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## Citation Information

Coughlan, Steve. "Threading Together Abuse of Process and Exclusion of Evidence: How it Became Possible to Rebuke Mr. Big." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 71. (2015).  
<http://digitalcommons.osgoode.yorku.ca/sclr/vol71/iss1/16>

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# Threading Together Abuse of Process and Exclusion of Evidence: How it Became Possible to Rebuke Mr. Big

Steve Coughlan\*

## I. INTRODUCTION

It is difficult to say something new about Mr. Big.

I do not say that only by way of apology for any lack of originality in this piece: rather, it is an aspect of my thesis. We have known from the very start what it is that is objectionable about the Mr. Big investigative technique. Only relatively recently, however, have we developed the legal tools to allow us to engage appropriately with that concern as a legal issue. As a result, *Hart*<sup>1</sup> and *Mack*<sup>2</sup> are not the last word on Mr. Big: rather they are the start of a discussion which is finally beginning to talk about the issue in the proper way.<sup>3</sup>

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<sup>1</sup> *R. v. Hart*, [2014] S.C.J. No. 52, [2014] 2 S.C.R. 544, 2014 SCC 52 (S.C.C.) [hereinafter "*Hart*"].

<sup>2</sup> *R. v. Mack*, [2014] S.C.J. No. 58, [2014] 3 S.C.R. 3, 2014 SCC 58 (S.C.C.) [hereinafter "*Mack*"].

<sup>3</sup> I do not mean by this to suggest any disrespect to the many people who have written about Mr. Big prior to the Supreme Court decision in *Hart*, such as Nikos Harris, "The Less-Travelled Exclusionary Path: Sections 7 and 24(1) of the *Charter* and *R. v. Hart*" (2014) 7 C.R. (7th) 287, Amar Khoday, "Scrutinizing Mr. Big: Police Trickery, the Confessions Rule and the Need to Regulate Extra-Custodial Undercover Interrogations" (2013) 60 Crim. L.Q. 277, Lisa Dufraimont, "*R. v. Hart*: Building a Screen for Mr. Big Confessions" (2013) 97 C.R. (6th) 104 or Timothy E. Moore, Peter Copeland & Regina A. Schuller, "Deceit, Betrayal and the Search for Truth: Legal and Psychological Perspectives on the 'Mr. Big' Strategy" (2009-10) 55 Crim. L.Q. 348 [hereinafter "*Moore*"]. These helpful and insightful analyses at a time when courts seemed generally uncritical of the technique have no doubt contributed to moving us to the position we are now in. For a thorough

*Hart* created a “two-pronged approach” to evaluating Mr. Big investigations that:

(1) recognizes a new common law rule of evidence, and (2) relies on a more robust conception of the doctrine of abuse of process to deal with the problem of police misconduct.<sup>4</sup>

The first prong is forward-looking: it is meant to look at the quality of evidence which will be led at trial, in order to ensure that it is reliable and will not be unduly prejudicial. The second prong, on the other hand, is backward-looking and focuses on the behaviour of the police in eliciting the evidence.<sup>5</sup> My thesis in this article is that the second prong, the backward-looking remedy which addresses police misconduct, is by far the more important approach, that we have only relatively recently reached a position to pursue that line of argument seriously, and that it is the approach that future cases should focus on.

To pursue this thesis, I will discuss three main threads in Canadian law: the nature of Mr. Big and the factors which lead to concerns; the history of cases discussing abuse of process; and the history of cases discussing exclusion of evidence. I will argue from that discussion that it is only in the past few years that our approach to the latter two has become sufficiently developed to allow us to come to grips with the real issue, the objectionable nature of the police conduct.

My argument proceeds on the basis that it is important to be alert to the “trends” in law, and to recognize that legal argument is as much a sociological phenomenon as anything else. I suggest in this article that there are trends in the way that both abuse of process and exclusion of evidence have been regarded which have made the time ripe for discussion of Mr. Big in a way that has not been true in the past.<sup>6</sup> I will argue in my final section that, as a result of those trends, it is no coincidence *Hart* did not come along sooner than it did, but by that same token we should not conclude that the discussion is now over. Rather, attention should focus on how to develop the backward-looking abuse of process prong of the Court’s approach.

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review of the findings in *Hart* and *Mack* themselves, see Lisa Dufrainmont, “*Hart* and *Mack*: New Restraints on Mr. Big and A New Approach to Unreliable Prosecution Evidence” in this volume.

<sup>4</sup> *Hart*, *supra*, note 1, at para. 84.

<sup>5</sup> *Id.*, at para. 120.

<sup>6</sup> I am indebted to my former colleague Philip Girard’s analogous approach to considering the acceptance of same-sex marriage in Canada for causing me to think about the issue in this way.

## II. THE NATURE OF MR. BIG

The Supreme Court of Canada notes in *Hart* that the earliest known use of the Mr. Big technique dates to the 1901 decision in *R. v. Todd*.<sup>7</sup> Interestingly, the discussion in that case generally presages the dilemma that has confronted critics of the technique to this day.

Other than the slight wrinkle that private agents were employed by the police to conduct the sting, the approach used in *Todd* is exactly what we now think of as the Mr. Big technique:

It appears from the statement of the case that Yeddeau and McBean, neither of whom was a peace officer, had been specially employed by the chief of police as detectives to see if they could procure evidence which would connect the prisoner with the murder of Gordon, and that they pretended to the prisoner that they belonged to a gang of organized criminals, from the operations of which large profits were likely to be made, and they offered to make him a member of the gang if he would satisfy them that he had committed some serious crime; and it was by the influence of this inducement that the prisoner confessed to Yeddeau that he had killed Gordon.<sup>8</sup>

The issue before the Manitoba Court of Appeal was whether the confession should be excluded: they decided that it was admissible. The decision held:

The means employed in this case to obtain the confession were contemptible; but it does not seem to be a sufficient ground for excluding the evidence.<sup>9</sup>

That, in a nutshell, is the debate which has circled around Mr. Big for more than a century afterward: something seems fundamentally objectionable about it, but no legal doctrine has matched up with that intuitive sense. The technique does not, strictly, violate any of our *rules*, and in the absence of a rule violation we have not had a sufficient ability to object on a policy basis.

It is, of course, no coincidence that no legal doctrine has been responsive to Mr. Big. As Green C.J.N.L. observed in *Hart* “the Mr. Big strategy has been uniquely structured to avoid the barriers to admissibility

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<sup>7</sup> *R. v. Todd*, [1901] M.J. No. 1, 4 C.C.C. 514 (Man. C.A.) [hereinafter “*Todd*”].

<sup>8</sup> *Id.*, at para. 15.

<sup>9</sup> *Id.*, at para. 8.

set up by the traditional rules”.<sup>10</sup> It is, I suggest, precisely because the technique manages to violate the spirit of so many rules without ever quite violating the letter of them that it raises many people’s hackles.<sup>11</sup>

Let us look at how our various traditional rules fail to grasp hold of the technique. For example, a confession has to be made without fear of prejudice or hope of advantage; however, it is exactly the hope of advantage (and sometimes the fear of prejudice) which motivates a target’s statement in a Mr. Big sting. An offer of a *quid pro quo* is often seen as the thing making a confession suspect, and precisely such an offer exists in Mr. Big. However, even though the target is in fact speaking to a person in authority, he or she does not know that: as a result the statement is not technically a “confession” and the rule excluding it does not apply.<sup>12</sup>

The statement is hearsay and thus inadmissible unless it falls within an exception. Mr. Big statements are generally admitted as party admissions, based on the theory that a party cannot plausibly “complain of the unreliability of his or her own statements”.<sup>13</sup> However true that assumption might be in general, Mr. Big creates unusual circumstances in which there are obvious reasons to doubt the reliability of the statement: that is, the *rationale* for the rule does not apply, but the rule applies nonetheless.

