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Hart and *Mack*: New Restraints on Mr. Big and a New Approach to Unreliable Prosecution Evidence

Lisa Dufraimont*

I. INTRODUCTION

The Mr. Big strategy has become one of the most controversial investigative techniques in Canadian criminal justice. On the one hand, it seems to have great value as a law enforcement tool, particularly in cold cases. The technique has been credited with generating the evidence necessary for conviction in hundreds of serious criminal cases — mostly homicides — where the perpetrator might otherwise have gone unpunished.[1] On the other hand, the Mr. Big strategy raises grave dangers. Enticing a suspect to join a fictitious criminal organization and then making his acceptance within that organization contingent upon his confessing to a prior crime creates a potential that the suspect may confess falsely to gain the rewards of membership or to avoid violent reprisals. Where statements obtained in Mr. Big operations are admitted, those statements are inevitably accompanied by evidence that the accused participated in simulated crimes and was eager to join a criminal organization; this kind of bad character evidence can significantly prejudice the accused. Finally, in some cases, police involved in these complex and psychologically manipulative undercover operations may abuse their power over individual suspects. These dangers are well-recognized by psychologists and legal scholars, who have frequently called for the Mr. Big strategy to be strictly limited or eliminated altogether.[2]

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[1] See *R. v. Hart*, [2014] S.C.J. No. 52, [2014] 2 S.C.R. 544, 2014 SCC 52, at para. 4 (S.C.C.) [hereinafter "*Hart*"] ("the technique has proved indispensable in the search for the truth").

[2] For example, Timothy E. Moore, Peter Copeland & Regina A. Schuller, "Deceit, Betrayal and the Search for Truth: Legal and Psychological Perspectives on the 'Mr. Big' Strategy"

Until recently, however, Canadian law placed few restraints on Mr. Big operations and the confessions obtained were almost always admissible.[3] The legal ground has now shifted with the Supreme Court's recent decisions in *R. v. Hart*[4] and *R. v. Mack*.[5] *Hart* makes Mr. Big confessions presumptively inadmissible and erects demanding admissibility criteria to screen such evidence. *Mack* establishes that even where Mr. Big confessions are admitted, judges should caution juries about the dangers of unreliability and prejudice. Taken together, these cases comprise a firm and coherent response to the dangers raised by Mr. Big operations.

This article examines that response and explores its implications. First, the Supreme Court's decisions in *Hart* and *Mack* will be reviewed to illuminate the features of the new legal regime governing confessions in Mr. Big operations. Next, the potential impact of that regime on the future of the Mr. Big strategy in Canada will be explored. How are *Hart* and *Mack* likely to change the way police use the Mr. Big technique? And how are those cases likely to be applied by courts when the Crown seeks to rely on Mr. Big evidence in future cases? Lastly, the analysis will turn to the broader implications of *Hart* and *Mack*. The potential for elements of the new Mr. Big regime to be applied to other kinds of undercover operations will be discussed, as will the Court's continued willingness to rely on common law evidence rules in preference to Charter standards in the context of statements elicited from suspects by police.[6] Moreover, it will be argued that *Hart* and *Mack* carry the potential to ground a new approach to unreliable prosecution evidence more broadly. Following *Hart*, trial judges may increasingly use their discretion to exclude prosecution evidence on reliability grounds. And by adopting in *Hart* and *Mack*

(2009) 55 Crim. L.Q. 348 [hereinafter "Moore, Copeland & Schuller"] (cited by Moldaver J. in *Hart*, *supra*, note 1, at para. 57); 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(3) Psychol., Pub. Pol'y & Law 168; Lisa Dufraimont, "The Patchwork Principle against Self-Incrimination under the Charter" in B.L. Berger, J. Stribopoulos, eds. (2012) 57 S.C.L.R. (2d) 241, at 258-62 [hereinafter "Dufraimont"].

[3] See Dufraimont, *id*., at 259-61; *R. v. Osmar*, [2007] O.J. No. 244, 217 C.C.C. (3d) 174 (Ont. C.A.) (neither the pre-trial right to silence nor the voluntary confessions rule applies to Mr. Big confessions).

[4] *Supra*, note 1.

[5] [2014] S.C.J. No. 58, [2014] 3 S.C.R. 3, 2014 SCC 58 (S.C.C.) [hereinafter "*Mack*"].

[6] *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"].

a framework that applies to Mr. Big evidence both an exclusionary rule and a requirement for cautionary jury instructions, the Supreme Court may have signalled a willingness to accept such overlapping safeguards to respond to reliability problems in other areas.

