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The Patchwork Principle against Self-Incrimination under the Charter

Lisa Dufraimont*

I. INTRODUCTION

Under our system of criminal justice, the state bears the burden of proving the accused's guilt and may not conscript the accused to help build a case against him or her. The fundamental idea that the individual cannot be compelled to assist in her own prosecution is known as the principle against self-incrimination. Recognition of this principle in its broad form emerged only recently in Canadian law; in the 1970s, the prevailing view was that there existed no overarching principle against self-incrimination.¹ The leading proponent of this view, Ed Ratushny, acknowledged that several legal doctrines — including the voluntary confessions rule and the non-compellability of the accused at trial — seemed to reflect disapproval of compulsory self-incrimination.² However, Ratushny argued that the idea of a general right against self-incrimination could be used, at best, only to describe a disparate collection of procedural and evidentiary rules.³ Even if this group of rules, as a whole, could be said to indicate that the law took a dim view of self-incrimination, that view was “speckled to an extent that, to refer to it, [was] more likely to create confusion than to assist in any way”.⁴ Consequently, Ratushny concluded that there was no independent, functional principle against self-incrimination from which legal consequences could flow.⁵

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¹ See Ed Ratushny, “Is There a Right Against Self-Incrimination in Canada?” (1973) 19 McGill L.J. 1, at 76 [hereinafter “Ratushny, ‘Is There a Right?’”]; Ed Ratushny, “Self-Incrimination: Nailing the Coffin Shut” (1978) 20 Crim. L.Q. 312, at 352. On the influence of Ratushny's views, see David M. Paciocco, “Self-Incrimination: Removing the Coffin Nails” (1989) 35 McGill L.J. 73 [hereinafter “Paciocco, ‘Removing the Coffin Nails’”].

² Ratushny, “Is There a Right?”, *id.*, at 2.

³ *Id.*, at 3.

⁴ *Id.*, at 77.

⁵ *Id.*, at 3.

Times have changed. Since the advent of the *Canadian Charter of Rights and Freedoms*,⁶ an independent, functional principle against self-incrimination has indeed taken root in Canadian law. The Supreme Court has recognized this “overarching”,⁷ “organizing principle”⁸ as a principle of fundamental justice under section 7 of the Charter.⁹ The constitutional principle against self-incrimination has come to be understood as undergirding a number of pre-existing legal rules and has also become a source of new legal protections. Current safeguards against self-incrimination in Canadian law are more numerous and more robust than ever.

Without detracting from the significance of these developments, this paper aims to show that the Canadian principle against self-incrimination remains (to borrow a phrase from Ratushny) troublingly “speckled”. The available protections are strong in some areas and weak or absent in other contexts where self-incrimination concerns appear equally pressing. It will be argued that the patchwork quality of Canadian self-incrimination law can be explained, at least in part, by the Supreme Court’s inconsistent approach to the problem of compulsion. The analysis begins in Part II with an overview of the principle against self-incrimination, including a discussion of its emergence as a Charter principle, the rationales offered for self-incrimination protections and the various legal rules animated by the principle. Part III will discuss the central, contested distinction between free choice and compulsion. In Part IV, the focus will narrow to undercover operations, which will serve as an example of a context where the current law provides inadequate protection. The analysis concludes in Part IV.

II. OVERVIEW OF THE PRINCIPLE AGAINST SELF-INCRIMINATION

Before the Charter, the law’s protection against self-incrimination *per se* was generally understood to be limited to the privilege against self-incrimination. In 1976, the Supreme Court of Canada firmly rejected

⁶ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter “Charter”].

⁷ *R. v. White*, [1999] S.C.J. No. 28, [1999] 2 S.C.R. 417, at paras. 44-45 (S.C.C.) [hereinafter “*White*”]; *R. v. P. (M.B.)*, [1994] S.C.J. No. 27, [1994] 1 S.C.R. 555, at para. 37 (S.C.C.) [hereinafter “*M.B.P.*”].

⁸ *M.B.P.*, *id.*, at para. 36.

⁹ For example, *White*, *supra*, note 7, at para. 40.

an attempt to extend self-incrimination principles beyond this narrow testimonial context:

The limit of the privilege against self-incrimination is clear. The privilege is the privilege of a witness not to answer a question which may incriminate him. That is all that is meant by the Latin maxim *nemo tenetur seipsum accusare*, often incorrectly advanced in support of a much broader proposition.¹⁰

Even at the time, this modest account of self-incrimination principles was an oversimplification. It is true that the common law privilege against self-incrimination entitled a witness to refuse to answer questions where the answers might incriminate her.¹¹ More particularly, the privilege historically encompassed both the non-compellability of the accused as a witness for the Crown and the privilege of an ordinary witness to refuse to answer incrimination questions.¹²

However, while the accused remains non-compellable to this day, the witness privilege was abrogated by statute in Canada long before the adoption of the Charter. Section 5 of the *Canada Evidence Act*¹³ eliminates a witness's privilege to refuse to answer and replaces it with another form of protection known as use immunity. The witness can be compelled to answer incriminating questions but, provided the witness objects on self-incrimination grounds at the time of testifying, the witness's testimony cannot be used against her in a future criminal trial.¹⁴ Thus modified by statute, the common law privilege offered protection that was limited to testimony given in formal proceedings and was generally thought to exhaust the law's concern with self-incrimination. With the benefit of hindsight, these pre-Charter safeguards against self-incrimination appear weak and incomplete.¹⁵

¹⁰ *R. v. Marcoux*, [1975] S.C.J. No. 54, [1976] 1 S.C.R. 763, 24 C.C.C. (2d) 1, at 4 C.C.C. (S.C.C.), *per* Dickson J. for the Court.

¹¹ This privilege finds protection under the Fifth Amendment of the Constitution of the United States.

¹² *R. v. S. (R.J.)*, [1995] S.C.J. No. 10, [1995] 1 S.C.R. 451, at para. 62 (S.C.C.) [hereinafter "*R.J.S.*"].

¹³ R.S.C. 1985, c. C-5.

¹⁴ *Canada Evidence Act*, *id.*, s. 5(1) and 5(2).

¹⁵ David M. Paciocco, "Self-Incrimination and the Case to Meet: The Legacy of Chief Justice Lamer" (2000) 5 Can. Crim. L. Rev. 63 [hereinafter "Paciocco, 'Self-Incrimination and the Case to Meet'"] (pre-Charter legal protections against self-incrimination were "feeble": at 65).