A further hearsay exception sometimes raised is the “statement against interest” exception, which admits statements made by a person against his or her pecuniary or penal interests. It is seen as acceptable to let in statements to the effect of “I committed that crime”, because normally no one would say that if it were not true. Of course Mr. Big creates abnormal circumstances in which making such a statement becomes *in* the accused’s interests, but based on the general rationale the exception applies.<sup>14</sup>

Bad character evidence about the accused cannot normally be introduced by the Crown. However, it is routinely admitted in Mr. Big cases in order to show the circumstances leading to the accused’s confession. The accused, in fact, is required to stress this evidence to the

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<sup>10</sup> *R. v. Hart*, [2012] N.J. No. 303, 327 Nfld. & P.E.I.R. 178, 2012 NLCA 61, at para. 154 (N.L.C.A.).

<sup>11</sup> As my student Paulina Munroe observed in a class, if an investigative technique can make people think “I feel bad about the way the police treated that murderer”, there might be something wrong with it.

<sup>12</sup> *R. v. Grandinetti*, [2005] S.C.J. No. 3, [2005] 1 S.C.R. 27, 2005 SCC 5 (S.C.C.).

<sup>13</sup> *Hart*, *supra*, note 1, at para. 63, quoting *R. v. Evans*, [1993] S.C.J. No. 115, [1993] 3 S.C.R. 653, at 664 (S.C.C.).

<sup>14</sup> See for example *R. v. Osmar*, [2007] O.J. No. 244, 84 O.R. (3d) 321, 2007 ONCA 50, at paras. 52-53 (Ont. C.A.). This exception applies to non-parties and so would not be directly applicable to the accused, but the spirit behind the exception is violated by the technique.

jury in order to try to explain away the confession: in effect “I only said that because I was a petty felon trying to become a serious career criminal.”<sup>15</sup>

An accused who is in the control of the state has many rights: a right to silence, a right to be free from self-incrimination, and a right to have the state not attempt to elicit information from him or her.<sup>16</sup> Targets of a Mr. Big, on the other hand, are confronted with statements which depart from all of those protections, such as “you’re not gonna fuckin’ get [my help] unless I get the fuckin’ story”.<sup>17</sup> This is seen to be perfectly fine because, although as a matter of fact everyone in the room except the target is a police officer, the target does not *know* that.<sup>18</sup> Perhaps a better way to put that is “the target has been kept deliberately ignorant of the fact which would give him or her rights”.

So that is one major reason that the technique feels objectionable. We create legal rules in order to try to make the system fair. The Mr. Big technique violates the spirit of many such rules, but the evidence is admitted nonetheless.

There are other aspects of the technique which make people uncomfortable. These include the behaviour in which the target is led to engage, the behaviour in which the police operatives engage, and the potential impact of the technique on the target and others.

Let us consider the behaviour in which the target is led to engage. It is common to say that the Mr. Big technique causes the target to become involved in “simulated” crimes. This description sanitizes the behaviour of the police: the accused is led to commit *actual* crimes. *Hart* is typical: among other things he delivered what he believed to be stolen credit cards.<sup>19</sup> In fact, the contents of what he was delivering were not contraband, and so he could not be guilty of the completed offence. However, he would unambiguously be guilty of *attempting* to commit that offence.

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<sup>15</sup> See *Hart*, *supra*, note 1, at para. 76, pointing to this problem.

<sup>16</sup> See for example *R. v. Hebert*, [1990] S.C.J. No. 64, [1990] 2 S.C.R. 151 (S.C.C.) and *R. v. Broyles*, [1991] S.C.J. No. 95, [1991] 3 S.C.R. 595 (S.C.C.).

<sup>17</sup> *R. v. Rose*, discussed in Kouri Thomas Keenan, “Mr. Big”: *Recruiting for the Criminal Underworld: An Examination of Undercover Police Investigations in Canada* (Burnaby, B.C.: Simon Fraser University, 2009), at 6 [hereinafter “Keenan”].

<sup>18</sup> *Osmar*, *supra*, note 14. See also the discussion in Lisa Dufraimont, “The Patchwork Principle against Self-Incrimination under the Charter” in Benjamin L. Berger & James Stribopoulos, eds., *Unsettled Legacy: Thirty Years of Criminal Justice under the Charter* (Markham, ON: LexisNexis Canada, 2012).

<sup>19</sup> *Hart*, *supra*, note 1, at para. 26.

His situation — and that of virtually all targets of Mr. Big — is identical to that in *Dynar*, where the accused tried to launder money which was not in fact the proceeds of crime.<sup>20</sup> *Dynar* argued that he could not be guilty of an attempt to launder money, since in the circumstances it was “legally impossible” to do so. The Supreme Court rejected that argument: because *Dynar* believed what he was laundering to be the proceeds of crime, he was guilty of the attempt. Exactly the same would be true of Hart’s transporting of stolen credit cards, O.N.E.’s smuggling of cigarettes and selling of drugs, Mack’s laundering of money, Mentuck’s delivery of parcels, Bonisteel’s lookout work, Fliss’s assistance setting up a grow-op and smuggling of firearms, and so on: each would be guilty of attempt.

Of course, no target of Mr. Big is ever *charged* with any of these offences: the only point is to lure the target in to the supposed criminal organization. Further, no accused could be successfully prosecuted for any of these offences: the circumstances constitute entrapment, in that the police will have actually induced the commission of the offence.<sup>21</sup> But the fact that the accused would have an entrapment defence does not make things better: it makes things worse!

Consider why we have an entrapment defence. As the Court said in creating it:

It is a deeply ingrained value in our democratic system that the ends do not justify the means. In particular, evidence or convictions may, at times, be obtained at too high a price.<sup>22</sup>

Similarly:

... there are inherent limits on the power of the state to manipulate people and events for the purpose of attaining the specific objective of obtaining convictions. These reasons and others support the view that there is a societal interest in limiting the use of entrapment techniques by the state.<sup>23</sup>

Those interests do not disappear simply because the accused is charged with an offence other than that he was induced to commit. That is why entrapment leads, not to an acquittal, but to a stay: because the concerns have nothing to do with the accused’s guilt for the underlying offence, and everything to do with the objectionable behaviour of the police.

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<sup>20</sup> *R. v. Dynar*, [1997] S.C.J. No. 64, [1997] 2 S.C.R. 462 (S.C.C.).

<sup>21</sup> See *R. v. Mack*, [1988] S.C.J. No. 91, [1988] 2 S.C.R. 903 (S.C.C.).

<sup>22</sup> *Id.*, at para. 71.

<sup>23</sup> *Id.*, at para. 76.