II. OVERVIEW OF THE MR. BIG STRATEGY, *HART* AND *MACK*

Generally speaking, the Mr. Big strategy is used to advance the investigation in high-priority cases like unsolved homicides where the police have a suspect but lack the evidence needed to lay charges.[7] The operation typically begins when an undercover officer or officers befriend the suspect. Gradually, the suspect learns that his new friends are members of a (fictitious) criminal organization and the suspect also begins to work for the organization. Often the suspect is paid generously for performing simple tasks like delivering packages or counting money. The suspect learns that involvement in the organization brings significant financial rewards and that larger rewards can be had by advancing within the organization. In their interactions with the suspect, undercover officers emphasize the importance of honesty and loyalty within the organization. Frequently, scenarios are staged involving simulated violence against members who have lied to the leader of the organization. After some period of deepening involvement with the organization, the suspect is introduced to that leader, Mr. Big, who in a surreptitiously video-recorded interview presses the suspect to confess his involvement in the crime being investigated. Mr. Big offers a persuasive reason why the accused should confess: for example, Mr. Big may claim that the organization needs to know about the suspect's prior crime as "insurance" of his loyalty. Mr. Big often indicates that the suspect's further participation or advancement in the organization depends on the suspect confessing to the prior crime. By all accounts, the Mr. Big strategy is very effective at eliciting confessions from suspects.[8] Until recently, the law imposed few restraints on either the

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[7] The following summary of the Mr. Big technique draws on Moore, Copeland & Schuller, *supra*, note 2, at 351-57 and Kouri T. Keenan & Joan Brockman, *Mr. Big: Exposing Undercover Operations in Canada* (Black Point, N.S.: Fernwood, 2010), at 19-21.

[8] See *e.g.*, Kate Puddister & Troy Riddell, "The RCMP's 'Mr. Big' Sting Operation: A Case Study in Police Independence, Accountability and Oversight" (2012) 55:3 Can. Pub. Admin. 385, at 386.

conduct of Mr. Big operations or the admissibility or use of the self-incriminating statements elicited.

1. *R. v. Hart*

That began to change with the Supreme Court's judgment in *Hart*.[9] Nelson Hart was caring for his twin three-year-old daughters when they drowned in a lake.[10] Hart claimed his daughters drowned accidentally but gave conflicting accounts of events in police interviews. Police believed that Hart had drowned his daughters on purpose and, two years after their deaths, they mounted a Mr. Big operation aimed at eliciting a confession to the two murders.

The Mr. Big operation targeting Hart involved 63 scenarios with undercover officers over four months. Before engaging Hart directly, police put him under surveillance, which established that Hart was poor and socially isolated to the extent that he left home rarely and never without his wife. Hart was then befriended by two undercover officers, who hired him as a driver. The officers told Hart that they were members of a criminal organization headed by a boss and gradually involved Hart in simulated criminal activities including delivering smuggled alcohol and stolen credit cards. Over the course of the operation, Hart was paid more than $15,000 for his work and was introduced to a lavish lifestyle that involved travelling to cities across Canada, staying in hotels and dining in fine restaurants.

By two months into the operation, Hart had embraced his new life and would frequently tell the officers that he loved them and they were his brothers. Around this time, one of the undercover officers claimed that Hart spontaneously admitted planning and carrying out his daughters' murder. According to the officer, this confession came in response to the undercover officer telling Hart that he had assaulted a prostitute and that sometimes the organization required its members to do "bad things".[11] This first confession was not recorded and Hart denied making it. The operation continued for two more months, during which time the officers stressed the importance of loyalty and honesty. Near the end of the operation, the officers told Hart that he could earn up to $25,000 if he participated in a big deal that was coming up, but that the leader of the

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[9] *Supra*, note 1.

[10] This summary is based on the more detailed account of the facts found in the majority judgment in *Hart*, *id.*, at paras. 15-39.

[11] *Id.*, at para. 29.

organization had found a problem in his background that would have to be resolved before he could continue to work for the organization. Hart ultimately met with Mr. Big, who asked him why he had killed his daughters. Hart claimed that the drownings were an accident but Mr. Big rejected this explanation as a lie. Mr. Big probed further and Hart gave his second confession, admitting that he killed his daughters by pushing them into the lake with his shoulder. Two days later, undercover officers took Hart to the scene of the drownings, where he gave a third confession and re-enacted pushing his daughters into the water with his knee.

Shortly after the re-enactment, Hart was arrested and charged with murder. The trial judge admitted Hart's self-incriminating statements during the Mr. Big operation and the jury convicted Hart of two counts of first degree murder. The Newfoundland and Labrador Court of Appeal allowed Hart's appeal and ordered a new trial.