1. Self-Incrimination under the Charter

When the Charter came into force in 1982, one might have predicted that the law on self-incrimination would undergo little change. Only two of the Charter's provisions appear on their face to be aimed at self-incrimination problems, and both seem to adopt the pre-existing law. Section 11(c) provides that "[a]ny person charged with an offence has the right not to be compelled to be a witness in proceedings against that person in respect of the offence." That provision simply confirms and constitutionalizes the non-compellability of the accused at trial. Section 13 of the Charter states that

[a] witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

That section has the effect of enhancing and conferring constitutional status on the use immunity that originated as a statutory substitute for the witness privilege. Section 13 use immunity is enhanced in the sense that it arises automatically, whereas section 5(2) of the *Canada Evidence Act* confers use immunity only on those who object at the time of testifying.

Had the Charter analysis of self-incrimination been confined to sections 11(c) and 13, the law in this area would have made little progress. However, the Supreme Court looked beyond these provisions to recognize a broad principle of self-incrimination as an element of fundamental justice under section 7.¹⁶ The principle was perhaps best stated by Lamer C.J.C., writing for the majority of the Court in *M.B.P.*:

Perhaps the single most important organizing principle in criminal law is the right of an accused not to be forced into assisting in his or her own prosecution. ... This means, in effect, that an accused is under no obligation to respond until the state has succeeded in making out a prima facie case against him or her. In other words, until the Crown establishes that there is a "case to meet", an accused is not compellable in a general sense (as opposed to the narrow, testimonial sense) and need not answer the allegations against him or her.¹⁷

¹⁶ For example, *M.B.P.*, *supra*, note 7, at para. 37; *White*, *supra*, note 7, at para. 40; *R.J.S.*, *supra*, note 12, at paras. 94, 97.

¹⁷ *M.B.P.*, *id.*, at para. 36. On the central role of Lamer C.J.C. in the development of this principle, see Paciocco, "Self-Incrimination and the Case to Meet", *supra*, note 15 (Lamer C.J.C. was primarily responsible for "dredg[ing] from beneath the cautious language of these provisions [ss. 11(c) and 13] an affirmative right to remain silent, the principle of a case to meet, and the

In this passage, Lamer C.J.C. explicitly disavowed a narrow conception of self-incrimination law that would limit its protection to the giving of testimony in formal proceedings. Rather, the broad principle against self-incrimination can protect a suspect from compulsion in any context where the state might try to extract incriminating evidence from him or her.¹⁸

2. Specific Rules Reflecting the Principle

The principle against self-incrimination has come to be regarded as animating a variety of constitutional, statutory and common law rules. Self-incrimination law in Canada is vast and complex, so an exhaustive survey would exceed the bounds of this paper. For present purposes, it will be sufficient to review a number of specific rules reflecting the principle.

In the constitutional context, as we have seen, sections 11(c) and 13 of the Charter protect individuals from being compelled to incriminate themselves directly and indirectly in the context of formal testimony.¹⁹ The Charter right to counsel that arises on detention under section 10(b) also reflects the principle against self-incrimination;²⁰ the ultimate purpose of affording detainees legal advice is to permit them to understand and effectively exercise their rights, including the right to be silent in the face of an accusation by the state.²¹ Finally, recognition of the principle against self-incrimination as a principle of fundamental justice under section 7 means that constitutional safeguards against self-incrimination can emerge in contexts not specifically addressed by the Charter text.²²

conception of ‘choice’ that now animates the law of self-conscription”: at 68); Don Stuart, “Chief Justice Antonio Lamer: An Extraordinary Judicial Record of Reform of the Canadian Criminal Justice System” (2000) 5 Can. Crim. L. Rev. 51, at 54.

¹⁸ See *R. v. Jones*, [1994] S.C.J. No. 42, [1994] 2 S.C.R. 229, at para. 29 (S.C.C.) [hereinafter “*Jones*”], Lamer C.J.C. dissenting.

¹⁹ See *R. v. Henry*, [2005] S.C.J. No. 76, [2005] 3 S.C.R. 609 (S.C.C.) [hereinafter “*Henry*”] (by exempting the accused from being compelled to testify at her own criminal trial, s. 11(c) guards against the testimonial self-incrimination that is “direct”: at para. 39); *R. v. Dubois*, [1985] S.C.J. No. 69, [1985] 2 S.C.R. 350 (S.C.C.) [hereinafter “*Dubois*”] (use immunity for prior testimony under s. 13 operates “to protect individuals from being indirectly compelled to incriminate themselves”: at 358).

²⁰ For example, *White*, *supra*, note 7, at para. 44.

²¹ *R. v. Sinclair*, [2010] S.C.J. No. 35, [2010] 2 S.C.R. 310, at para. 24 (S.C.C.), McLachlin C.J.C. and Charron J. [hereinafter “*Sinclair*”].

²² *White*, *supra*, note 7 (the s. 7 principle against self-incrimination grants “residual protection”: at para. 44).

The broad section 7 principle against self-incrimination has been superimposed as a modern justification for various rules that developed historically for other reasons. Consider the confessions rule, which renders inadmissible any statement by an accused person to a person in authority unless the prosecution can prove beyond a reasonable doubt that the statement was obtained voluntarily.²³ The confessions rule has formed a part of the common law of evidence since the 18th century.²⁴ At the time of its emergence and for much of its history, the rule was understood to be rooted primarily, if not exclusively, in concerns about the reliability of coerced confessions.²⁵ In the Charter era, however, the Supreme Court has declared that the confessions rule is grounded in the principle against self-incrimination.²⁶

In other areas too, legal rules that developed for seemingly independent reasons have come to be regarded as embodiments of the principle against self-incrimination. In *R. v. Stinchcombe*,²⁷ the Supreme Court recognized the Crown's duty to disclose evidence to the defence before trial as a protection of the right to make full answer and defence under section 7 of the Charter; at the same time, the Court preserved the pre-existing rule that the defence has no reciprocal duty to disclose its case to the Crown.²⁸ No reference was made to self-incrimination in *Stinchcombe*, but the absence of a defence duty to disclose has since been interpreted as a reflection of the principle against self-incrimination.²⁹ Similarly, the rule prohibiting the Crown from reopening its case once the defence has opened its own case has been confirmed and strengthened under the Charter on the basis of the principle against self-incrimination.³⁰ The Crown has but one chance to bring its case to meet, and to allow it to adjust that case once the defence has started to respond would "jeopardiz[e], indirectly, the principle that an accused not be

²³ *R. v. Hodgson*, [1998] S.C.J. No. 66, [1998] 2 S.C.R. 449, at para. 12 (S.C.C.) [hereinafter "*Hodgson*"].

²⁴ John H. Langbein, *The Origins of Adversary Criminal Trial* (New York: Oxford University Press, 2003), at 220-21.

