supra*: RBA, tab 1, paragraph 48.
[94] *R. v. Osmar*, *supra*: ABA, tab 7, at paragraph 33.
[95] *Jones*, *supra*: RBA, tab 4, paragraph 29, *R. v. White*, *supra*: RBA, tab 1, paragraph 42; and *R. v. Fitzpatrick*, *supra*: ABA, tab 11, paragraph 33.
[96] *R. v. Hart, supra*: Appellant`s Record, Volume VI, tab 15, at paragraph 222.
[97] Appellant's Factum at paragraph 91.

adversaries violates the principle against self-incrimination".[98] This statement of the law, the Respondent submits, suggests that "compulsion" is but one of any variety of actions which might be considered "coercion". Further, there is no suggestion in this Honourable Court's definition of "coercion" in *Jones*, *supra*, that the individual is require to have an awareness of their adversarial relationship with the state.

Coercion Includes Inducements

71. Coercion means more than threats. It also includes inducements. Threats and inducements do not exist in splendid isolation from one another in the real world. They can interact to provide a fixed set of choices to a person subject to coercion. To be offered a choice between a threat and an inducement is materially different than being offered a choice between a threat or its absence, or an inducement or its absence. Of particular concern in an undercover operation is that the state actor wearing the guise of a non-state actor can engage in threats and offer inducements similar to or far beyond those offered by the state. The coercion in the present case was by design. The intersection of threats and inducements was tailored to the known vulnerabilities of the Respondent. The "First Phase" of the Mr. Big operation was designed to gather intelligence of the Respondent's unique vulnerabilities and how best to exploit them. The stated purpose of this Mr. Big operation was to manipulate the Respondent into making a "confession" indicating that he was responsible for the deaths of his daughters. The Trial Judge erred in concerning himself primarily with threats, failing to properly consider the inducements, failing to consider the interaction of the inducements and the threats, as well as failing to consider them in the context of the Mr. Hart's known vulnerabilities.

72. The undercover portion of the Mr. Big operation lasted over four months. Over that time the Respondent was immersed in an engineered social world in which his own actions were orchestrated though manipulation and what to Mr. Hart must have been unimaginably substantial inducements both financial and social. The Respondent's life was changed dramatically by the inducements received during the course of the Mr. Big operation.

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[98] *Jones, supra* : RBA, tab 4, paragraph 29 (emphasis added).

73. The Mr. Big operation in this case is more accurately characterized as one large inducement, as opposed to many individual inducements. The Respondent's life prior to the Mr. Big operation consisted of abject poverty including a struggle to obtain necessities such as food, hygienic items, heat, light and furniture as basic as a bed. He suffered extreme social isolation in which he rarely left his house and his wife was his only regular social contact. No other friend was mentioned anywhere in the voir dire.

74. Upon becoming immersed in the world engineered for the purposes of the Mr. Big operation, Mr. Hart was induced into and gained access to a better life in which he: 1) was paid more than four times his regular income in cash, drastically raising his standard of living; 2) travelled extensively across the country; 3) travelled in modes beyond his means and experience such a planes and trains; 4) travelled with generous expense allowances; 5) ate meals in fancy restaurants; 6) stayed in nice hotels; 7) had clothing bought and tailored for him at no cost; 8) was given cash and casino chips for gambling; and 9) was taken to horse races. His wife was also included in travel, dining and entertainment opportunities on two occasions. While the financial element of this lifestyle change is apparent, the social change has to be considered as well. Mr. Hart was lead to believe he had developed two friendships that he reasonably regarded, based on the words and deeds of "Steph" and "Pat", to be brother-like bonds of love and respect. In addition they held out a broad network of powerful friends across the country. "Pat's" girlfriend also purported to befriend his wife.

75. The Respondent's options in this new social world were to continue his involvement in the various tasks he given, enjoying the reprieve from destitution and social isolation, or reject his "brothers" and go back to his previous life. The inducements provided along the way were designed, having regard to the Respondent's known vulnerabilities, to keep the Respondent from choosing to go back to his former life.