The Supreme Court of Canada was unanimous in dismissing the Crown's appeal. Writing for the majority,[12] Moldaver J. concluded that the existing law was not sufficiently protective of suspects who confessed in Mr. Big operations,[13] and that such operations could no longer be conducted in a "legal vacuum".[14] The majority acknowledged three main concerns about Mr. Big operations: they may result in confessions that are false or unreliable, they generate bad character evidence that can prejudice the accused, and they carry the potential for police misconduct and abuse.[15] At the same time, Moldaver J. acknowledged that not all Mr. Big operations are abusive and that such operations can generate "valuable evidence" that should be admitted in the "interests of justice".[16]

The majority then proposed a two-pronged approach to the admissibility of Mr. Big confessions that aims to balance these competing concerns.[17] First, a new common law rule of evidence governs the admissibility of confessions given in Mr. Big operations. The rule starts from a presumption that such confessions are inadmissible, but allows for admission where the Crown establishes on a balance of probabilities that the probative value of the evidence outweighs its prejudicial effect.[18] The second prong of the analysis relies on a reinvigorated doctrine of abuse of

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[12] Chief Justice McLachlin, LeBel, Abella and Wagner JJ. concurring.

[13] *Hart*, *supra*, note 1, at para. 67.

[14] *Id.*, at para. 79.

[15] *Id.*, at paras. 68-80.

[16] *Id.*, at para. 83.

[17] *Id.*, at para. 84.

[18] *Id.*, at para. 85.

process to address the potential for police misconduct in Mr. Big operations.[19] The onus lies on the defence to establish an abuse of process.[20] Where such an abuse is shown, the trial judge enjoys a wide discretion to order an appropriate remedy, which may include exclusion of evidence or a stay of proceedings.[21] This two-pronged approach necessitates a *voir dire* to determine the admissibility of confessions to Mr. Big.[22]

Expanding on the features of this two-pronged approach, Moldaver J. explained that the probative value of Mr. Big confessions is a function of their reliability.[23] Reliability in this context can be assessed by examining, first, the circumstances in which the statement was made and, second, any "markers of reliability" in the confession itself or the surrounding evidence.[24] All the circumstances surrounding the making of the statement should be considered, including:

> ... the length of the operation, the number of interactions between the police and the accused, the nature of the relationship between the undercover officers and the accused, the nature and extent of the inducements offered, the presence of any threats, the conduct of the interrogation itself, and the personality of the accused, including his or her age, sophistication, and mental health.[25]

In evaluating the confession itself for indicia of reliability, the trial judge should consider:

- the level of detail in the accused's confession
- whether new evidence is discovered on the basis of the confession
- whether the confession contains information about the offence that was not made public (so-called "hold-back" evidence), and
- whether the confession contains accurate information about the "mundane details" of the crime or the crime scene.[26]

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[19] *Id*., at paras. 86 and 114.
[20] *Id*., at paras. 89 and 113.
[21] *Id*., at para. 113.
[22] *Id*., at para. 89.
[23] *Id*., at para. 99.
[24] *Id*., at paras. 101-105.
[25] *Id*., at para. 102.
[26] *Id*., at para. 105.

The Court emphasized the importance of looking to other evidence to confirm the reliability of the Mr. Big confession. Such "[c]onfirmatory evidence is not a hard and fast requirement, but where it exists, it can provide a powerful guarantee of reliability."[27]

On the issue of prejudice, the majority explained that Mr. Big confessions can give rise to "moral prejudice" against the accused, who is made to look like a bad person because he wanted to be part of a criminal organization and committed what he thought were real crimes in pursuit of that goal.[28] Indeed, the defence must emphasize the strength of the accused's desire to join the gang, because that desire explains why the accused might have confessed falsely. Mr. Big confessions can also create "reasoning prejudice" by distracting the jury from its proper focus on the offence charged.[29] The risk of prejudice may be reduced by excluding particularly prejudicial information that is not essential to the narrative of the Mr. Big operation or by offering limiting instructions to the jury on the use of bad character evidence generated by the operation. Trial judges are well-situated to weigh prejudicial effect against probative value in this context and their admissibility decisions will be treated with deference by appellate courts.[30]

Turning to the doctrine of abuse of process, the majority observed that that doctrine reflects certain limits on the state's exercise of its investigative powers. Even reliable confessions should not be admitted if they were elicited by state conduct that is unacceptable or undermines the integrity of Canada's justice system.[31] In the past, Moldaver J. acknowledged, the doctrine of abuse of process has done little to protect suspects who confess in Mr. Big operations. Going forward, the solution is to reinvigorate the doctrine as it applies to Mr. Big operations, and the first step in this reinvigoration is "to remind trial judges that these operations can become abusive, and that they must carefully scrutinize how the police conduct them".[32] While there is no "precise formula" for deciding when Mr. Big tactics amount to an abuse of process, the majority suggested one guideline for the analysis: police conduct is "problematic in this context when it approximates coercion. In conducting these operations, the police cannot be permitted to overcome