²⁵ *Hodgson*, *supra*, note 23, at para. 17. For a case exemplifying this view, see *R. v. Wray*, [1970] S.C.J. No. 80, [1971] S.C.R. 272 (S.C.C.).

²⁶ *R.J.S.*, *supra*, note 12 (while it does not capture the historical origins of the rule, the proposition that "the confessions rule is grounded in a principle against self-incrimination ... is true in a modern sense": at para. 75).

²⁷ [1991] S.C.J. No. 83, [1991] 3 S.C.R. 326 (S.C.C.) [hereinafter "*Stinchcombe*"].

²⁸ *Id.*, at 333.

²⁹ *M.B.P.*, *supra*, note 7, at para. 38.

³⁰ *Id.*

conscripted against him- or herself”.³¹ Even when the pre-trial right to silence under section 7 was recognized in *R. v. Hebert*,³² McLachlin J. went only so far as to say the newly minted right was “related” to the narrow testimonial “privilege” against self-incrimination.³³ In later cases, the right to silence has come to be viewed as a central manifestation of the broad principle against self-incrimination.³⁴ These examples demonstrate that the principle against self-incrimination operates as a unifying theme linking a disparate set of procedural and evidentiary rules. Historically, at least, these “rules were not derived from the principle[; i]t was the other way around”.³⁵

This is not to suggest that the section 7 principle against self-incrimination is infertile. New legal protections have been derived from the principle. For example, based on the observation that section 13 use immunity for prior compelled testimony would be ineffective without it, the Supreme Court has recognized that section 7 of the Charter grounds “derivative use immunity” for evidence (such as physical evidence) discovered as a result of the prior compelled testimony.³⁶ Furthermore, the Supreme Court has recognized that the principle against self-incrimination demands that individuals be exempted from being compelled to testify where the authorities seek to compel a witness to testify in formal proceedings for the “predominant purpose” of obtaining incriminating evidence against the witness.³⁷ Finally, the section 7 principle against self-incrimination has been used to ground protection against the use of statutorily compelled statements. In *R. v. White*,³⁸ motor vehicle accident reports made under compulsion of a provincial statute could not be used against the accused in criminal proceedings.

In sum, the principle against self-incrimination has emerged as an organizing idea that structures and informs a variety of procedural safeguards. Some of those safeguards pre-dated the section 7 principle against self-incrimination; others emanate from that principle. There remains a possibility that in future, further procedural protections will be drawn out of the constitutional principle against self-incrimination.

³¹ *Id.*, at para. 41.

³² *R. v. Hebert*, [1990] S.C.J. No. 64, [1990] 2 S.C.R. 151 (S.C.C.) [hereinafter “*Hebert*”].

³³ *Id.*, at paras. 20, 47 and 50.

³⁴ *R.J.S.*, *supra*, note 12, at para. 93.

³⁵ *Id.*, at para. 76.

³⁶ *British Columbia (Securities Commission) v. Branch*, [1995] S.C.J. No. 32, [1995] 2 S.C.R. 3, at para. 5 (S.C.C.).

³⁷ *Id.*, at para. 7.

³⁸ *White*, *supra*, note 7.

However, such developments appear to have slowed in recent years and there are indications that the Supreme Court may have retreated somewhat from its embrace of the principle. For instance, in upholding the constitutional validity of compulsion to testify in investigative hearings related to terrorism, a majority of the Court described the principle as grounding only “three procedural safeguards ...: use immunity, derivative use immunity, and constitutional exemption”.³⁹ And in *R. v. B. (S.A.)*,⁴⁰ the full Court ruled that the section 7 principle against self-incrimination was not engaged by the DNA warrant powers in the *Criminal Code*.⁴¹ While it is difficult to argue with the Court’s conclusion that this finely crafted scheme involving prior authorization was more appropriately assessed under the section 8 protection against unreasonable search and seizure, in so ruling the Court adopted language that seemed to disparage the principle against self-incrimination itself.⁴² That principle, once described as “the single most important organizing principle in criminal law”,⁴³ was diminished to a principle of “limited scope”.⁴⁴

3. Rationales for the Principle

The principle against self-incrimination has been justified on a number of grounds. Two of the principal justifications centre on the consequences that might flow if the state could freely compel self-incrimination. First, it is argued that coerced statements by the accused would likely be unreliable.⁴⁵ On this view, the principle against self-incrimination promotes accuracy in adjudication by guarding against the admission and use of unreliable evidence.⁴⁶ Second, compulsory self-

³⁹ *Re Application under s. 83.23 of the Criminal Code*, [2004] S.C.J. No. 40, [2004] 2 S.C.R. 248, at para. 70 (S.C.C.).

⁴⁰ [2003] S.C.J. No. 61, [2003] 2 S.C.R. 678 (S.C.C.) [hereinafter “*S.A.B.*”].

⁴¹ R.S.C. 1985, c. C-46.

⁴² See David Stratas, “*R. v. B. (S.A.)* and the Right Against Self-Incrimination: A Confusing Change of Direction” Case Comment (2004) 14 C.R. (6th) 227.

⁴³ *M.B.P.*, *supra*, note 7, at para. 36.

⁴⁴ *S.A.B.*, *supra*, note 40, at para. 57. See also *R. v. Grant*, [2009] S.C.J. No. 32, [2009] 2 S.C.R. 353 (S.C.C.) (reconfiguring the analysis of exclusion of unconstitutionally obtained evidence under s. 24(2) in a way that places less emphasis on whether the evidence was conscripted and discarding the law’s former “assumption that the use of conscriptive evidence always, or almost always, renders the trial unfair”: at para. 65).

⁴⁵ See, e.g., *White*, *supra*, note 7 (one of the two key purposes of the principle is “to protect against unreliable confessions”: at para. 43).

⁴⁶ See, e.g., Hamish Stewart, “The Confessions Rule and the Charter” (2009) 54 McGill L.J. 517 [hereinafter “Stewart, ‘The Confessions Rule’”]; Steven Penney, “What’s Wrong with Self-

incrimination is associated with inhumane investigative tactics and invasions of privacy.⁴⁷ In this respect the principle against self-incrimination acts as a check on state abuses of power.⁴⁸

Beyond these consequentialist concerns, the courts and commentators have recognized a normative dimension to the principle against self-incrimination. The right not to be compelled to incriminate oneself exists, at least in part, because we think individuals ought to have freedom of choice on the matter of whether to cooperate with authorities.⁴⁹ This normative claim has been supported by reference to the sovereignty, autonomy, dignity and privacy of the individual.⁵⁰ Moreover, in light of the presumption of innocence and the imbalance of power between the state and the individual accused, justice seems to require that the state bring its case without compelling the cooperation of the accused.⁵¹

Normative arguments in favour of the principle against self-incrimination have not attracted universal support. An undercurrent of dissent has developed against the idea that individuals ought, in principle, to be free to choose whether to respond to state accusations. In his exhaustive study of self-incrimination law in Canada, Steven Penney argued that compulsory self-incrimination was not necessarily objectionable.⁵² As Penney and others have observed, it does not seem inconsistent with ordinary moral principles to require individuals to respond to well-founded accusations of misconduct.⁵³ Therefore, Penney posited, if adequate grounds for suspicion existed against the suspect and controls were put in place to prevent abusive treatment and ensure evidentiary

Incrimination? The Wayward Path of Self-Incrimination Law in the Post-Charter Era: Part I: Justifications for Rules Preventing Self-Incrimination” (2003) 48 *Crim. L.Q.* 249, at 250, 253-54 [hereinafter “Penney, ‘Justifications’”].