76. The Mr. Big operation gave Mr. Hart a reprieve from life-long social isolation, while at the same time weakening his only real social bond, with his wife, [redacted]. Mr. Hart was explicitly told to deceive his wife as to his actions for more than one quarter of his days during the period in question. This was a requirement of maintaining his new friendships. He was also

physically removed from her presence for long stretches. [redacted] was tasked with convincing Mr, Hart he was his best friend. [redacted] told Mr. Hart that he loved him.

77. The Mr. Big operation was designed to impress upon the Mr. Hart the violent nature of the organization with which he had become involved. It is worthy to note that the violent criminal nature of the organization was not revealed to the Mr. Hart until after he had established social bonds with the operatives and had been immersed in what was for him a lavish lifestyle. Mr. Hart: 1) was told that "Pat" would kill someone who ratted on him; 2) was told that he should not tell his wife the truth about his activities; 3) witnessed "Pat" warn a client that if he talked about where he got the contraband he would be killed; 5) was told that "Steph" felt rats should be killed; 6) was told that based on past events "Steph" knew that he and "Pat" (as well as [redacted]) were capable of killing; 7) was told that "Steph" conducted assaults as a part of ordinary course business and would not hesitate to hurt even women, which some criminals balked at; 8) was introduced to a biker ("ice-man") who was an assassin; 9) when being introduced to Mr. Big was told that the boss was not too happy to see him and "Steph" kept assuring Mr. Big that Mr. Hart "was not a rat"; and 10) just before the "confession", was told by "Steph" that he was worried. "Steph" told Mr. Hart he had his "head on the log" for Mr. Hart and told Mr. Hart not to let him down.

78. The message consistently instilled in the Respondent in relation to the organization, overseen by Mr. Big, was that while loyalty and truth were rewarded, disloyalty and deceit were met with violence and death. Taken in the context of Mr. Hart's life the probable outcomes in his meeting with Mr. Big were: 1) ascension to the "family" and "circle" with income that could "set him up for life" and protect him from a renewed police investigation; 2) exclusion and destruction of the life he had built in the last four months, casting him into crushing poverty and social isolation and subjecting him to a renewed police investigation without resources to fight it; or 3) extreme violence up to and including death.

79. It is in this context that the exchange noted by Justice Green at paragraphs 209 and 211 of his decision occurs. Faced with Mr. Big's instant and vehement disbelief in Mr. Hart's explanation that the death of his daughters was a tragic accident following a seizure his choices

were clear. If he stuck to his version of events in which it was an accident he risked serious injury or death. At best he would be cast into crushing poverty and social isolation with renewed "heat" from the police. If he lied and "admitted" to the "murder" his current lifestyle would continue an even improve, he would be financially "set" and protected from the police. There was no adverse consequence to lying. In such circumstances a lie was a rational choice, arguably the only rational choice.

(ii) Presence of an Adversarial Relationship

80. The Respondent submits that the adversarial relationship between the target of an undercover investigation who maintains his innocence and the police who are trying to elicit a confession is self-evident.

(iii) Prospect of an Unreliable Confession

81. Mr. Hart described and demonstrated the *actus reus* of the "murders" several different and materially inconsistent ways in both of his videotaped "confessions". Even after making his "confession" to Mr. Big he made statements inconsistent with a guilty mind and consistent with accident and belief that he was innocent. The trial judge found as a fact he had a motive to lie to Mr. Big and in fact the evidence showed he had repeatedly lied to "Pat" and "Steph". There was no evidence to corroborate any element of the "confession". When considering the possibility of a "coercive-compliant" confession it is important to consider Mr. Hart's embarrassment and propensity to hide his seizures, that his seizures can be induced by stress and that behaviours that mitigate stressors (compliance) would be second nature to him. His epilepsy and coping mechanisms for it were an inherent vulnerability.