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27 *Id*.
28 *Id*., at para. 106.
29 *Id*.
30 *Id*., at para. 110.
31 *Id*., at paras. 112-113.
32 *Id*., at para. 114.

the will of the accused and coerce a confession. This would almost certainly amount to an abuse of process".[33] Coercive police tactics that rise to the level of an abuse of process include the use of actual or threatened physical violence against an accused, which will always render a confession inadmissible, and could also include exploiting the target's vulnerabilities, including mental health or addictions issues or youthfulness. In the view of the majority, preying on these vulnerabilities is "highly problematic" in the context of Mr. Big operations because such state conduct offends our sense of decency and fair play.[34] Finally, Moldaver J. noted the potential for Mr. Big operations to become abusive even when they are not coercive. Trial judges are charged with determining whether the state's conduct of a Mr. Big operation was abusive in all the circumstances of the case.

Applying the new two-pronged admissibility analysis to the facts of the case, the majority ruled that all three of Hart's confessions were inadmissible.[35] The Crown's case depended on these confessions, especially the second and third confessions that emerged from the interview with Mr. Big and the re-enactment at the scene of the drownings. The circumstances in which these confessions were made "cast serious doubt" on their reliability.[36] The Mr. Big operation was long and intense, transforming Hart's life, lifting him out of poverty and introducing him to a lavish lifestyle. Over the course of the operation, Hart was in almost daily contact with the undercover officers, who he came to see as his best friends. During the crucial meeting with Mr. Big, Hart was aware that his continued involvement with the criminal organization — "his ticket out of poverty and social isolation"[37] — was on the line. When Mr. Big rejected Hart's innocent explanation as a lie, in all the circumstances Hart faced "an overwhelming incentive to confess", whether or not he was guilty.[38]

Moreover, the confessions carried no markers of reliability.[39] Hart gave inconsistent accounts of how the crime was committed and, more importantly, there was no confirmatory evidence whatsoever. Hart's knowledge of the only verifiable facts in the confessions could be

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[33] *Id.*, at para. 115.
[34] *Id.*, at para. 117.
[35] *Id.*, at paras. 126-151.
[36] *Id.*, at para. 133.
[37] *Id.*, at para. 139.
[38] *Id.*, at para. 140.
[39] *Id.*, at para. 141.

explained by his presence at the scene of the drownings. Taken together, the circumstances of the operation and the absence of confirmatory evidence indicated that the probative value of Hart's confessions was low. By contrast, their potential prejudicial effect was obvious and significant. For four months, Hart "devoted his entire life to trying to join a criminal gang".[40] He boasted about killing his small children to win the approval of criminals. On balance, the limited value of these confessions was outweighed by their prejudicial effect. Hart's first confession was also inadmissible for similar reasons.[41]

According to Moldaver J., there were features of the Mr. Big operation against Hart that raised abuse of process concerns. The operation was "extremely intensive" and exploited Hart's vulnerabilities as a poor, socially isolated individual.[42] Moreover, the undercover officers sent Hart on long driving assignments when they knew he was at risk of having a seizure, arguably putting Hart's own safety and the safety of the public at risk. However, having found the confessions inadmissible under the new common law rule of evidence, the majority found it unnecessary to decide whether the police conduct in the operation against Hart was an abuse of process. In the result, the Court dismissed the Crown appeal and upheld the order for a new trial.

Separate concurring reasons were delivered by Cromwell J. and Karakatsanis J. While Cromwell J. agreed with the majority's analysis of the new legal framework for assessing the admissibility of Mr. Big confessions, he concluded that a decision about the admissibility of Hart's confessions should not be determined at the appellate level. Rather, Cromwell J. would have left the admissibility question to be decided at the new trial.[43] Justice Karakatsanis agreed with the majority's conclusion that Hart's confessions were inadmissible, but she relied on Charter grounds. In her view, Hart's confessions were coerced in violation of the principle against self-incrimination under section 7 of the Charter. She concluded that the police conduct was egregious, involving extensive psychological manipulation and exploitation of Hart's vulnerabilities that amounted to an

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[40] *Id*., at para. 145.

[41] See *id*., at para. 147. While it was unprompted, Hart's first confession occurred when he was already under sway of the social and financial inducements held out by the organization, it contained no details of the events, and its very existence was contested by the defence. Therefore, like his later confessions, Hart's first confession carried a potential for prejudice that outweighed its limited probative value.

[42] *Id*., at para. 148.