So causing the target to commit crimes is troublesome. Equally troublesome is the behaviour in which the police operatives themselves sometimes engage. It has included quite serious intrusions into the personal lives of targets: for example by attempting to have a target break up with his fiancée when she seemed to be an obstacle to his becoming involved in the criminal organization.<sup>24</sup> It involves exploiting the loyalties of a target, for example by suggesting that the handler (the target's close friend, as far as he or she knows) will suffer consequences if the target does not confess.<sup>25</sup> It involves making use of drug treatment facilities as a means of introducing the undercover operative to the target, thus undermining the amount of confidence which can be placed in such organizations by those who rely on them.<sup>26</sup> It involves making alcohol available to targets who are recovering alcoholics.<sup>27</sup> All of this goes far beyond the sort of impact on a target's life that other investigative techniques, including other undercover techniques, are likely to have. As Moore aptly put it:

Mr. Big operatives purposefully infiltrate the suspect's life. If the target has no friends, they provide some. If he has low self-esteem, they bolster his feelings of self worth. If he has no money, they supply it. If he has no long-term prospects, they hold out the expectation of steady work. If he is an alcoholic, they give him liquor. If he is naive and uncomfortable around women, an appreciative female friend is made available.<sup>28</sup>

Finally, it should come as no surprise that this "Truman Show" approach has an impact that, at least sometimes, gives us pause. Perhaps the most striking impact is observable in *Hart*, in a fact not mentioned in the Supreme Court decision: that an *amicus curiae* had to be appointed for Hart at his initial appeal because he did not trust his legal counsel. Specifically, Hart suspected that lawyers appointed for him were participants in a further sting.<sup>29</sup> In most people, we would see this as a kind of paranoia: in someone whose closest friends and entire social circle have turned out never to have been anything but a fraud, it is understandable caution. How can Hart, an already vulnerable and isolated individual, ever be expected to trust anyone for the rest of his life?

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<sup>24</sup> *R. v. Proulx*, [2005] B.C.J. No. 272, 29 C.R. (6th) 136 (B.C.S.C.).

<sup>25</sup> *R. v. Mentuck*, [2001] S.C.J. No. 73, [2001] 3 S.C.R. 442, 2001 SCC 76 (S.C.C.).

<sup>26</sup> *Osmar*, *supra*, note 14.

<sup>27</sup> *R. v. Cretney*, [1999] B.C.J. No. 2875 (B.C.S.C.).

<sup>28</sup> Moore, *supra*, note 3, at 381.

<sup>29</sup> *R. v. Hart*, [2009] N.J. No. 35, 242 C.C.C. (3d) 31 (N.L.C.A.).

### III. THE HISTORY OF ABUSE OF PROCESS

The history of the doctrine of abuse of process is a complex one, with significant developments outside of *Hart* in just the past couple of years. I will paint that history with broad brushstrokes: my goal, as stated, is to argue that there have been “trends” in the way that doctrine has been regarded, not to engage in a close analysis of every major case.

I want to point to two lines of development. First, I will argue that the law has gone from providing *no* space for an abuse of process doctrine, to envisioning a fundamentally forward-looking remedy, and then eventually to having the real possibility of a backward-looking remedy. Second, I will point to an additional trend: that “abuse of process” and “stay of proceedings” were at first twinned questions, but have recently become separated. As a result, other remedies can now plausibly be considered after an abuse of process claim. This matters, since the issue in *Mr. Big* cases normally concerns only the admissibility of the confession, not an application for a stay.

#### 1. Creating a Backward-looking Abuse of Process Doctrine

I began this article by noting the objection to *Mr. Big* over a century ago in *Todd*: that the means employed were “contemptible” but that nothing could be done about that. It was a long time after that before an abuse of process doctrine existed in Commonwealth countries: the Court noted in its 1995 decision in *O'Connor* that the doctrine arrived in Canada in 1985 in *Jewitt*,<sup>30</sup> and quoted that decision:

I would adopt the conclusion of the Ontario Court of Appeal in *R. v. Young, supra*, and affirm that ‘*there is a residual discretion in a trial court judge to stay proceedings where compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community’s sense of fair play and decency and to prevent the abuse of a court’s process through oppressive and vexatious proceedings*’. I would also adopt the caveat added by the Court in *Young* that *this is a power which can be exercised only in the ‘clearest of cases’*.<sup>31</sup>

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<sup>30</sup> *R. v. Jewitt*, [1985] S.C.J. No. 53, [1985] 2 S.C.R. 128 (S.C.C.) [hereinafter “*Jewitt*”].

<sup>31</sup> *R. v. O'Connor*, [1995] S.C.J. No. 98, [1995] 4 S.C.R. 411, at para. 59 (S.C.C.) [hereinafter “*O'Connor*”] (emphasis added).

This passage is relevant to the first line of development I want to note, in that it takes the law from having *no* abuse of process doctrine to having such a doctrine. However, that doctrine was, when formulated in *Jewitt*, an essentially forward-looking one. As the Court explained seven years after *O'Connor*, in *Regan*:

Regardless of whether the abuse causes prejudice to the accused, because of an unfair trial, or to the integrity of the justice system, a stay of proceedings will only be appropriate when two criteria are met:

- (1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and
- (2) no other remedy is reasonably capable of removing that prejudice.  
[*O'Connor*, at para. 75]

The Court's judgment in *Tobiass*, at para. 91, emphasized that the first criterion is critically important. *It reflects the fact that a stay of proceedings is a prospective rather than a retroactive remedy. A stay of proceedings does not merely redress a past wrong. It aims to prevent the perpetuation of a wrong that, if left alone, will continue to trouble the parties and the community as a whole, in the future.*<sup>32</sup>

The Court added “[t]he mere fact that the state has treated an individual shabbily in the past is not enough to warrant a stay of proceedings.”<sup>33</sup> That is, the doctrine looked forward to see whether there will be mistreatment in the future: mistreatment in the past was of essentially no relevance. Obviously such an approach severely limited the ability of abuse of process as a doctrine to respond to Mr. Big, where the issue (other than concerns about the reliability of the statement made) is the past treatment of the accused. As the Court noted in *Hart*:

... the doctrine of abuse of process — intended to protect against abusive state conduct — appears to be somewhat of a paper tiger. To date, it has never operated to exclude a Mr. Big confession, nor has it ever led to the stay of charges arising from one of these operations.<sup>34</sup>

However, despite the stated prospectivity of the abuse of process doctrine, trial judges were inexorably drawn to apply it retrospectively.

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<sup>32</sup> *R. v. Regan*, [2002] S.C.J. No. 14, [2002] 1 S.C.R. 297, 2002 SCC 12, at para. 54 (S.C.C.) [hereinafter “*Regan*”] (emphasis added).

<sup>33</sup> *Id.*, at para. 55, quoting *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] S.C.J. No. 82, [1997] 3 S.C.R. 391, at para. 91 [hereinafter “*Tobiass*”].

<sup>34</sup> *Hart*, *supra*, note 1, at para. 79.

In case after case, where excessive force was used in arrests, or humiliating strip searches were undertaken, or accused were detained gratuitously, trial judges found an abuse of process.<sup>35</sup> As one trial judge noted:

... In the present case the applicant complains about excessive force used by the police during his arrest. This is not a case where one could realistically say that any prejudice suffered by the applicant from that conduct would affect trial fairness and be ‘manifested, perpetuated or aggravated through the conduct of the trial.’ In his well-known text, *Constitutional Remedies in Canada*, Professor Kent Roach writes, at s.9.119, that in view of the decision in *Regan* and its predecessors, ‘it is difficult to imagine non-continuing misconduct that will warrant a stay of proceedings in order to protect judicial integrity’.