(iv) Possibility of Abusive Conduct by the State

82. It is difficult to improve upon the observations of Green C.J.N.L. on this point. As he notes in his decision at paragraphs 229 to 234:

> **229** …the potential for abuse in a case like Mr. Hart's is far greater. This is especially so because, as I noted earlier, by accident or design, the Mr. Big scenario does not fit easily within the traditional techniques of control of statements obtained from suspects. If all manifestations of the Mr. Big strategy are regarded as immune from scrutiny, the potential for abuse is, as counsel suggests, "built into the very structure of the technique itself"...
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> **230** In Mr. Hart's case, the abuse of power is that the state employed considerable resources to gain control over a weak and vulnerable person by a dishonest trick and then used that power to place him in a situation where it was, given his expectations and needs, the only logical thing to do but to say what he believed Mr. Big wanted him to say as a condition of remaining in the organization… The trickery becomes abusive when the state takes control over the accused, as in Mr. Hart's case, by creating a false world of imaginary friends and a lifestyle that he desperately wanted but could not maintain without continuing to be associated with them, and then uses the product of that trickery in a manner that effectively requires him to testify in his own defence in circumstances where his credibility is already destroyed through the creation of adverse propensity evidence that is inherent in the technique that was employed.
>
> **233** A Mr. Big operation, by its nature, involves a steady escalation in association, influence and pressure, leading up to the creation of an atmosphere in which it is deemed appropriate to encourage the target to confess. Up to a certain point, escalating the pressure increases the likelihood of a confession. But beyond that point, the pressure and influence just increases the risk of a false confession...
>
> **234** …. At that interview, Mr. Big employed coercive techniques by presenting implicit threats (of termination of Mr. Hart's new lifestyle) and promises, rejected any (innocent) explanations that did not involve the admission he was seeking, and continued to accuse him of lying until Mr. Hart agreed with the assertions Mr. Big was putting to him.[99]

Conclusion

83. The principle against self-incrimination is strongly brought into play by numerous aspects of the context of the Mr. Big operation in the present case. The "confession" provided to Mr. Big is unreliable. It was obtained in the context of significant psychological coercion wherein the state exploited Mr. Hart's known vulnerabilities. Mr. Hart was under significant state control in circumstances "functionally equivalent" to detention for large periods of time, including the days nine immediately prior to his "confession". As such, Mr. Hart *was* in need of protection from the greater power of the state to preserve the two fundamental purposes of the principle against

[99] *R. v. Hart*, *supra*: Appellant's Record, Volume VI, tab 15, paragraph 135.

self-incrimination. As a result of the actions of the state, the Respondent cannot be said to be 'freely' consenting to his involvement. There was without question, the existence of an adversarial relationship.

Abuse of Process: Police Conduct "Shocking the Conscience of the Community"

84. The Crown argues that the present case ought to be decided using the doctrine of abuse of process.[100] The Respondent submits that even applying this doctrine, which embodies a notoriously high standard, the statements provided in the context of the Mr. Big operation should be excluded. The conduct of the state in the present case would easily "shock the community".

85. Examining the conduct of police in pursuit of obtaining a confession is a distinct line of inquiry related to voluntariness. While the inquiry is related to voluntariness, however, this Court held in *R. v. Oickle*, [2000] 2 S.C.R. 3 at paragraph 65 that: "it's more specific objective is maintaining the integrity of the criminal justice system".