⁴⁷ See especially Penney, “Justifications”, *id.*, at 250, 254-56.

⁴⁸ See, e.g., *White, supra*, note 7 (the other key purposes of the principle is “to protect against abuses of power by the state”: at para. 43).

⁴⁹ See especially Penney, “Justifications”, *supra*, note 46, at 250.

⁵⁰ See especially *White, supra*, note 7, at para. 43. See also *R.J.S., supra*, note 12 (the “principle of sovereignty ... [requires] that individuals should be left alone in the absence of justification, and not conscripted by the state to promote a self-defeating purpose”: at para. 81); Stewart, “The Confessions Rule”, *supra*, note 46 (respect for human dignity entails protection against self-incrimination because “to force a suspect or an accused person to testify in support of the state’s case against him or her would be to treat this person as a mere means to the state’s objectives”).

⁵¹ For example, *M.B.P., supra*, note 7, at paras. 37, 40.

⁵² Penney, “Justifications”, *supra*, note 46.

⁵³ See *id.*, at 257-58, and the sources cited therein.

reliability, the state could be justified in compelling an answer to a criminal accusation.⁵⁴

Notwithstanding the questions raised about the moral status of free choice in this context, the fact remains that our legal system reflects “a basic distaste for self-conscription”.⁵⁵ Moreover, it is no accident that, historically, the privilege against self-incrimination became established in English common law in the late 18th century, when the theory of the trial as an opportunity for the defence to test the prosecution’s case was born.⁵⁶ The norms of modern adversary criminal trials, including the burden of proof on the Crown and the presumption of innocence, entail some version of the principle against self-incrimination. Whatever doubts may surround the ultimate justification for the suspect’s freedom to choose whether to cooperate with authorities, that choice appears justified at least in the historically contingent sense that it follows from the normative logic of our theory of the trial.⁵⁷

Ultimately, questioning whether suspects ought to have a choice about whether to cooperate with authorities may be beside the point. The principle against self-incrimination, as it exists today, requires that suspects’ choices be protected, either because free choice is a moral right, because it protects suspects from abuse, because it offers some assurance of evidentiary reliability, or, more likely, for some combination of reasons. From a doctrinal point of view, the difficult question is not whether suspects ought to have a choice but what choice means.⁵⁸ Under what conditions is a suspect’s choice to incriminate herself valid? What kinds of state action represent an unjustifiable interference with that choice? On these fundamental questions, Canadian law remains troublingly inconsistent.

⁵⁴ *Id.*, at 250. For a similar view from an American perspective, see Albert W. Alschuler, “A Peculiar Privilege in Historical Perspective” in R.H. Helmholz *et al.*, eds., *The Privilege Against Self-Incrimination: Its Origins and Development* (Chicago: University of Chicago Press, 1997) 181 (“[a] suspect’s answers to orderly questions in a safeguarded courtroom environment should not be regarded as the product of compulsion”: at 204).

⁵⁵ *R.J.S.*, *supra*, note 12, at para. 83.

⁵⁶ See John H. Langbein, “The Historical Origins of the Privilege Against Self-Incrimination at Common Law” (1994) 92 Mich. L. Rev. 1047, at 1048.

⁵⁷ See Paciocco, “Removing the Coffin Nails”, *supra*, note 1 (the principle against self-incrimination “is an indispensable corollary of the principle of a case to meet which helps to define the accusatorial system which, in turn, exists in order to vindicate the rule of law”: at 103).

⁵⁸ See, e.g., Stewart, “The Confessions Rule”, *supra*, note 46; Michael Plaxton, “An Analysis and Defence of Free Choice Theory: A Response to Professor Penney” (1999) 27 C.R. (5th) 218.

III. FREE CHOICE AND COMPULSION

The principle against self-incrimination has nothing to say about self-incrimination that is the product of a free choice on the part of the suspect. The principle prohibits self-incrimination that is compelled. The notion of compulsion or coercion thus plays a central role in defining the scope of the principle. Unfortunately, the Supreme Court's treatment of the problem of compulsion has been erratic. The Court's failure to maintain a clear and consistent approach to compulsion has created discrepancies in the safeguards against self-incrimination in Canadian law.

1. Constraints on the Compulsion Analysis

Two constraints on the Court's analysis of compulsion should be acknowledged at the outset. First, to some extent, the "mishmash"⁵⁹ quality of protections against compelled self-incrimination in Canada reflects real differences between the contexts to which the overarching principle applies. For example, state compulsion to testify in formal proceedings (through the use of subpoenas and the threat of contempt proceedings) looks very different from compulsion to give a statement in the context of police interrogation (which might involve threats or intimidation). In light of the varied contexts in which the principle against self-incrimination applies, the Supreme Court has repeatedly held that the "principle may demand different things at different times."⁶⁰ This sensitivity to context makes a uniform approach to compulsion — or to self-incrimination issues generally — unattainable.

Second, as a practical matter, safeguards against self-incrimination cannot be too categorical because effective law enforcement frequently depends on the authorities' ability to induce suspects to incriminate themselves by offering confessions or pleading guilty.⁶¹ An overly expansive notion of compulsion in the self-incrimination context would interfere with the state's legitimate interest in influencing individuals to

⁵⁹ Lee Stuesser, "R. v. S.A.B.: Putting Self-Incrimination in Context" Case Comment (2004) 42 Alta. L. Rev. 543.

⁶⁰ For example, *R.J.S.*, *supra*, note 12, at para. 97. See also *White*, *supra*, note 7, at para. 45.