Yet, that is not how trial courts are acting. ...<sup>36</sup>

This disconnect issue was addressed by the Supreme Court in 2012 in *Bellusci*.<sup>37</sup> That case falls squarely within the pattern of trial judgments that departed from the prospective approach: a guard “grievously assaulted” a prisoner while transporting him to a correctional facility. The prisoner was charged with various offences, but the trial judge entered a stay because of the guard’s behaviour. The Quebec Court of Appeal overturned that decision, on the basis that the prejudice would not be perpetuated or aggravated by holding a trial: that is, they held that the trial judge had granted a retrospective remedy when the test was a prospective one.

The Supreme Court reversed that decision and restored the stay issued by the trial judge. They concluded that the trial judge had considered the proper factors, had made no reviewable error, and therefore was entitled to deference in the decision he had made about the appropriate remedy. Not only this trial judge, it seems, but many of those trial judges who thought they were acting contrary to the approach dictated by the Supreme Court turned out nonetheless to be in the right!

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<sup>35</sup> See for example *R. v. Fryingpan*, [2005] A.J. No. 102, 373 A.R. 187, 2005 ABPC 28 (Alta. Prov. Ct.); *R. v. Cheddie*, [2006] O.J. No. 1585 (Ont. S.C.J.); *R. v. Merrick*, [2007] O.J. No. 2266, 2007 ONCJ 260 (Ont. C.J.); *R. v. Walcott*, [2008] O.J. No. 1050, 57 C.R. (6th) 223 (Ont. S.C.J.) [hereinafter “*Walcott*”]; *R. v. Knight*, [2010] O.J. No. 3817, 79 C.R. (6th) 39 (Ont. C.J.); *R. v. De Lima*, [2010] O.J. No. 2673, 79 C.R. (6th) 82 (Ont. C.J.); and *R. v. Bonds*, [2010] O.J. No. 5034, 79 C.R. (6th) 119 (Ont. C.J.). See also Tim Quigley, “Stays of Proceedings Due to Police Misconduct” (2011) 79 C.R. (6th) 124.

<sup>36</sup> *Walcott*, *id.*, at paras. 123-124.

<sup>37</sup> *R. v. Bellusci*, [2012] S.C.J. No. 44, [2012] 2 S.C.R. 509, 2012 SCC 44 (S.C.C.) [hereinafter “*Bellusci*”].

Strictly there was no change in the underlying law. *Bellusci* quotes the 1997 decision in *Tobiass*:

As the Court explained in *Tobiass*, ‘if a past abuse were serious enough, then public confidence in the administration of justice could be so undermined that the mere act of carrying forward in the light of it would constitute a new and ongoing abuse sufficient to warrant a stay of proceedings’ (para. 96).<sup>38</sup>

The point is not a change in the law so much as it is a change in the *attitude* to the law. That is, it had always been acknowledged that there was a “residual category” in which a retrospective remedy was theoretically available, but it had seemed so narrow as to be negligible.<sup>39</sup> *Bellusci*, decided only two years before *Hart*, shows it to have some real teeth.

## 2. Creating a Range of Remedies for an Abuse of Process

For much of the time that we have had an abuse of process doctrine it has not, analytically, been very separate from the question of a stay of proceedings. This need not have been the case, but as a matter of fact “was there an abuse of process” and “should a stay of proceedings be issued” were treated as the same question. The clearest evidence that this was the approach adopted by courts at the time is the academic commentary criticizing it. Lee Steusser argued that judges ought to be considering remedies other than a stay for an abuse of process.<sup>40</sup> David Paciocco argued that two separate steps should be kept distinct: was there an abuse of process, and if so what would be the best remedy.<sup>41</sup>

This conflation of the two questions has real consequences. A stay of proceedings is the big gun among remedies, and can only be granted in the “clearest of cases”.<sup>42</sup> But if abuse of process and stay of proceedings are treated as the same question, then of course that amounts to saying

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<sup>38</sup> *Id.*, at para. 25.

<sup>39</sup> Kent Roach, “The Evolving Test for Stays of Proceedings” (1998) 40 *Crim. L.Q.* 400 [hereinafter “Roach”], for example, criticized the 1997 *Tobiass* decision, noting at p. 400 that under it: The judicial integrity rationale is only a “residual category” that will rarely, if ever, be appropriate as a response to egregious but non-continuing misconduct.

<sup>40</sup> Lee Steusser, “Abuse of Process: The Need to Reconsider” (1994) 29 *C.R.* (4th) 92.

<sup>41</sup> David M. Paciocco, “The Stay of Proceedings as a Remedy in Criminal Cases: Abusing the Abuse of Process Concept” (1991) 15 *Crim. L.J.* 315 [hereinafter “Paciocco”]. See also Roach, *supra*, note 39, noting “Before *O’Connor*, a stay of proceedings was considered the only appropriate remedy for an abuse of process”, citing Graeme G. Mitchell, “Abuse of Process and the Crown’s Disclosure Obligation” (1996) 44 *C.R.* (4th) 130, at 136.

<sup>42</sup> See *O’Connor*, *supra*, note 31, at para. 59, quoted above at note 31.

that there can only be a finding of abuse of process in the clearest of cases. Setting that stringent standard has probably contributed to the result that no Mr. Big operation has ever been found to meet the abuse of process test.

This situation has changed as well, however. First, the Court addressed this point with the 1995 decision in *O'Connor*, holding that the test for a stay was:

- (1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and
- (2) no other remedy is reasonably capable of removing that prejudice.<sup>43</sup>

This formulation, at least nominally, separates the questions of abuse and stay. However, this explicit separation of whether there was an abuse of process and what the remedy for that abuse should be had, as a matter of fact, less impact than it might. It occurs in the context of a discussion about the relationship between abuse of process and section 7 of the Charter,<sup>44</sup> which concludes that, although there are roles for both, in essence the common law test and the constitutional test are the same. Most of the focus in *O'Connor* in fact concerns whether there was a violation of the accused's rights under section 7, rather than looking at the abuse of process question. As a result *O'Connor* was therefore looking at the issue of a section 24(1) "appropriate and just" remedy for a Charter violation: it was not centrally about the availability of a common law stay for abuse of process. In particular it is not looking at the "residual category" of abuse, where it is possible there could be a backward-looking remedy.

Much the same remained true for subsequent cases dealing with stays of proceedings. It is difficult to demonstrate that there has been a tendency not to employ in practice a rule which has been articulated in principle. However, virtually all Supreme Court cases following *O'Connor* were looking at section 7 violations rather than the common law rule,<sup>45</sup> at circumstances with special rules such as entrapment,<sup>46</sup>

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<sup>43</sup> *Id.*, *supra*, note 31, at para. 75. The Court explicitly adopts this position from Paciocco's article, *supra*, note 41.