86. A statement obtained through police conduct that is "so appalling as to shock the community" will be excluded "to [maintain] the integrity of the criminal justice system".[101] This Court in *Oickle*, *supra*, traces the origins the doctrine back to the concurring reasons of Lamer J. in *R. v. Rothman*, [1981] 1 S.C.R. 640 at page 697 sets out the rules regarding the admissibility of statements by an accused to a person in authority:

> 1. A statement made by the accused to a person in authority is inadmissible if tendered by the prosecution in a criminal proceeding unless the judge is satisfied beyond a reasonable doubt that nothing said or done by any person in authority could have induced the accused to make a statement which was or might be untrue;
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> 2. A statement made by the accused to a person in authority and tendered by the prosecution in a criminal proceeding against him, though elicited under circumstances which would not render it inadmissible, shall nevertheless be excluded if its use in the proceedings would, as a

[100] Appellant's Factum at paragraphs 101-104.
[101] *R. v. Bonisteel*, [2008] B.C.J. No. 1705 (C.A.): ABA, tab 17, paragraph 88, *R. v. Oickle, supra*: ABA, tab 14, paragraphs 65-67.

> result of what was said or done by any person in authority in eliciting the statement, bring the administration of justice into disrepute.
>
> . . . [As regards the second rule] [t]here first must be a clear connection between the obtaining of the statement and the conduct; furthermore that conduct must be so shocking as to justify the judicial branch of the criminal justice system in feeling that, short of disassociating itself from such conduct through rejection of the statement, its reputation and, as a result, that of the whole criminal justice system, would be brought into disrepute.
>
> The judge, in determining whether under the circumstances the use of the statement in the proceedings would bring the administration of justice into disrepute, should consider all of the circumstances of the proceedings, the manner in which the statement was obtained, the degree to which there was a breach of social values, the seriousness of the charge, the effect the exclusion would have on the result of the proceedings. It must also be borne in mind that the investigation of crime and the detection of criminals is not a game to be governed by the Marquees of Queensbury rules. The authorities, in dealing with shrewd and often sophisticated criminals, must sometimes of necessity resort to tricks or other forms of deceit and should not through the rule be hampered in their work. What should be repressed vigorously is conduct on their part that shocks the community.
>
> It must be remembered that the first part of the rule, the reliability test, will have dealt with most of the situations and that the second part of the rule would come into operation on very rare occasions since such conduct would usually have some effect on the reliability of the statement. Nevertheless, it is in my opinion all the more important to have a rule that is available to deal with those situations which, thanks to the high standard of conduct of the vast majority of our police officers, will be very few but for that reason all the more deserving of immediate and vigorous rebuke.[102]

87. The present case is one of those residual "rare occasions" contemplated by Lamer J. in *Rothman*, *supra* in which the impugned state conduct, while not necessarily having an effect on the reliability of the statement, is connected to the statement and deserving of "immediate and vigorous rebuke". To be caught by the second part of the rule enunciated in *Rothman, supra*, it is not necessary that the right to silence be breached or voluntariness brought into question. There may be situations in which the police conduct, though not touching on either of these concerns *per se*, is so appalling that is shocks the conscience of the community.[103]

88. In the course of the Mr. Big operation employed against Mr. Hart, the state committed *actual* breaches of the *Criminal Code* and/or provincial regulations. The most egregious conduct,

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[102] *R. v. Rothman, supra*: RBA, tab 7, page 697.
[103] *R. v. Oickle, supra*: ABA, tab 14, paragraph 67.

however, involved the decision made by police to place the target of their operation and the general public at risk of grievous bodily harm or death. In doing so, police abdicated their role as guardians of public safety in pursuit of a "confession" from Mr. Hart to perfect their theory of the case. If a line ought to be drawn anywhere in terms of unacceptable state conduct in the context of a Mr. Big operation, it ought to be where police knowingly maintain an operation despite, or cause an operation to become a clear and present risk to public safety.

89. The Respondent submits that the following conduct of police in pursuing a confession from Mr. Hart would "shock the community" and ought to result in the exclusion of the evidence obtained via the Mr. Big operation:

Incentivising Risk to the Public – Acts of Criminal Negligence

90. Mr. Hart's role in the fictitious organization was that of driver, mainly driving large trucks on public highways. On April 7, 2005, "Pat" observed Mr. Hart have a seizure. He immediately contacted [redacted] for directions. The decision was to ignore the seizure. The operation continued without any changes due Mr. Hart's seizure. [104]

91. At this juncture, the police could have shut down the operation, notified the Registrar of Motor Vehicles and had Mr. Hart's licence suspended. However, they did not. Doing so would have meant abandoning their pursuit of a confession from Mr. Hart via the Mr. Big operation.