[43] *Id*., at para. 162.

abuse of process. For Karakatsanis J., the risk of a miscarriage of justice and the abusive police conduct called for exclusion of Hart's confessions under section 24(2) of the Charter.[44]

2. *R. v. Mack*

Less than two months after *Hart* was released, the Supreme Court had another opportunity to consider its approach to Mr. Big confessions in *Mack*.[45] Police initiated a Mr. Big operation against Dax Mack after his roommate disappeared and a friend reported to police that Mack had confessed to killing the roommate and burning his body.[46] The operation began when Mack was introduced to an undercover officer at a nightclub where Mack was working as a D.J. Mack was told that the officer was employed by a criminal organization headed by a boss and over the next few months Mack did a number of jobs for the organization. Two months into the operation, Mack met with Mr. Big, who tried to question him about his missing roommate. Mack asked if he could decline to speak about it and Mr. Big indicated that that was his choice but that it would mean he would remain on the third line of the organization. If he wanted to advance to the first line, he would have to talk about what happened to the victim.

Three weeks later, Mack told an undercover officer that he was willing to do what it took to work for the organization. He then confessed that he shot the victim five times before burning his body, and showed the officer the fire pit where the body was burned. Mack made a similar confession to Mr. Big a few days later. The ashes in the fire pit were later found to contain the victim's remains and shell casings that had been fired by a rifle that was found in Mack's apartment. The Mr. Big operation against Mack lasted for four months and involved 30 scenarios. Mack was paid approximately $5,000 plus expenses for his work.

Mack was charged with first degree murder and his confessions during the Mr. Big operation were admitted at the trial. In charging the jury, the trial judge emphasized the need to consider carefully the reliability of these confessions in light of the inducements held out to the accused and the themes of violence and easy money in the operation.

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[44] *Id*., at para. 242.

[45] *Supra*, note 5.

[46] This summary is based on the more detailed account of the facts found in the Supreme Court's judgment in *Mack*, *id*., at paras. 4-25.

The jury found the accused guilty of first degree murder and his appeal to the Alberta Court of Appeal was dismissed.

The Supreme Court was unanimous in dismissing the appeal and affirming the conviction. Writing for the Court, Moldaver J. began by holding that Mack's confessions in the Mr. Big operation were clearly admissible under the two-pronged approach set out in *Hart*.[47] Probative value was high because the undercover officers offered only modest inducements.[48] Mack was paid $5,000 over four months when he also had legitimate work. The officers did not use threats and Mr. Big specifically told Mack that he could decline to speak about the victim and keep his place on the organization's third line. The reliability and probative value of the confessions was also amply confirmed by other evidence, including the victim's remains and the shell casings discovered in the fire pit.[49] While the confessions were highly probative, their prejudicial effect was limited.[50] Mack was not involved in any scenarios involving violence and the work he did for the organization consisted mostly of repossessing vehicles and making deliveries. On balance, the probative value of Mack's confessions in the Mr. Big operation clearly outweighed any potential prejudicial effect.[51] Moreover, the Mr. Big operation did not involve any improper police conduct that could amount to an abuse of process.[52]

Having dealt with the admissibility issue, Moldaver J. proceeded to analyze how a jury should be instructed about confessions made in Mr. Big operations. The Court held that even though the new common law rule of evidence recognized in *Hart* responds to concerns about reliability and prejudice, the admissibility rule does not "erase" those concerns in the Mr. Big context.[53] Reliability and prejudice concerns will persist even when the evidence is admitted. Consequently, trial judges who admit Mr. Big evidence must instruct juries in a way that gives them the analytical tools to assess these issues.[54] The Court emphasized that no "magical incantation"[55] or "prescriptive formula"[56] could be given for

47 *Mack*, *id*., at para. 32, citing *Hart*, *supra*, note 1.
48 *Mack*, *supra*, note 5, at para. 33.
49 *Id*., at para. 34.
50 *Id*., at para. 35.
51 *Id*.
52 *Id*., at para. 36.
53 *Id*., at para. 44.
54 *Id*., at para. 50.
55 *Id*.
56 *Id*., at para. 51.

such instructions, but did give "some guidance"[57] on the content of the instructions. To equip juries to assess the reliability of a Mr. Big confession, the trial judge's instruction should:

- tell the jury that they decide whether the accused's confession is reliable, and
- review the factors laid out in *Hart* that are relevant to the reliability of the confession, including the circumstances in which the statement was made and any markers of reliability in the confession itself.[58]

The trial judge's instructions can also address the prejudicial effect of the bad character evidence that comes along with evidence of a Mr. Big confession. The trial judge should:

- explain the limited purpose for which the evidence of the Mr. Big operation was admitted, which is to "provid[e] context for the confession"[59]
- instruct jurors not to rely on the evidence to go to guilt, and
- remind jurors that "the simulated criminal activity … was fabricated and encouraged by agents of the state".[60]

In the circumstances, Moldaver J. held that while "more could have been said"[61] about the reliability of Mack's confessions, the trial judge's charge was adequate to equip the jury to assess the Mr. Big confessions in light of the concerns about reliability and prejudice.[62]

III. THE FUTURE OF MR. BIG

Together, *Mack* and *Hart* create a bold new legal framework for evidence emerging from Mr. Big operations. The judgments represent a major change in tone in Canadian law. Whereas previously the Supreme Court has directed more praise than criticism toward Mr. Big operations

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[57] *Id*.