<sup>44</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

<sup>45</sup> See for example *R. v. Nasogaluak*, [2010] S.C.J. No. 6, [2010] 1 S.C.R. 206, 2010 SCC 6 (S.C.C.); *Charkaoui v. Canada (Citizenship and Immigration)*, [2008] S.C.J. No. 39, [2008] 2 S.C.R.

found that the breach of the accused's rights would not continue to be manifested in the trial and so no remedy was required,<sup>47</sup> or implicitly seem to assume that the only option after finding an abuse of process is to order a stay of proceedings.<sup>48</sup> The situation which is most relevant to this discussion — an abuse of process, considered retrospectively, with alternative remedies to a stay seriously considered — did not arise.<sup>49</sup>

However, the Court's latest pronouncement on abuse of process — at least, latest prior to *Hart* itself — came in *Babos*, decided only a few months prior. In that case, the Court articulated a new three-step test for deciding whether an accused should receive a stay as a remedy for an abuse of process:

- 1) There must be prejudice to the accused's right to a fair trial or the integrity of the justice system that "will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome" (*Regan*, at para. 54);
- 2) There must be no alternative remedy capable of redressing the prejudice; and
- 3) Where there is still uncertainty over whether a stay is warranted after steps 1) and 2), the court is required to balance the interests in favour of granting a stay, such as denouncing misconduct and preserving the integrity of the justice system, against "the interest that society has in having a final decision on the merits" (*id.*, at para. 57).<sup>50</sup>

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326, 2008 SCC 38 (S.C.C.); *R. v. Taillefer*; *R. v. Duguay*, [2003] S.C.J. No. 75, [2003] 3 S.C.R. 307, 2003 SCC 70 (S.C.C.); *R. v. Carosella*, [1997] S.C.J. No. 12, [1997] 1 S.C.R. 80 (S.C.C.); *R. v. La*, [1997] S.C.J. No. 30, [1997] 2 S.C.R. 680 (S.C.C.); *R. v. Wickstead*, [1997] S.C.J. No. 17, [1997] 1 S.C.R. 307 (S.C.C.).

<sup>46</sup> *R. v. Pearson*, [1998] S.C.J. No. 86, [1998] 3 S.C.R. 620 (S.C.C.).

<sup>47</sup> *Tobiass*, *supra*, note 33 and *Regan*, *supra*, note 32.

<sup>48</sup> *R. v. Punko*, [2012] S.C.J. No. 39, [2012] 2 S.C.R. 396, 2012 SCC 39 (S.C.C.); *R. v. Mahalingan*, [2008] S.C.J. No. 64, [2008] 3 S.C.R. 316, 2008 SCC 63 (S.C.C.); *R. v. Pan*; *R. v. Sawyer*, [2001] S.C.J. No. 44, [2001] 2 S.C.R. 344, 2001 SCC 42 (S.C.C.); *United States of America v. Cobb*, [2001] S.C.J. No. 20, [2001] 1 S.C.R. 587, 2001 SCC 19 (S.C.C.); *R. v. Finn*, [1997] S.C.J. No. 9, [1997] 1 S.C.R. 10 (S.C.C.); *R. v. Curragh Inc.*, [1997] S.C.J. No. 33, [1997] 1 S.C.R. 537 (S.C.C.).

<sup>49</sup> The closest situation would be *R. v. Latimer*, [1997] S.C.J. No. 11, [1997] 1 S.C.R. 217, at para. 43 (S.C.C.), where in a one paragraph discussion the Court described the actions of the Crown in engaging in questioning of prospective jurors in advance of the selection process as "a flagrant abuse of process". There was no use whatsoever of the test from *O'Connor*, *supra*, note 31, in reaching this conclusion, and although the remedy actually given was a new trial rather than a stay, there is quite literally *no* explanation as to why that was the remedy given.

<sup>50</sup> *R. v. Babos*, [2014] S.C.J. No. 16, [2014] 1 S.C.R. 309, 2014 SCC 16, at para. 32 (S.C.C.).

The second step of this test, as did the *O'Connor* test, specifically directs judges to consider what alternatives *other than* a stay might serve as a remedy for the prejudice suffered by the accused. In this case, however, the Court is speaking about common law abuse of process rather than a section 7 violation. Further, they are specifically contemplating the possible retrospective claim of abuse which can arise from the residual category. They say:

Where the residual category is invoked, however, and the prejudice complained of is prejudice to the integrity of the justice system, remedies must be directed towards that harm. It must be remembered that for those cases which fall solely within the residual category, the goal is *not* to provide redress to an accused for a wrong that has been done to him or her in the past. Instead, the focus is on whether an alternate remedy short of a stay of proceedings will adequately dissociate the justice system from the impugned state conduct going forward.<sup>51</sup>

Further, in *Babos* the claim for a stay based on alleged police collusion failed precisely because an alternative remedy was available: excluding the evidence in question.

In *Hart* itself the Court relied on *Babos* to note that the abuse of process doctrine “provides trial judges with a wide discretion to issue a remedy — including *the exclusion of evidence* or a stay of proceedings — where doing so is necessary to preserve the integrity of the justice system or the fairness of the trial”.<sup>52</sup>

*Babos* was criticized for making the remedy of a stay of proceedings more difficult to obtain than it already was.<sup>53</sup> That claim is not incorrect, but it is the “glass half-empty” way of looking at the decision. The “glass half-full” approach to *Babos* is to see it as making other remedies, such as the exclusion of evidence which would be looked for as a response to Mr. Big, more readily available.

In sum, then, the past 30 years of case law on abuse of process has seen two significant developments, each reaching fruition in the past couple of years: a greater willingness to use abuse of process as a remedy for past objectionable behaviour by the state, and a greater willingness to

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<sup>51</sup> *Id.*, at para. 39.

<sup>52</sup> *Hart*, *supra*, note 1, at para. 113 (emphasis added).

<sup>53</sup> H.A. Kaiser, “*Babos*: Further Narrowing Access to Stay of Proceedings Where the Integrity of the Judicial Process is Implicated” (2014) 8 C.R. (7th) 59; Tim Quigley, “*Babos*: Balancing Test Unnecessarily Restricts Residual Category for Stay as Abuse of Process” (2014) 8 C.R. (7th) 55.

use the remedy of exclusion of evidence as a response to that objectionable behaviour. As noted in the introduction to this section, both of those developments put us in a better position to more sensibly respond to Mr. Big.

#### IV. THE HISTORY OF EXCLUSION OF EVIDENCE

Once again this is an area I plan to paint with broad brushstrokes. I do not, for example, plan to trace the variations in the approach to excluding evidence under section 24(2) from *Collins*,<sup>54</sup> through *Stillman*,<sup>55</sup> to *Grant*.<sup>56</sup> Instead, the trend I want to demonstrate relates specifically to the exclusion of evidence on grounds *other* than those in section 24(2). My suggestion is that we have gone from essentially no exclusion of evidence, to exclusion only under section 24(2), to a broader recognition of the ability to exclude evidence on other grounds. Since that is exactly what is required as a response to Mr. Big, this trend also better poises us to consider that technique in future.

The starting point for this discussion is the Supreme Court decision in *Wray*.<sup>57</sup> There have long been rules of admissibility for certain types of evidence, such as confessions or hearsay. However, those rules are based on reliability concerns: *Wray* addressed the different question of whether trial judges had a discretion to exclude evidence on the basis that “its admission would be calculated to bring the administration of justice into disrepute”.<sup>58</sup> The particular issue arose from a confession given by the accused which was excluded on the basis that it was not voluntary and therefore not reliable. However, in the course of confessing, the accused had led the police to the place where he had disposed of a weapon. The trial judge had also excluded that evidence, even though no reliability concerns arose with regard to it, but the Supreme Court held that the judge had no such discretion to exclude evidence: “if it is relevant, it is admissible, and the court is not concerned with how it was obtained”.<sup>59</sup>

While rejecting a “bring the administration of justice into disrepute” exclusionary power, the Court did hold out the possibility of a very

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<sup>54</sup> *R. v. Collins*, [1987] S.C.J. No. 15, [1987] 1 S.C.R. 265 (S.C.C.).