92. The police could have simply modified Mr. Hart's role in the organization and relieved him of his driving duties. Police had already demonstrated significant influence over Mr. Hart. It is reasonable to infer that such a change could be made without jeopardizing the operation. It might be considered somewhat unpalatable for police to refrain from notifying the Registrar of Motor Vehicles, turning a blind eye to the danger posed by Mr. Hart driving in his "private" time. However, it would have been much less abhorrent than the course of action they chose.

[104] Evidence of [redacted] Appellant's Record, Volume VIIII tab 24 page 61-64.

93. Armed with knowledge of Mr. Hart's seizure disorder and having just observed Mr. Hart have a seizure, police opted, not to do nothing, but to do worse than nothing. Police continued to encourage, instruct and incentivize Mr. Hart to continue in his role as driver for the organization. Even following April 7, 2005, Mr. Hart was offered large sums of money to drive vehicles, including large cube vans, long distances on highways in five different provinces, needlessly placing motorists and pedestrians alike at a high level of unnecessary risk, a risk the RCMP itself had previously concluded was unacceptable.

94. In continuing to direct Mr. Hart to drive as part of his 'employment' and offer strong financial incentives for Mr. Hart to drive on public highways for long distances, the police showed wanton or reckless disregard for the lives and safety of other motorists. While Mr. Big operations might involve simulated criminal offences, entering into a Mr. Big operation does not give police a licence to actually commit crimes or endanger the public. The police conduct described above constitutes criminal negligence and is contrary to sections 217, 217.1 and 219 of the *Criminal Code*.[105]

95. Public safety was ignored in pursuit of the stated goal of the Mr. Big operation: to cause Mr. Hart to say that he murdered his daughters. This ought to be contrasted with the response of police to receiving information about Mr. Hart having a seizure in September 2002. Immediate steps were taken by police at that time to see that Mr. Hart was taken off the road. Had Mr. Hart had a seizure while driving, causing an accident the police would have been exposed to significant civil liability as well. The fact that police managed to complete the operation without catastrophe does not justify their conduct. The court ought to distance itself from such conduct by excluding the evidence obtained through the reckless police operation to preserve its reputation and that of the criminal justice system. The Mr. Big operation, at least from April 7, 2005 until its completion, negligently endangered the public.

[105] RBA, tab 15 and tab 16.

Other Unlawful Acts

96. Although less serious than criminal negligence the undercover officers engaged in an unlawful search[106] of Mr. Hart's hotel room. In transporting cigarettes from Montreal to Cornwall and back the RCMP likely violated either or both of Ontario's or Quebec's legislation with respect to importing packaged cigarettes.[107]

No Failure to Accord Deference to the Trial Judge

97. The Respondent submits that the Court of Appeal did not err by failing to show deference to the findings of the trial judge. The majority of the Court of Appeal found that the trial judge failed to apply the correct legal test in his analysis by failing to consider the role of inducements in analysing coercion. The trial judge dealt with this evidence simply by finding that Mr. Hart had a "motive to lie" as he "wanted into the organization". [108] He did not consider the "air of permanence" the prolonged operation created, nor that the benefits to date and proposed greater benefits constituted an inducement to give a particular type of statement. Not having considered these issues, no finding of fact or mixed fact and law was made by the trial judge with respect to the same and no deference was possible.

98. The evidence considered by the Court of Appeal was evidence that was accepted by the trial judge and not contested by Mr. Hart. This evidence included the length of the operation, the activities and expenditures in the scenarios and the benefits, including professed love and affection, that the officers testified Mr. Hart received.