⁶¹ For example, Tim Quigley, *Procedure in Canadian Criminal Law*, 2d ed., loose-leaf (consulted on February 15, 2012) (Toronto: Carswell, 2005), ch. 7 (while the principle against self-incrimination "is deeply entrenched ..., the relatively smooth functioning of our criminal justice system is very dependent upon accused persons ... pleading guilty ... [or] actually incriminating themselves and thereby assisting in the proof of the allegation": at 5).

incriminate themselves. The Supreme Court has recently emphasized the importance of maintaining a balance between defensive safeguard and law enforcement interests in the self-incrimination context. As Charron J. held for a majority of the Court in *R. v. Singh*,⁶² “[p]rovided that the detainee’s rights are adequately protected, including the freedom to choose whether to speak or not, it is in society’s interest that the police attempt to tap this valuable source.”⁶³ The difficulty, of course, lies in locating the line between influence and coercion; between compelling self-incrimination and using “legitimate means of persuasion”⁶⁴ to encourage self-incrimination.

2. The Uncertain Notion of Compulsion

Recognizing that a workable approach to compulsion in the law of self-incrimination can be neither uniform nor overbroad, it remains to be considered what such an approach should look like. The central role played by the idea of compulsion in separating permissible from impermissible self-incrimination arguably grounds two conclusions about how self-incrimination law should be structured. First, compulsion should be the focus. Any analysis of a self-incrimination issue that loses sight of the distinction between compulsion and choice has gone astray. Second, while the approach to compulsion must be contextually sensitive, one might expect to find some coherence to the concept of compulsion across contexts. At the very least, one would hope that problems of compulsory self-incrimination would be treated similarly in contexts that are, in fact, similar. Principled variation across factually dissimilar contexts should be expected; arbitrary variation in factually similar contexts should be avoided.

Measuring the Canadian law of self-incrimination against these standards yields mixed results. At times, self-incrimination law has lost its focus on compulsion. For instance, for two decades after it first considered the provision in *R. v. Dubois*,⁶⁵ the Supreme Court’s jurisprudence on section 13 use immunity descended into a morass of difficult distinctions between permissible and impermissible uses of prior testimony. The Court repeatedly affirmed that section 13 was engaged when the prior

⁶² [2007] S.C.J. No. 48, [2007] 3 S.C.R. 405, at para. 45 (S.C.C.) [hereinafter “*Singh*”].

⁶³ *Id.*, at para. 45.

⁶⁴ *Hebert*, *supra*, note 32, at para. 53.

⁶⁵ *Supra*, note 19.

testimony was used to incriminate the accused, but not when the testimony was used to impeach the accused's credibility.⁶⁶ The distinction between incrimination and impeachment was unsustainable in this context because, realistically, all uses of prior testimony against an accused are incriminating.⁶⁷ In *R. v. Henry*,⁶⁸ the full Court changed course on section 13 and jettisoned the distinction between impeachment and incrimination. *Henry* established that section 13 prevents prior testimony from being used against the accused for any purpose whenever that prior testimony is *compelled*. The case advanced the interpretation of section 13 by refocusing the analysis on the question of compulsion.

With respect to the meaning of compulsion generally, Canadian law on self-incrimination appears disappointingly incoherent. The Supreme Court has propounded a range of divergent views on the limits of compulsion in the self-incrimination context. Consider the following proposition, initially advanced by Lamer C.J.C. in dissent and later adopted by the full Court:

Any 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 violates the principle against self-incrimination. *Coercion, it should be noted, means the denial of free and informed consent.*⁶⁹

On this view, which was stated broadly without any apparent limitation as to context, any deception on the part of state agents would vitiate the suspect's free and informed choice and render any resulting self-incrimination coerced. Such an expansive notion of coercion is impossible to square with much of the Court's jurisprudence on confessions, which holds, for example, that deceiving a suspect into thinking the evidence against him is overwhelming is a legitimate interrogation tactic that normally will not render a resulting statement involuntary.⁷⁰

Within narrower doctrinal contexts, the Court has had varying levels of success in maintaining a consistent definition of compulsion. The law

⁶⁶ *R. v. Kuldip*, [1990] S.C.J. No. 126, [1990] 3 S.C.R. 618 (S.C.C.); *R. v. Noel*, [2002] S.C.J. No. 68, [2002] 3 S.C.R. 433 (S.C.C.).

⁶⁷ For example, Hamish Stewart, "Henry in the Supreme Court of Canada: Reorienting the s. 13 Right against Self-Incrimination" (2006) 34 C.R. (6th) 112, at 115.

⁶⁸ *Henry*, *supra*, note 19.

⁶⁹ *Jones*, *supra*, note 18, at para. 29 (emphasis added), Lamer C.J.C. dissenting, cited with approval in *S.A.B.*, *supra*, note 40, at para. 59, and *R. v. Brown*, [2002] S.C.J. No. 35, [2002] 2 S.C.R. 185, at para. 92 (S.C.C.).

⁷⁰ See, e.g., *R. v. Oickle*, [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3 (S.C.C.) [hereinafter "*Oickle*"] ("the tactic of inflating the reliability of incriminating evidence is a common, and generally unobjectionable one": at para. 2).

has been admirably consistent, for example, on the meaning of compulsion where the law obliges the accused to speak. It is clear that a legal requirement to testify in formal proceedings amounts to *per se* compulsion for the self-incrimination analysis.⁷¹ The Court's conclusion in *White* that the section 7 principle against self-incrimination grounds use immunity for statutorily compelled statements⁷² accords nicely with the idea of compulsion that applies to formal testimony. Whether as a compellable witness in formal proceedings or as the maker of an obligatory statement under provincial law, the Supreme Court has consistently taken the view that an individual under a legal obligation to make a statement is thereby compelled to do so for the purposes of the self-incrimination analysis. By contrast, as we will see, glaring inconsistencies have developed in the Supreme Court's approach to distinguishing compulsion from persuasion where an individual makes a statement to police in the absence of any legal requirement to do so.

IV. SELF-INCRIMINATION IN UNDERCOVER OPERATIONS

The patchwork quality of self-incrimination law can perhaps best be observed in the context of statements to police. The existing rules against compulsory self-incrimination in this context — chiefly the section 7 pre-trial right to silence and the confessions rule — provide meaningful protection, but the limited scope of those rules means that they do not apply to undercover operations outside of detention. Consequently, such undercover operations and the self-incriminating statements that emerge from them are subject to little or no judicial oversight or restraint. The largely unregulated status of statements made to undercover police raises serious concerns about self-incrimination. In this section, the Mr. Big strategy will be offered as an example of a potentially coercive undercover tactic designed to extract confessions.

1. The Gap in the Existing Self-Incrimination Protections

The two principal protections against self-incrimination that apply when individuals make statements to police are the common law confes-

⁷¹ For example, *Henry, supra*, note 19 (“evidence of compellable witnesses should be treated as compelled even if their attendance was not enforced by a subpoena”: at para. 34).