<sup>55</sup> *R. v. Stillman*, [1997] S.C.J. No. 34, [1997] 1 S.C.R. 607 (S.C.C.).

<sup>56</sup> *R. v. Grant*, [2009] S.C.J. No. 32, [2009] 2 S.C.R. 353, 2009 SCC 32 (S.C.C.).

<sup>57</sup> *R. v. Wray*, [1970] S.C.J. No. 80, [1971] S.C.R. 272 (S.C.C.) [hereinafter “*Wray*”].

<sup>58</sup> *Id.*, at 287.

<sup>59</sup> *Id.*, at 298. This particular quote is from the decision of Judson J., concurring with the majority opinion of Martland J.

narrow exclusionary power for evidence which would operate “unfairly”. In this regard they held that:

It is only the allowance of evidence gravely prejudicial to the accused, the admissibility of which is tenuous, and whose probative force in relation to the main issue before the court is trifling, which can be said to operate unfairly.<sup>60</sup>

Nominally this creates a very narrow exclusionary power, as opposed to none at all. However, as far as I am able to determine, out of the hundreds of cases which have considered *Wray*, only two found that the circumstances met that stringent test and allowed for the exclusion of evidence.<sup>61</sup> The *Wray* rule was, in its impact, that exclusion of evidence based on disapproval of the underlying state action was a dead letter.

Of course *Wray* only remained the governing authority for 11 years, until the Charter was passed in 1982. Indeed, the Charter specifically reverses *Wray*, by creating in section 24(2) a discretionary exclusion power as a response to state action which could “bring the administration of justice into disrepute”, exactly the power rejected in *Wray*.

That moves us along the path of the justice system’s willingness to exclude, but only to some extent. The first Charter case to consider the issue of exclusion of evidence, the 1985 decision in *Therens*,<sup>62</sup> established a different limitation on that remedy. Section 24 contains, of course, two remedial powers: the exclusion of evidence in section 24(2), but the ability to give any remedy which is “appropriate and just” under section 24(1). It was argued, in early Charter days, that both of these provisions allowed for exclusion. *Therens* found unequivocally that this was *not* the case:

I am satisfied from the words of s. 24 that s. 24(2) was intended to be the sole basis for the exclusion of evidence because of an infringement or a denial of a right or freedom guaranteed by the *Charter*. It is clear, in my opinion, that in making explicit provision for the remedy of exclusion of evidence in s. 24(2), following the general terms of s. 24(1), the framers of the *Charter*, intended that this particular remedy should be governed entirely by the terms of s. 24(2).<sup>63</sup>

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<sup>60</sup> *Id.*, at 293.

<sup>61</sup> The two cases are *R. v. Darwin*, [1973] B.C.J. No. 771, 13 C.C.C. (2d) 432 (B.C.C.A.) and *R. v. MacLean*, [1975] B.C.J. No. 1017, 27 C.C.C. (2d) 57 (B.C. Cty. Ct.).

<sup>62</sup> *R. v. Therens*, [1985] S.C.J. No. 30, [1985] 1 S.C.R. 613 (S.C.C.) [hereinafter “*Therens*”].

<sup>63</sup> *Id.*, at para. 60, *per* Le Dain J., dissenting in the result but speaking for the majority on this point.

No matter how unequivocal *Therens* was on this point, however, 10 years later the Court moved forward another step on the road to greater exclusionary power, and found the ability to exclude evidence under section 24(1) after all. Indeed, in the 1995 *Harrer* decision the Court really took two steps forward at once.<sup>64</sup>

*Harrer* concerned evidence which was gathered without compliance with the accused's Charter rights: however, that gathering occurred outside the country and so the Charter did not apply. Since the evidence had therefore not been "obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter", exclusion of evidence was not available under section 24(2). Nonetheless the Court articulated two separate bases upon which exclusion might be possible nonetheless.

Chief Justice McLachlin held in a concurring opinion:

Evidence not obtained in breach of the *Charter* but the admission of which may undermine the right to a fair trial may be excluded under s. 24(1), which provides for "such remedy as the court considers appropriate and just in the circumstances" for *Charter* breaches.<sup>65</sup>

In contrast, La Forest J. held for the majority that, if exclusion were called for, it would be for other reasons:

I would not take this step under s. 24(2), which is addressed to the rejection of evidence that has been wrongfully obtained. Nor would I rely on s. 24(1), under which a judge of competent jurisdiction has the power to grant such remedy to a person who has suffered a *Charter* breach as the court considers just and appropriate. Rather, I would reject the evidence on the basis of the trial judge's duty, now constitutionalized by the enshrinement of a fair trial in the *Charter*, to exercise properly his or her judicial discretion to exclude evidence that would result in an unfair trial.<sup>66</sup>

*Harrer* recognized *in principle* the possibility of excluding evidence other than through section 24(2), though it did not do so in practice: the evidence was not excluded.

It is arguable *Harrer* recognized three new ways to exclude evidence, since La Forest J.'s rationale can be understood in two ways. On the one hand we might say that, if admitting evidence would violate the Charter,

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<sup>64</sup> *R. v. Harrer*, [1995] S.C.J. No. 81, [1995] 3 S.C.R. 562 (S.C.C.) [hereinafter "*Harrer*"].

<sup>65</sup> *Id.*, at para. 42. Although McLachlin J. (as she then was) said this in a concurring judgment, it has been acted upon by other courts as an accurate statement of the law: see for example *R. v. Jageshur*, [2002] O.J. No. 4108, 8 C.R. (6th) 67 (Ont. C.A.).

<sup>66</sup> *Harrer*, *supra*, note 64, at para. 21.

then a trial judge should avoid violating the Charter at all by not admitting the evidence.<sup>67</sup> Alternatively, we might say that the basis for exclusion is not the Charter at all, but a common law power to exclude evidence.

It was in this latter way that McLachlin C.J.C. primarily described the power in her concurring judgment.<sup>68</sup> In essence that same approach was subsequently adopted by a unanimous Court eight years further on with the 2003 decision in *Buhay*, where it was held that:

... even in the absence of a *Charter* breach, judges have a discretion at common law to exclude evidence obtained in circumstances such that it would result in unfairness if the evidence was admitted at trial, or if the prejudicial effect of admitting the evidence outweighs its probative value.<sup>69</sup>

This is subtly different from *Harrer*. The earlier case could have been read as suggesting that the common law had changed on this point since the passage of the Charter: the latter is saying that, independent of the Charter, the common law has *long* provided a broad-based power for trial judges to exclude evidence. One might be forgiven for seeing that as rewriting history.<sup>70</sup>

The last case to be looked at here is the 2009 decision in *Bjelland*,<sup>71</sup> where the Court returned to the question of exclusion of evidence as a remedy under section 24(1). In this case the issue was not *whether* such a remedy was available under that section: it was *when*. Specifically the issue in that case was whether late disclosure of evidence could result in the exclusion of that evidence.<sup>72</sup> All seven judges hearing the case agreed that in principle such an order was available under section 24(1): they disagreed in a four to three split over the test which should govern granting that remedy, and whether the remedy had been properly granted by the trial judge.