99. While the trial judge did consider the "trickery" used in other cases as noted by the Appellant in paragraph 107 of its Factum, the trial judge failed to consider the comparative duration and intensity of those operations in comparison to the operation employed against Mr. Hart. Not all of the reported cases provided considered how many days contact were had with

[106] Trial judge's decision on voir dire, Appellant's Record, Volume I, Tab 5 paragraphs 73-80.
[107] Tobacco Tax Act, R.S.Q. c. I-2: RBA, tab 12, sections 2 ("importer" definition), 6 and 14.2: Tobacco Tax Act RSO 1990, c. T. 10: RBA, tab 13, sections 1 ("importer", "tobacco in bulk" definitions), 5(1) and 5(13): and Tobacco Tax Act Regulation R.R.O 1990 Regulation 1034 : RBA, tab 14, section 1 ("carton", "case", "package" definitions).
[108] Trial judge's decision on voir dire, Appellant's Record, Volume I, tab 5, paragraphs 42, 43, 65 and 140.

the target – in *Osmar* it appears to have been thirteen days and in *Bonisteel* six. The other cases are silent on the issue – it does not seem to have been considered as a relevant factor in the cases. In Mr. Hart's case it appears he was in personal contact with RCMP agents on 48 of 118 days, 40% of the operational time, excluding phone contact.

100. The other primary facts considered by Green C.J.N.L. arose from the videotaped statements to "Mr. Big" and the transcripts of same, evidence which the trial judge was not in a superior position to the Court of Appeal to assess. In particular, the material discrepancies noted by Green C.J.N.L. in the "confessions" as to the actus reus were not dealt with by the trial judge, nor was the absence of corroborative evidence. These things do not rely upon any assessment of credibility or finding of fact by the trial judge.

101. Justice Green's analysis did not depend upon the rejection of the trial judge's findings of facts, nor did he substitute his own view of the evidence. Properly applying the *correct* legal test, Green, C.J.N.L. relied upon the uncontested facts and upon evidence not subject to credibility assessment. Green, C.J.N.L. committed no error.

Denial of Opportunity to Testify *In Camera*

102. The Supreme Court of Newfoundland and Labrador, Court of Appeal was unanimous on this issue. The Court of Appeal correctly held that it was unreasonable for the trial judge to refuse the Respondent's request to have the public excluded from the courtroom while his testimony was being given. The error was brought about through a misconception and misapplication of the open court principle.

103. The principle of open court is inextricably tied to the rights guaranteed by s. 2(b) of the *Charter*. Openness permits public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings. However, the open court principle ought not to be confused with or taken as affirming the right of the public to be physically present in the courtroom.[109]

[109] *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480: ABA, tab 22, paragraphs 3 and 27.

104. A Trial Judge's exercise of discretion to make an Order which might limit freedom of expression by the press or offend the open court principle is governed by the principles expressed in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 and *R. v. Mentcuk*, [2001] 3 S.C.R. 442.[110] The *Daginais/Mentcuk* test is used to balance freedom of expression and other important rights and interests, including the right to a fair trial. In the context of an Order for exclusion of the public under s. 486(1) of the *Criminal Code*, the test is stated as follows:

> (i) the judge must consider the available options and consider whether there are any other reasonable and effective alternatives;
>
> (ii) the judge must consider whether the order is limited as much as possible; and
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> (iii) the judge must weigh the importance of the objectives of the particular order and its probable effects against the importance of openness and the particular expression that will be limited in order to ensure that the positive and negative effects of the order are proportionate.[111]

105. Alternative measures would not have eliminated the serious prejudice arising if the Mr. Big statements went to the jury without testing or explanation. Further, the salutary effects of excluding the public outweighed any slight deleterious effect (if indeed there could be said to be any at all) on the open court principle by minimizing the possibility of a wrongful conviction.