⁷² *White, supra*, note 7 (such a statement is compelled where the individual makes it “on the basis of an honest and reasonably held belief that he or she was required by law to [do so]”: at para. 75).

sions rule and the section 7 pre-trial right to silence.⁷³ As noted above, the confessions rule holds that a statement made by an accused person to a person in authority is inadmissible against the accused unless the Crown proves voluntariness beyond a reasonable doubt.⁷⁴ The law defines a “person in authority” for the purposes of the confessions rule as an individual who the accused reasonably believes is involved in her detention or the proceedings against her.⁷⁵ The confessions rule thus applies to ordinary police interrogations where the accused knows she is dealing with police,⁷⁶ but not to undercover operations.⁷⁷ The question whether a confession was voluntarily obtained is decided by reference to a range of factors that shed light on whether, in all the circumstances, the accused’s will was overborne.⁷⁸ Voluntariness can be vitiated where the authorities make threats or promises, where the circumstances of the interrogation are oppressive, where the suspect lacks an operating mind, or for some combination of these reasons.⁷⁹ In addition, the confessions rule mandates a “distinct inquiry” into whether the tactics used by police would shock the conscience of the community; if they would, the confession should be excluded on that ground alone.⁸⁰

The section 7 pre-trial right to silence was recognized in *R. v. Hebert*,⁸¹ a case involving an undercover operation. The accused had been arrested for robbery and, after consulting with counsel, he told police that he did not wish to make a statement. Police then placed him in a cell with an undercover officer, who engaged the accused in conversation and elicited incriminating statements from him. Justice McLachlin, writing for the majority, found that section 7 protected the accused’s right to silence before trial, which “secures to the detained person the right to make a free and meaningful choice as to whether to speak to the authorities or to remain silent”.⁸² On the facts, the police violated the accused’s right to silence when they “us[ed] a trick to negate his decision

⁷³ The s. 10(b) right to counsel also provides some protection against self-incrimination in this context: see *supra*, notes 20-21 and accompanying text.

⁷⁴ See *supra*, note 23, and accompanying text.

⁷⁵ *Hodgson, supra*, note 23, at paras. 32-34.

⁷⁶ *Oickle, supra*, note 70 (the confessions rule concerns “common law limits on police interrogation”: at para. 1).

⁷⁷ *R. v. Grandinetti*, [2005] S.C.J. No. 3, [2005] 1 S.C.R. 27 (S.C.C.) [hereinafter “*Grandinetti*”] (undercover officer not a “person in authority”: at para. 40).

⁷⁸ *Oickle, supra*, note 70, at para. 57; *Singh, supra*, note 62, at para. 36.

⁷⁹ *Oickle, id.*, at paras. 47-64, 68-71.

⁸⁰ *Id.*, at paras. 65-67.

⁸¹ *Hebert, supra*, note 32.

⁸² *Id.*, at para. 67.

not to speak”.⁸³ The idea that police trickery may negate a suspect’s freedom of choice and violate the right to silence appears to cast doubt on the constitutionality of undercover operations generally. However, the Court in *Hebert* recognized four limitations that curtail the scope of the section 7 pre-trial right to silence: the right does not prevent police questioning an accused after counsel has been retained, it applies only after detention, it does not apply to statements made voluntarily to cellmates, and it applies only where state agents actively elicit the self-incriminating statements.⁸⁴

Broadly speaking, both the confessions rule and the right to silence are concerned with protecting the accused from being compelled to speak to police. These doctrines are plainly inconsistent, however, in terms of the way compulsion is understood. The confessions rule demands a complex balancing of factors to determine whether the accused’s statements were, in all the circumstances, voluntary. Out of deference to society’s interest in effective law enforcement, the courts have been careful to interpret voluntariness in a way that preserves the ability of police to use some tricks and pressure tactics to persuade suspects to confess.⁸⁵ For example, the Supreme Court has recently upheld the voluntariness of statements made after police used each of the following tactics: falsely claiming that the suspect’s DNA has been discovered at the crime scene;⁸⁶ representing a polygraph test that allegedly implicated the suspect as “infallible”;⁸⁷ and refusing to let the suspect see his girlfriend until he “cleaned his slate” by confessing.⁸⁸ The section 7 right to silence as recognized in *Hebert* seems to rely on a very different view of the line between free choice and compulsion. If an undercover officer engaging a detainee in conversation about the crime is enough to negate the detainee’s freedom of choice, then any deception on the part of police might amount to compulsion.⁸⁹

⁸³ *Id.*, at para. 81.

⁸⁴ *Id.*, at paras. 73-76. See also *R. v. Broyles*, [1991] S.C.J. No. 95, [1991] 3 S.C.R. 595 (S.C.C.).

⁸⁵ See e.g., *Oickle*, *supra*, note 70 (“courts must remember that the police may often offer some kind of inducement to the suspect to obtain a confession”: at para. 57); Don Stuart, “*Oickle*: The Supreme Court’s Recipe for Coercive Interrogation” (2001) 36 C.R. (5th) 188.

⁸⁶ *Sinclair*, *supra*, note 21, at para. 116.

⁸⁷ *Oickle*, *supra*, note 70, at para. 94.

⁸⁸ *R. v. Spencer*, [2007] S.C.J. No. 11, [2007] 1 S.C.R. 500, at para. 8 (S.C.C.).

⁸⁹ See Tim Quigley, “Principled Reform of Criminal Procedure” in Don Stuart, R.J. Delisle & Allan Manson, *Towards a Clear and Just Criminal Law: A Criminal Reports Forum* (Toronto: Carswell, 1999) 253 (“it is time to take measures against police lying which, after all, is another means of overcoming a suspect’s choice of whether or not to speak to authorities”: at 292).

The Supreme Court discussed the relationship between the section 7 pre-trial right to silence and the confessions rule in *Singh*.⁹⁰ That case involved a detained murder suspect who was interrogated by individuals he knew were police. In the course of the interrogation, Singh asserted his right to remain silent 18 times before ultimately responding to police questions with some self-incriminating statements. The defence objected to the admissibility of Singh's statements on the basis that they were obtained in violation of his section 7 right to silence, but a slim majority of the Supreme Court rejected this argument. The majority held that, where a detainee is interrogated by known police, the section 7 right to silence is subsumed into the voluntariness inquiry.⁹¹ Since the trial judge had considered all the circumstances and determined that the statements were made voluntarily, the question whether the accused's free will was overborne had already been answered and the section 7 right to silence could provide no further protection.⁹²

The majority judgment in *Singh* provoked a strong dissent and has proven unpopular with commentators because it arguably undermines the right to silence to give no effect to a suspect's repeated assertions of that right.⁹³ This author has elsewhere argued that while it might have been better for the Supreme Court to recognize a stronger right to silence, there are advantages to relying on the multi-dimensional confessions rule as the principal protection for interrogated suspects.⁹⁴ For present purposes, it is important to note that *Singh* has created some incoherence in the idea of compulsion under the section 7 right to silence. Where a detainee who has asserted the right to silence is approached by an undercover "cell plant", as in *Hebert*, this mild form of deception will negate the detainee's choice. On the other hand, where a detainee is interrogated by known police, as in *Singh*, the problem of compulsion will collapse into the voluntary confessions rule, which leaves ample room for police pressure and deceit.