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<sup>67</sup> This is the way in which the situation seems to be understood in *R. v. Terry*, [1996] S.C.J. No. 62, [1996] 2 S.C.R. 207 (S.C.C.), for example.

<sup>68</sup> See *Harrer*, *supra*, note 64, at para. 41. Chief Justice McLachlin supports this conclusion by relying on a broad interpretation of *Kuruma v. The Queen*, [1955] A.C. 197. *Kuruma* was the case argued unsuccessfully in support of exclusion in *Wray*, *supra*, note 57: the Court in that decision had held that the case had to be given an extremely narrow interpretation.

<sup>69</sup> *R. v. Buhay*, [2003] S.C.J. No. 30, [2003] 1 S.C.R. 631, 2003 SCC 30, at para. 40 (S.C.C.).

<sup>70</sup> My skepticism on this point is not idiosyncratic. See for example Michael C. Plaxton, "Who Needs Section 24(2)? Or: Common Law Sleight-of-Hand" (2003) 10 C.R. (6th) 236.

<sup>71</sup> *R. v. Bjelland*, [2009] S.C.J. No. 38, [2009] 2 S.C.R. 651, 2009 SCC 38 (S.C.C.) [hereinafter "*Bjelland*"].

<sup>72</sup> There had been no Charter violation in *obtaining* the evidence in question, and so s. 24(2) was not applicable.

Justice Rothstein for the majority relied, as it happened, on two cases already discussed here: *O'Connor* and *Harrer*. Based on those cases he concluded that evidence could be excluded where its admission would render the trial unfair or “where exclusion is necessary to maintain the integrity of the justice system”.<sup>73</sup> He elaborated that:

The exclusion of evidence may also be an appropriate and just remedy where the Crown has withheld evidence through deliberate misconduct amounting to an abuse of process.<sup>74</sup>

Justice Fish, in dissent, finds the majority’s position too restrictive. Specifically he objects that the majority’s test for exclusion of evidence under section 24(1) relies on “the same exacting standard that until now has been uniquely reserved for a far more drastic remedy — a stay of proceedings”.<sup>75</sup>

The majority’s test in *Bjelland* has been criticized for making exclusion too difficult to obtain under section 24(1).<sup>76</sup> It is undeniably true that *Bjelland* — at least in the context of late disclosure — makes exclusion of evidence under section 24(1) less available than it might have been. Once again, however, we can regard that as the “glass half-full” way to regard the situation. For the particular purposes of this article, *Bjelland* can be seen as bringing about a convergence. Just as the abuse of process case law reached the point of saying “where there is objectionable state conduct, evidence can be excluded”, so the exclusion of evidence case law reached the point of saying “where there is objectionable state conduct, evidence can be excluded”. And that placed us exactly where we needed to be to begin to discuss Mr. Big’s ability to weave a path through all the law’s exclusionary rules, and whether to exclude simply because of that, without the need for another reliability-based rule.

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<sup>73</sup> *Bjelland*, *supra*, note 71, at para. 24.

<sup>74</sup> *Id.*, at para. 27.

<sup>75</sup> *Id.*, at para. 45.

<sup>76</sup> Paul Calarco, “*R. v. Bjelland*: No Effective Remedy for Crown Failure to Disclose” (2009) 67 C.R. (6th) 219. See also David M. Paciocco, “Section 24(2): Lottery or Law — The Appreciable Limits of Purposive Reasoning” (2011) 58 Crim. L.Q. 15, noting that it proceeds under different assumptions about the relevant considerations than does the analysis under s. 24(2).

## V. THE PATH FORWARD: PURSUING THE ABUSE OF PROCESS PRONG

As noted at the start, my thesis is that evaluating Mr. Big by looking at it as possible misconduct is the approach that future cases should focus on. Let me conclude, therefore, by explaining why we should prefer that second prong to the new reliability-based rule.

First, focusing too much on the precise dictates of particular reliability-based rules is what created the problem in the first place. We tend to think of *Hart* as having created a “Mr. Big Rule”.<sup>77</sup> But the presence of a purported ring leader — *i.e.*, the existence of Mr. Big personally — is not essential. Hart incriminated himself before he ever met Mr. Big. If we take the Supreme Court in *Hart* and *Mack* to have formulated a “Mr. Big Rule” then we simply encourage the police to create a new technique which avoids the strictures of that rule, just as Mr. Big avoids the confessions, admissions against interest, party admissions, right to silence, right against self-incrimination and entrapment rules.

*Hart*, to its credit, foresees this danger:

This rule targets Mr. Big operations in their present form. A change in the way the police use undercover operations to elicit confessions may escape the scope of this rule. However, it is not for this Court to anticipate potential developments in policing. To do so would be speculative. Time will tell whether, in a future case, the principles that underlie this rule warrant extending its application to another context.<sup>78</sup>

Further, the actual rule created in *Hart* does not insist on a crime boss as part of the scheme. Rather the rule states:

Where the state recruits an accused into a fictitious criminal organization of its own making and seeks to elicit a confession from him, any confession made by the accused to the state during the operation should be treated as presumptively inadmissible.<sup>79</sup>

However, that does not make the reliability-based rule sufficient to meet future needs.

Consider *R. v. Derbyshire*.<sup>80</sup> The police believed the accused to be an accessory after the fact to a murder committed by her boyfriend, and to

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<sup>77</sup> See for example Lisa Dufraimont, “*R. v. Hart: Standing Up to Mr. Big*” (2014) 12 C.R. (6th) 294.

<sup>78</sup> *Hart*, *supra*, note 1, footnote 5 in the decision.

<sup>79</sup> *Id.*, at para. 85.

<sup>80</sup> *R. v. Derbyshire*, [2014] N.S.J. No. 689, 353 N.S.R. (2d) 40, 2014 NSSC 371 (N.S.S.C.).

have assisted him in concealing the offence and escaping. Two undercover officers claimed to be Montreal-based outlaw motorcycle gang members who were associates of her boyfriend, there to “clean up” the mistake which was adversely affecting their business. The two large men, strangers to the accused and dressed as gang members, approached her aggressively in a dimly-lit underground parking garage and said “Brittany, jump in the fucking car. I need to fucking talk to you.” Within a few minutes, she had given significant information to the two police officers about the murder and her involvement in it, including drawing them two maps: ultimately she drove with them for hours, showing them places where evidence could be found. Nothing in this approach hinges on recruiting the target to join a fictitious criminal organization, but nonetheless it ought to give us pause.<sup>81</sup>

If we focus particularly on whether the undercover officers try to recruit the target, we could continue to miss the point. Any concerns about Mr. Big must lead to a response to *more* than just Mr. Big.

Second, reliability-based rules run into the admissibility/weight problem. I cannot summarize this issue better than David Tanovich has:

Historically, reliability has often been treated as a question going to weight rather than admissibility. So, for example, in *R. v. Hodgson*, Justice Cory observed that ‘the quality, weight or reliability of evidence is a matter for the jury, and that the admission of evidence which may be unreliable does not *per se* render a trial unfair: see, e.g., *R. v. Buric* (1996), 28 O.R. (3d) 737 (C.A.); aff’d [1997] 1 S.C.R. 535, and *R. v. Charemski*, [1998] 1 S.C.R. 679’.<sup>82</sup>

The tendency of courts is to admit the confession and invite the accused to argue to the jury why it should not be given much weight.<sup>83</sup> Particularly given the additional reluctance of courts to refuse to admit evidence about the “false confession” phenomenon,<sup>84</sup> the first prong in *Hart* is not the most promising for the future.