[58] See *id*., at paras. 52-53. The *Hart* reliability factors are listed in the text accompanying footnotes 24-25, *supra*.

[59] *Mack*, *id*., at para. 55.

[60] *Id*.

[61] *Id*., at para. 59.

[62] *Id*., at para. 61.

and the evidence they generate,[63] the Court now appears highly sensitive to the dangers of false confessions, prejudicial bad character evidence and police abuse raised by this investigative technique. *Hart* essentially accepts all the main criticisms directed at this procedure by commentators[64] and admonishes lower Courts to be on guard against the risks posed by this evidence.[65] While *Mack* appears at first blush to be less cautionary in tone, it is significant that *Mack* acknowledges that reliability and prejudice concerns are not exhausted by the application of the exclusionary rule. By calling for cautionary jury instructions as an additional safeguard even where the evidence is admissible under *Hart*, the Court in *Mack* recognizes that the dangers posed by Mr. Big evidence are serious and persistent. What, then, is the future of the Mr. Big strategy in Canada? This section considers the implications of *Hart* and *Mack* for investigators who use the Mr. Big strategy and for Courts assessing the resulting evidence.

1. Implications for Investigators

In *Hart*, Moldaver J. predicted that the new approach to Mr. Big evidence would influence police investigators in two ways. First, since the state bears the burden of establishing admissibility, "the state will be strongly encouraged to tread carefully in how it conducts these operations".[66] Although Moldaver J. did not elaborate on how this new level of police restraint might manifest itself, it seems likely that *Hart* and *Mack* will discourage police from using strong inducements or tactics that might be viewed as coercive or abusive. While suspects will no doubt continue to be offered social and financial inducements to participate in fictitious criminal organizations, in future police may be more careful to avoid showering a suspect with cash, luxuries and close friendships, since these tactics were recognized as undermining the reliability of the confessions in *Hart*.[67] The analysis in *Hart* will also encourage police to be cautious about using violence in Mr. Big

[63] See *e.g.*, *R. v. Fliss*, [2002] S.C.J. No. 15, [2002] 1 S.C.R. 535, 2002 SCC 16, at para. 21 (S.C.C.), cited in *Hart*, *supra*, note 1, at para. 114, describing a Mr. Big operation as "skillful police work".

[64] See, for example, the critical commentaries cited in footnote 2, *supra*.

[65] See especially the Court's reminder to trial judges that Mr. Big operations can become abusive and require careful scrutiny: *Hart*, *supra*, note 1, at para. 114.

[66] *Id.*, at para. 92.

[67] *Id.*, at paras. 133-140.

operations, for three reasons: confessions prompted by fear are less reliable, violence and threats were identified as coercive police tactics that can amount to an abuse of process, and scenarios involving violence can generate prejudice against an accused who shows himself willing to engage in violence himself.[68] Finally, police may think twice before targeting vulnerable individuals in Mr. Big stings, since the Supreme Court has identified preying on a suspect's vulnerabilities as a basis of an abuse of process claim.[69] In some cases, police may forego a Mr. Big operation because of the potential for the resulting statements to be ruled inadmissible.

Second, Moldaver J. predicted that the new approach to Mr. Big evidence would encourage police to keep better records. He explained:

> At present, many of the key interactions between undercover officers and the accused are unrecorded. This is problematic. Where it is logistically feasible and would not jeopardize the operation itself or the safety of the undercover officers, the police would do well to record their conversations with the accused. With the onus of demonstrating reliability placed on the Crown, gaps in the record may undermine the case for admissibility, which will encourage better record keeping.[70]

This emphasis on record keeping parallels a similar line of reasoning in the confessions rule cases, where deliberate failure to record a police interrogation can undermine the Crown's ability to prove the voluntariness of the confession beyond a reasonable doubt.[71] No doubt this kind of encouragement from the Courts has increased use of recording for police interrogations and it will likely have a similar effect in the Mr. Big context.

Although not explicitly raised by Moldaver J., one might expect to see one further effect on police investigations going forward. Both *Hart* and *Mack* stress the importance of confirmatory evidence to the analysis of the admissibility of Mr. Big confessions. Indeed, one of the key features

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[68] *Id*., at paras. 102, 117 and 106.