106. The Trial Judge confused the right of the public to be informed and the freedom of the press with the right to be physically present in the courtroom. The open court principle does not mean that everyone who wants to sit in on a trial should have the right to do so. The principle merely ensures that justice is done in an open and transparent manner. This does not mean presence in the courtroom at all times and an immediate right to know everything that is happening.[112]

107. The Trial Judge purported to balance the Respondent's request against the notion that the open court principle requires presence in the courtroom at the time the evidence is unfolding. This is an error of law.

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[110] *Vancouver Sun (Re)*, [2004] 2 S.C.R. 332: RBA, tab 8, paragraphs 28-31.
[111] *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, *supra*: ABA, tab 22, paragraph 69.
[112] *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, *supra*: ABA, tab 22, paragraph 27.

108. The Appellant argues that the Court of Appeal erred in failing to defer to the Trial Judge's exercise of discretion to grant the relief sought by the Respondent. The Appellant argues that the Court of Appeal "simply disagreed with the decision" and supplanted "their own view of the circumstances" and "arrived at a different determination as to how the balance was to be struck".[113] These, however, are incorrect interpretations of the ruling.

109. The Trial Judge's exercise of discretion was predicated upon an incorrect understanding and application of the open court principle. The Trial Judge believed that the public right in jeopardy of derogation was a right to be physically present in the courtroom while the Respondent was testifying. As already discussed, no such right exists. As such, it would not have been appropriate for the Court of Appeal to defer to the discretion of the Trial Judge exercised on the basis of an incorrect understanding and application of the law.

110. The Appellant further argues that the Trial Judge properly exercised his discretion to deny the Respondent's request in light of "limits" that had already been "placed on public access via other means than physical attendance at trial, by way of the publication bans".[114] These publication bans, however, had no great impact on the public's ability to receive information about the proceeding.[115] These Orders merely prohibit the publication, broadcast or transmission of information which could identify the undercover operators. The exclusion of the public from the courtroom during the Respondent's testimony would not have had the effect of further restricting the quantity or quality of the information accessible by the public.

111. The Trial Judge ought to have considered whether the Respondent's request could have been accommodated while ensuring that the values of transparency and openness were still serviced by other means. While the Trial Judge did offer certain "accommodations"[116] for the

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[113] Appellant's Factum, paragraphs 132-133.
[114] Appellant's Factum, paragraph 139.
[115] See Appellant's Record, tabs 3 and 4.
[116] Decision of Dymond J. on Application for *in camera* testimony, Appellant's Record, Volume VI, Tab 13, pages 28-29. Dymond J. dismissed the Application, indicating that although the public not be excluded from the courtroom, Mr. Hart would be permitted to: (1) take breaks, (2) have a medical doctor present; and (3) testify behind a "small screen to at least close off part of the public".

Respondent, those offered were not reasonable or effective alternatives to excluding the public. They did not address the Respondent's concerns.

112. Very little, if anything, was required to both accommodate the Respondent's request and protect the open court principle, as it is properly understood. There is nothing to suggest that the media could not report Mr. Hart's evidence. Media routinely obtain copies of recordings of Court proceedings and report on them immediately after they take place. Further, there was no consideration given to the Respondent testifying via closed circuit TV with the public simultaneously viewing his testimony. The Respondent was not asking for an Order that his testimony not be heard by the public, but rather that the public not be in his physical presence while he testified.

113. The administration of justice weighed in favour of the Respondent's request to testify without the public present in the courtroom, especially given that the jury had been told he would testify. He did not testify and the jury was left to speculate as to why. Refusing the Respondent's request to have the public excluded also caused the truthfulness of the statements to Mr. Big to remain untested. Indeed, the very rationale for admitting such inculpatory statements rests on the theory of the adversarial system.[117] The Respondent's ability and opportunity to test the statements made to Mr. Big was necessary to a fair trial.

114. The context of the Mr. Big operation in the present case gave rise to a unique and significant prejudice if the Respondent failed to testify. The statements elicited during the Mr. Big operation were the Crown's case. Without the statements, the Crown had no evidence implicating the Respondent in the alleged murders. Moreover, without the statements, the Crown did not have any evidence that a crime had been committed at all.