⁹⁰ *Supra*, note 62.

⁹¹ *Id.*, at para. 39.

⁹² *Id.*, at paras. 50-53.

⁹³ See *id.* ("[w]hat is at stake ... is the Court's duty to ensure that a detainee's right to silence will be respected by interrogators once it has been unequivocally asserted": at para. 57), Fish J., dissenting. For commentary, see *e.g.*, Don Stuart, Annotation (2007) 51 C.R. (6th) 201; Dale E. Ives & Christopher Sherrin, "*R. v. Singh* — A Meaningless Right to Silence with Dangerous Consequences" (2007) 51 C.R. (6th) 250.

⁹⁴ Lisa Dufraimont, "The Interrogation Trilogy and the Protections for Interrogated Suspects in Canadian Law" (2011) 54 S.C.L.R. (2d) 309.

Admittedly, the doctrinal limits on the confessions rule and the section 7 pre-trial right to silence were created with a view to managing the problem of compulsion. *Hebert* limited the right to silence to the detention context because, outside detention, the suspect “is not in the control of the state”.⁹⁵ The person in authority requirement exists because the confessions rule is specifically concerned with the ways in which police might abuse their authority when suspects see them as capable of influencing their fate.⁹⁶ One cannot dispute that both detention and interrogation by known police raise special and, arguably, heightened concerns about coercion. However, it hardly follows that coercion issues are not in play when police interact with suspects undercover or outside of the context of detention.⁹⁷ Unfortunately, the interplay between the confessions rule and the section 7 pre-trial right to silence creates an apparent gap in the law: no existing rule seems to protect suspects who are not detained from being compelled to incriminate themselves in interactions with undercover police.

2. The “Mr. Big” Problem

This gap has raised problems in cases involving an increasingly common and controversial undercover police technique known as the “Mr. Big” strategy. Typically, the scenario unfolds as follows.⁹⁸ One or more undercover officers befriend the suspect and introduce him or her into a fictitious criminal organization. The suspect begins to “work” for the organization, often receiving generous compensation for petty tasks like delivering packages or counting money. Promises of large financial payouts in the future are held out to entice suspects to deepen their involvement in the organization. Scenarios are also created to impress on suspects that the organization will not tolerate any dishonesty or disloyalty; beatings or even a killing might be staged to demonstrate the violent

⁹⁵ *Hebert*, *supra*, note 32, at para. 74.

⁹⁶ *Hodgson*, *supra*, note 23 (“it is the fear of reprisal or hope of leniency that persons in authority may hold out and which is associated with their official status that may render a statement involuntary”: at para. 24).

⁹⁷ See Patrick Healy, “The Right to Remain Silent: Value Added, But How Much?” (1990) 77 C.R. (3d) 199, at 200.

⁹⁸ This summary of the technique draws on the more detailed discussions in Timothy E. Moore, Peter Copeland & Regina A. Schuller, “Deceit, Betrayal and the Search for Truth: Legal and Psychological Perspectives on the ‘Mr. Big’ Strategy” (2009) 55 Crim. L.Q. 348, at 351-57, [hereinafter “Moore, Copeland & Schuller”] and Kouri T. Keenan & Joan Brockman, *Mr. Big: Exposing Undercover Operations in Canada* (Black Point, N.S.: Fernwood, 2010), at 19-21 [hereinafter “Keenan & Brockman”].

response one should expect for lying to the leaders of the organization. At some point, the suspect will be introduced to a leader — “Mr. Big” — who will press the suspect to admit involvement in some prior crime. Various reasons might be given for the demand for the confession: for example, that the organization needs information about its members’ illegal activities as “insurance” to guarantee loyalty, or that the organization can use its police connections to derail an ongoing investigation against the suspect. Mr. Big operations are time-consuming and expensive — often they go on for months and involve dozens of officers — so they tend to be used to obtain confessions only in high-priority cases.

Mr. Big operations raise obvious self-incrimination problems. Every one of the policy concerns underlying the principle against self-incrimination is clearly engaged. Concerns about the abuse of official authority appear grave where the state itself lures an individual into a life of crime and makes the individual fearful for his personal safety, all to the end of obtaining a confession to be used in his prosecution. The imbalance of resources between the Crown and the accused is also evident in the Mr. Big cases. Finally, the reliability of a confession given to Mr. Big can be suspect for at least three reasons: suspects may perceive that there is no downside to falsely confessing guilt to individuals who are themselves criminals, suspects may capitulate out of fear of the harm that may come to them if they disobey Mr. Big, and suspects may be too tempted by the social and financial rewards that come with moving up in the organization to risk falling into disfavour by refusing Mr. Big’s demand for a confession.⁹⁹ No empirical research exists — nor could any be ethically conducted — to speak directly to the question whether Mr. Big confessions are diagnostic of actual guilt.¹⁰⁰ But given the coercive tactics involved, a fear of false confessions in this context appears entirely well-founded.

Nevertheless, because of the gap between the confessions rule and the section 7 pre-trial right to silence, it is difficult to find a doctrinal basis in Canadian law to sustain an objection to the admissibility of a confession arising from the Mr. Big scenario.¹⁰¹ Various approaches have

⁹⁹ See especially Moore, Copeland & Schuller, *id.*, at 378-83. See also Steven M. Smith, Veronica Stinson & Marc W. Patry, “Using the ‘Mr. Big’ Technique to Elicit Confessions: Successful Innovation or Dangerous Development in the Canadian Legal System?” (2009) 15 *Psychol. Pub. Pol’y & L.* 168 (“the motivation to confess is overwhelming and ... the drawbacks of doing so are nearly non-existent”: at 181).

¹⁰⁰ Moore, Copeland & Schuller, *id.*, at 392.