[69] *Id*., at para. 117.

[70] *Id*., at para. 93.

[71] See especially *R. v. Moore-McFarlane*, [2001] O.J. No. 4646, 47 C.R. (5th) 203, at para. 65 (Ont. C.A.): "the Crown bears the onus of establishing a sufficient record of the interaction between the suspect and the police. That onus may be readily satisfied by the use of audio, or better still, video recording. Indeed, it is my view that where the suspect is in custody, recording facilities are readily available, and the police deliberately set out to interrogate the suspect without giving any thought to the making of a reliable record, the context inevitably makes the resulting non-recorded interrogation suspect."

distinguishing Hart's inadmissible confessions and Mack's admissible ones was that the latter were confirmed by independent evidence. While the Court insists confirmatory evidence is not absolutely required for admissibility, the majority in *Hart* acknowledges that "it can provide a powerful guarantee of reliability".[72] Given this emphasis on corroboration, one might expect police to focus more in future on trying to obtain confirmatory evidence from Mr. Big operations. To the extent that some investigators may have focused primarily on obtaining self-incriminating statements from targets, *Hart* and *Mack* encourage a shift in emphasis toward a search for evidentiary confirmation. This shift is salutary and accords with insights from the academic literature on false confession in police interrogation, which has long promoted questioning practices that focus less on obtaining an "I did it" statement and more on finding confirmation of the statement in the post-admission narrative.[73]

2. Implications for the Courts

Hart and *Mack* will work major changes in the courts' approach to Mr. Big evidence. In the past, Canadian courts have tended to downplay the dangers associated with Mr. Big operations, but *Hart* explicitly puts judges on notice of the reliability and prejudice problems and the potential for abuse. The judgment strikes a new tone of caution that will no doubt shape the development in the case law.

Admittedly, *Mack* has been criticized for failing to require a sharp caution on Mr. Big evidence. As Archibald Kaiser has noted, "[w]hat is missing from this modest guidance [on Mr. Big jury instructions in *Mack*] is any of the more direct and chastening language that prefaces the *Hart* admissibility standard."[74] The Court might have done well to require a sharper warning, but one might hope that the cautious tone of *Hart* may find its way into jury instructions in any event. The Supreme Court acknowledged that the trial judge in *Mack* could have said more about the risks of the Mr. Big evidence, and if courts are looking for more to say there is no shortage of sharply cautionary language to draw on in *Hart*. This cautious attitude toward Mr. Big operations, heretofore

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[72] *Hart*, *supra*, note 1, at para. 105.

[73] See especially Richard J. Ofshe & Richard A. Leo, "The Decision to Confess Falsely: Rational Choice and Irrational Action" (1997) 74 Denver U. L. Rev. 979, at 990-97.

[74] H. Archibald Kaiser, "*Mack*: Mr. Big Receives an Undeserved Reprieve, Recommended Jury Instructions Are Too Weak" (2014) 13 C.R. (7th) 251, at 261.

restricted to legal and psychological commentators, has now been adopted by the Supreme Court of Canada and woven into the fabric of the law in *Hart*.

Of course, one must take care not to overstate the probable impact of *Hart* and *Mack*. Mr. Big operations are still legal in Canada, and the evidence gathered in these operations is likely to be admitted in most cases. While the presumption of inadmissibility might, on its face, suggest that exclusion of the evidence will be the norm, logic and experience suggest otherwise. In weighing probative value against prejudicial effect, in many cases courts are likely to view the accused's confessions as highly probative. The costs of excluding this potentially valuable information — which may include the collapse of the Crown's case — will often be seen as too high. Given the high costs of exclusion, I have argued elsewhere that exclusionary rules directed at unreliable prosecution evidence should be expected to result in exclusion in a relatively narrow range of cases where reliability concerns are particularly acute.[75] That expectation is borne out in the voluntary confessions rule cases where, despite their presumptive inadmissibility, statements by accused persons to persons in authority are typically admitted.[76] Exclusionary rules are well suited to capture the most unreliable and prejudicial evidence, such as the uncorroborated admissions wrung out of Hart by questionable police tactics. For less problematic confessions to Mr. Big, for example confessions given in response to mild inducements or where confirmatory evidence is available, one would expect that admission with a caution would be the typical result.

This expectation finds some preliminary support in the cases decided in the one year since *Hart*. A review of the cases citing the Supreme Court's judgment in *Hart* reveals five instances where trial courts have applied the new two-pronged approach to the admissibility of statements made by accused persons during Mr. Big operations:[77]

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[75] Lisa Dufraimont, "Regulating Unreliable Evidence: Can Evidence Rules Guide Juries and Prevent Wrongful Convictions?" (2008) 33 Queen's L.J. 261, at 283 [hereinafter "Dufraimont"].