115. The collateral impact of the evidence of the entire Mr. Big operation also cannot be ignored. The Respondent's immersion in the operation not only changed his life financially and socially, but also converted a person with a dated (1992) and minor criminal history into an

[117] *R. v. Evans*, [1993] 3 S.C.R. 653: RBA, tab 9, paragraph 24: *R. v. Foreman*, [2002] O.J. No. 4332 (C.A.): RBA, tab 10, paragraph 37.

apparent criminal and aspiring member of an organized crime syndicate. Practically speaking, the Respondent had no choice but to tell his side of the story. Such prejudice faced by the Respondent if he were not to testify ought to have been considered by the Trial Judge in balancing the salutary and deleterious effects of making the Order.

116. The Respondent made it clear that he could not and would not testify unless the public were excluded. The Trial Judge, up to the time of the request, had received a great deal of evidence establishing the weak, socially dependant personality of the Respondent. The Trial Judge had also received uncontradicted medical evidence of the Respondent's proneness to serious epileptic seizures and that stress could bring them on. [redacted] testified that the Respondent became embarrassed if he had a seizure in public. At the time of the Respondent's request, the Respondent provided the following explanation to the court *after the Trial Judge having excluded the public from the courtroom*:

> I gets frustrated and all tangled up with a crowd. I am no good, I was never no good to be able to talk in front of a crowd or be in front of a crowd. I black out and this is what is what causes this, when I gets frustrated I ends up blackin' out and it will only just make matters [worse]. I feel more comfortable with just a few people in the court than have a full courtroom full of people and be up there on the stand ... and be overcome, frustrated and not be able to answer questions right that [crown counsel or defence counsel] put to me ... and then end up answering them wrong. ... [N]ow it's only just a few people and I can, I feel more comfortable, and I can answer the questions more straightly [sic] with a full, clear mind. Which I don't think I'd be able to do with a crowd because I would be all frustrated and I'm just the one that's no good to be able to talk where a crowd is and I get frustrated and with that I'll end up probably blackin' out it's just going to, just going to make things [worse].[118]

117. An order may be made excluding the public from the courtroom where a witness is unable to testify because of the stress caused by the presence of too many persons in the courtroom.[119] However, clearly, this was more than a case of an accused simply having a general fear of public speaking.

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[118] As cited in the Judgment of Green, C.J.N.L in *R. v. Hart*, *supra*: Appellant's Record, Volume VI, tab 15, paragraph 135.

[119] *R. v. Lefebvre* (1984), 17 C.C.C. (3d) 277 (Que. C.A.): ABA, tab 25.

118. The openness principle does not mean that the public has an immediate right to know what is happening in a trial. The guiding principles behind the openness principle could have been preserved in this case. The result would not have compromised the public's right in any event. The Trial Judge did not approach his discretion in a manner dictated by the case law. He misinterpreted the law regarding the public's right to know what happens in a trial. In the circumstances, especially given that counsel in his opening address told the jury the Respondent would be testifying,[120] the Trial Judge should have given more consideration to the perception of trial fairness. The Accused's right to make full answer and defence should have taken priority.

119. The Trial Judge should have considered the options he discussed in the context of the public's right to know what *transpires* in a courtroom, not to *be present* in the courtroom. It is submitted that with this premise as a starting point, the balance of rights would have come down in the Respondent's favour. This misstatement and misapplication of the law, in and of itself, justifies a new trial.

PART IV – SUBMISSIONS CONCERNING COSTS

120. The Respondent makes no submission as to costs.

PART V – ORDER SOUGHT

121. The Respondent respectfully requests that this Court dismiss the appeal and affirm the order of the Supreme Court of Newfoundland and Labrador, Court of Appeal.

[120] Defence Opening Address to the Jury, Appellant's Record, Volume XI, Tab 30, pages 116-118.

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PART VI – TABLE OF AUTHORITIES

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Part VII – STATUTORY PROVISIONS