¹⁰¹ See especially the discussion of these doctrines in *R. v. Osmar*, [2007] O.J. No. 244, 217 C.C.C. (3d) 174 (Ont. C.A.) [hereinafter “*Osmar*”].

been suggested, including excluding Mr. Big confessions on reliability grounds under the principled approach to hearsay and staying proceedings where the Mr. Big operation amounts to an abuse of process.¹⁰² Overwhelmingly, however, courts have rejected these arguments, admitted such confessions and left any reliability issues to be considered by the trier of fact.¹⁰³

A few courts have recently suggested that confessions arising from more extreme versions of the Mr. Big strategy might be excluded because the police conduct could be considered shocking to the conscience of the community.¹⁰⁴ The community shock test was initially articulated by Lamer J. in his concurring judgment in the pre-Charter case of *R. v. Rothman*,¹⁰⁵ and was later adopted as a discrete inquiry linked to voluntariness in *R. v. Oickle*.¹⁰⁶ Community shock is a high threshold and few tactics meet the test; moreover, the existing cases support the view that, generally, the test will not be met in the Mr. Big context.¹⁰⁷ Still, building on the community shock test constitutes, at present, one promising avenue for developing some existing legal rule into a check on the Mr. Big strategy. On the other hand, resort to a doctrine that was developed pre-Charter and has barely been used since arguably bespeaks a level of desperation in the courts' effort to find some doctrinal basis on which challenges to the admissibility of Mr. Big confessions might conceivably proceed.

The struggle to find a doctrine to place some restraint on Mr. Big operations raises a fundamental question. What good is a constitutional principle against self-incrimination that does not apply where the state exploits its overwhelming resources to wage a relentless and intrusive

¹⁰² Attempts to challenge the admissibility of Mr. Big confessions using the principled approach to hearsay have generally been unsuccessful because, as a species of admissions, the prevailing view holds that confessions are not subject to the necessity and reliability analysis: Moore, Copeland & Schuller, *supra*, note 98, at 360-67. In one Mr. Big case, the Supreme Court held that "admissibility of such statements is filtered through exclusionary doctrines like abuse of process": *Grandinetti*, *supra*, note 77, at para. 36. However, a stay of proceedings for abuse of process under s. 7 of the Charter is considered a drastic remedy that should only be ordered in the "clearest of cases": *R. v. Regan*, [2002] S.C.J. No. 14, [2002] 1 S.C.R. 297, at para. 53 (S.C.C.). Perhaps it is unsurprising that abuse of process doctrine has not frequently been taken up in the Mr. Big cases: see Keenan & Brockman, *supra*, note 98, at 69-75.

¹⁰³ Moore, Copeland & Schuller, *id.*, at 357.

¹⁰⁴ See *R. v. Earhart*, [2011] B.C.J. No. 2286, 90 C.R. (6th) 238, at para. 84 (B.C.C.A.); *R. v. Bonisteel*, [2008] B.C.J. No. 1705, 236 C.C.C. (3d) 170, at para. 93 (B.C.C.A.); *Osmar*, *supra*, note 101, at para. 48.

¹⁰⁵ [1981] S.C.J. No. 55, [1981] 1 S.C.R. 640 (S.C.C.).

¹⁰⁶ See *supra*, note 80, and accompanying text.

¹⁰⁷ Moore, Copeland & Schuller, *supra*, note 98, at 367-68.

campaign of deception to manipulate, bribe and terrify an individual into complying with its demands for a confession to a serious crime? Arguably there are good reasons to confine the confessions rule to statements made to persons in authority. The rich and complex voluntariness analysis has clearly been developed with the ordinary police interrogation context in mind. There may also be good reasons to limit the section 7 pre-trial right to silence in the form recognized in *Hebert* to the specific context of detention. Wide application of the *Hebert* rule, with its stringent notion of free choice and intolerance for police deception, would outlaw most undercover operations. But if no existing legal rule applies to Mr. Big operations, surely the overarching principle against self-incrimination demands that some new safeguard be created. After all, filling gaps between specific rules is what residual constitutional principles are for.

In *R. v. Hart*,¹⁰⁸ an important judgment released as this volume went to press, the Supreme Court of Newfoundland and Labrador (Court of Appeal) relied on the principle against self-incrimination to quash the convictions of a man who had been convicted of murdering his two young daughters. The convictions were based almost entirely on the statements of the accused to undercover officers in a Mr. Big operation. A majority of the Court found that undercover operatives used psychological coercion to extract a confession from the poor and socially isolated accused by offering him friends, money, a lavish lifestyle and a sense of community over a period of months. Writing for the majority, Green C.J. reasoned that “if forced to choose between telling the truth and keeping his friends, lifestyle, and income ... there was a strong likelihood that, even if he was innocent, he would lie”.¹⁰⁹ Chief Justice Green held that *Hebert*’s limitation of the section 7 right to silence to the detention context should be loosened so that the right to silence would apply where, as here, the suspect was otherwise under the control of the state.¹¹⁰ However, the majority ruled that, even if the section 7 right to silence could not be extended in that way, the accused’s section 7 rights were breached on the basis of the “broader principle against self-incrimination”.¹¹¹ Should this case proceed to the Supreme Court of Canada, one might hope that further light may be shed on the application of the principle in the context of undercover operations.

¹⁰⁸ *R. v. Hart*, [2012] N.J. No. 303, 2012 NLCA 61 (N.L.C.A.).

¹⁰⁹ *Id.*, at para. 207.

¹¹⁰ *Id.*, at para. 199.

¹¹¹ *Id.*, at para. 246.

A case could be made for prohibiting Mr. Big tactics entirely, but the more modest aim of the present analysis is to show that such operations should receive some judicial oversight. The principle against self-incrimination minimally demands that confessions arising from Mr. Big operations be subjected to an individualized analysis of whether, in all the circumstances, the police crossed the line from persuasion to coercion. Ultimately, the Mr. Big problem reveals the extent to which, notwithstanding the Supreme Court's recognition of the principle against self-incrimination under the Charter, self-incrimination law in Canada continues to be understood as a patchwork assortment of discrete procedural protections. Overcoming this tendency might move the law closer to solving the Mr. Big conundrum and vindicating the residual protection promised by the constitutional principle against self-incrimination.

V. CONCLUSION

The Charter effected a revolution in Canadian self-incrimination law, but that revolution remains contested and incomplete. One can hardly overstate the significance of the emergence of the overarching principle against self-incrimination under section 7 and the specific rules that spring from that principle. Nevertheless, as this analysis has shown, the Supreme Court's commitment to the principle has sometimes appeared to waver and its analysis of what constitutes compulsion has been variable. Consequently, the existing protections against compulsory self-incrimination retain the haphazard quality that characterized self-incrimination law in the pre-Charter era. For instance, the doctrinal gap between the confessions rule and the section 7 pre-trial right to silence has created a legal situation which, practically speaking, *permits* the state to compel suspects to incriminate themselves in undercover operations. If the overarching principle against self-incrimination remains a vital part of our Charter jurisprudence, this state of affairs should not be allowed to stand. Time will tell if the patchwork principle against self-incrimination can be made whole.