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<sup>81</sup> The trial judge found an abuse of process analogous to the possibility outlined in *Hart*, *supra*, note 1.

<sup>82</sup> David Tanovich, “*R. v. Hart*: A Welcome New Emphasis on Reliability and Admissibility” (2012) 12 C.R. (7th) 298, at 299.

<sup>83</sup> *Osmar*, *supra*, note 14.

<sup>84</sup> See for example *Osmar*, *supra*, note 14. See the discussion of false confessions and of expert evidence in Moore, *supra*, note 3, and in 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) *Psychology, Public Policy and Law* Vol. 15(3) 168 [hereinafter “Smith”], at 170. See also *R. v. Pearce*, [2014] M.J. No. 202, 310 Man. R. (2d) 14, 2014 MBCA 70 (Man. C.A.), though it is not a Mr. Big case.

Third, there is other cause to be less-than-optimistic about how successful arguments under the reliability-based first prong will be. The Court in *Hart* held that two sets of factors should be looked at to decide whether to admit the confession: “the circumstances in which the statement was made” and “whether there is any confirmatory evidence”.<sup>85</sup>

The Court in *Hart* pointed to a number of circumstances that could be considered, such as the length of the operation, the relationship between the undercover officers and the accused, and the age, sophistication and mental health of the accused, among other things.<sup>86</sup> Clearly the Court is suggesting that there is a range of circumstances, some only mildly coercive, others very coercive. That is of course true, but we should not draw the wrong conclusion from the existence of that range. The range only describes the extent to which the circumstances *undermine* the reliability of the confession: sometimes a great deal, sometimes only a little bit. But the circumstances of a Mr. Big investigation should not invite us to think “that makes the accused’s statement more reliable”. The target of a Mr. Big sting is *always* being given a motive to claim, truly or falsely, to have committed a crime. The fact that on some occasions there is only a small extraneous motive to give the statement means the reliability is only undermined to a small degree: it does not *enhance* reliability.

Nonetheless the way the Court describes this consideration in *Hart* suggests that they believe the circumstances could sometimes enhance reliability, and indeed that seems to be exactly what they conclude in *Mack*. The probative value was found to be high precisely because the monetary inducement were “modest”, he was not threatened and he only needed to confess if he wanted to advance from the “third line” to the greater rewards of the first line. These factors only amount to saying *Mack* was given a small inducement to confess, not a large inducement. None of them are factors which point *away from* an inducement.

Things are little better when it comes to the second way of enhancing reliability, the existence of confirmatory evidence. Certainly it is possible that there could be confirmatory evidence. The Court in *Hart*, for example, points to a confession which contains details which have not been released to the public. That would certainly constitute confirmation.

However, in *Mack*, the Court finds that the confession was confirmed by two things. First, Mack had previously made the same statements he made to Mr. Big to others. However, that argument should be suspect,

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<sup>85</sup> *Hart*, *supra*, note 1, at para. 101.

<sup>86</sup> *Id.*, at para. 102.

since it runs directly contrary to the rationale for the rule against prior consistent statements: “it is impermissible to assume that because a witness has made the same statement in the past, he or she is more likely to be telling the truth”.<sup>87</sup>

The other “confirmatory” evidence was that shell casings and the victim’s body were found in the place to which the accused led the police. In the abstract that is potentially confirmatory. However, saying the evidence should therefore be admitted comes uncomfortably close to re-establishing the pre-Charter position on exclusion of evidence set out in *Wray*. In *Wray* the accused gave a statement which was not admissible, but also led the police to the place where the weapon could be found: the result was that the weapon *and* the portions of the statement dealing with the weapon were admissible. In *Mack*, because of similar confirmation, not only parts of his statement but his *entire* statement was admitted. That risks reinstating *Wray*’s “if it is relevant, it is admissible, and the court is not concerned with how it was obtained”<sup>88</sup> approach, which has properly been rebuffed.

I do not suggest the Court is unaware of this danger.<sup>89</sup> Aware or not, however, it *is* a danger, and one the Court arguably fell prey to in *Mack*.

Despite suggesting in *Hart* that judges might prefer to begin with the abuse of process question,<sup>90</sup> the Court does not follow that approach in either *Hart* or *Mack*. I suggest they ought to have, because of my final reason for suggesting that the abuse of process prong is the line to follow in future: it engages more directly with the fundamental objections to Mr. Big.

The usual “success rate” for obtaining a confession through Mr. Big is quoted as 75 per cent.<sup>91</sup> What that means is that one quarter of those subjected to the technique have had a fictitious world created, have been led to commit crimes, have been part of a scheme in which the police created the impression of violence and intimidation — and all for no reason whatsoever. Where no confession is ever made, there is no possibility of assessing the probative value against the prejudice: however, if the police went too far in what they did, they went too far whether it produced a confession or not.

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<sup>87</sup> *R. v. Stirling*, [2008] S.C.J. No. 10, [2008] 1 S.C.R. 272, 2008 SCC 10, at para. 7 (S.C.C.).

<sup>88</sup> *Wray*, *supra*, note 57, at 298.

<sup>89</sup> *Hart*, *supra*, note 1, says at para. 112 “It should not, however, be taken as suggesting that police misconduct will be forgiven so long as a demonstrably reliable confession is ultimately secured.”

<sup>90</sup> *Hart*, *supra*, note 1, at para. 89.

<sup>91</sup> Keenan, *supra*, note 17, at 17; Smith, *supra*, note 84, at 170.

Put another way, we should not focus too centrally on the risk of false confessions, which is sometimes presented as the main problem. The behaviour which produces false confessions is undeniably unacceptable — but it is just as unacceptable whether it produces a confession or not. Imagine if, after living for months in the fantasy world the police created for him, Hart had nonetheless insisted that his daughters had died in a tragic accident: it would still have been wrong for the police to do what they did, and it would still be an abuse of process.<sup>92</sup> The prong of the *Hart* analysis which looks at the real issue is the abuse of process one, and so that is the question to which the greatest attention should be paid in future.

## VI. CONCLUSION

I suggested at the start that it is hard to say something new about Mr. Big. When it was first discussed it was pronounced “contemptible”<sup>93</sup> and in the intervening years every imaginable rule-based objection was made to it, without success — until *Hart*. But *Hart* did not find something new to say about the technique by accident: rather, it was a product of the trends in law which had led up to it.

The problem with the Mr. Big technique has never been that it does not comply with the technical rules of the system: the problem is that it is *designed* to evade those rules and game that system. It follows the letter of the rules while snubbing its nose at the spirit of them. Creating an additional specific rule is unlikely to solve that problem, because that approach plays the game at which Mr. Big is already a master.

What is needed instead is a meta-rule, a rule which steps outside the system to address directly the spirit of what the police have done. Developments in other areas of the law have made it easier for courts to look backward and assess whether police behaviour was unacceptable, and have made it easier for courts to conclude that exclusion of evidence on general policy grounds is a realistic option. Because of that the Supreme Court was, in *Hart*, able to reinvigorate the abuse of process doctrine, and to give the possibility of real teeth to the paper tiger.

Perhaps, finally, we can now say something new.

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<sup>92</sup> Or rather it still “might well amount to an abuse of process”, to limit this to what the Court concluded at para. 149.

<sup>93</sup> *Todd, supra*, note 7, at para. 8.