[76] See *id*., at 284.

[77] In the weeks before this article went to press, three provincial courts of appeal decided cases in which Mr. Big statements were admitted at trials held before the Supreme Court released its judgment in *Hart*. In two cases – *R. v. West*, [2015] B.C.J. No. 1943, 2015 BCCA 379 (B.C.C.A.), and *R. v. Allgood*, [2015] S.J. No. 387, 2015 SKCA 88 (Sask. C.A.) – the appeal courts held that the statements were admissible under the *Hart* framework. In the third case, *R. c. Laflamme*, [2015] J.Q. no 8925, 2015 QCCA 1517 (Que. C.A.), the Quebec Court of Appeal entered a stay of proceedings on the basis that the police conduct in the Mr. Big operation amounted to an abuse of process. The operation involved violent scenarios calculated to convince the accused that his safety would be put

R. v. Balbar,[78] *R. v. Keene*,[79] *R. v. Hales*,[80] *R. v. Ledesma*[81] and *R. v. Magoon*.[82] In all five cases, the Mr. Big statements were admitted. Each of these cases reveals a Mr. Big operation with some troubling features. In *Balbar*, the operation included a number of staged scenarios involving serious violence, including one undercover operative apparently forcing a gun into the mouth of another operative.[83] Balbar was also addicted to methamphetamine during the operation and his level of intellectual functioning was called into question.[84] During the Mr. Big operation in *Keene*, the accused expressed concern that the criminal organization might kill him, saying, "If I'm going to die, then make it quick and don't let me see it coming."[85] In *Ledesma*, the accused brought a gun to a meeting with the undercover officers.[86] In *Hales*, the target grew close emotionally with one of the undercover operatives, saying that he was a brother and he loved him, and the operation also included a serious simulated assault on a female operative.[87] In *Magoon*, the two targets of the Mr. Big operation were a couple who were initially unemployed and living in their vehicle. In the course of an intensive eight-month operation they acquired an apartment and, among other "powerful financial inducements",[88] the male target was paid $15,000 for his work.

On the other hand, in all five cases there were factors suggesting reliability in the circumstances of the Mr. Big operation and in the confessions themselves. Balbar correctly stated that the victim had been killed by multiple blows to the head, which was holdback evidence that had not been made public.[89] In *Keene*, the accused drew a map and

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at risk if he were not accepted into the organization. *Hart* and *Mack* were also recently applied in a Mr. Big case at the Quebec Court of Appeal, where a new trial was ordered because the trial judge's instructions to the jury were inadequate: *Perreault c. R.*, [2015] J.Q. no 3389, 2015 QCCA 694, 19 C.R. (7th) 393 (Que. C.A.). In addition, there is a developing line of cases considering the admissibility of Mr. Big statements against persons other than the makers of the statements: see *e.g.*, *R. v. Campeau*, [2015] A.J. No. 679, 18 Alta. L.R. (6th) 180, 2015 ABCA 210 (Alta. C.A.); *R. v. Tingle*, [2015] S.J. No. 348, 2015 SKQB 184 (Sask. Q.B.).

[78] [2014] B.C.J. No. 3232, 2014 BCSC 2285 (B.C.S.C.) [hereinafter "*Balbar*"].

[79] [2014] O.J. No. 6511, 2014 ONSC 7190 (Ont. S.C.J.) [hereinafter "*Keene*"].

[80] [2014] S.J. No. 750, 2014 SKQB 411 (Sask. Q.B.) [hereinafter "*Hales*"].

[81] [2014] A.J. No. 1468, 2014 ABQB 788 (Alta. Q.B.) [hereinafter "*Ledesma*"].

[82] [2015] A.J. No. 607, 2015 ABQB 351 (Alta. Q.B.) [hereinafter "*Magoon*"].

[83] *Balbar*, *supra*, note 78, at para. 201 (scenario 17).

[84] *Id*., at para. 356.

[85] *Keene*, *supra*, note 79, at para. 90.

[86] *Ledesma*, *supra*, note 81, at para. 72.

[87] *Hales*, *supra*, note 80, at paras. 54 and 61.

[88] *Magoon*, *supra*, note 82, at para. 72.

[89] *Balbar*, *supra*, note 78, at paras. 358 and 363-364.

pointed out a specific location where a previously undiscovered part of the victim's body was later found by police.[90] The trial judge in *Ledesma* determined that the accused was not financially vulnerable and was not subjected to any coercive inducements.[91] The self-incriminating Mr. Big statements given by the two accused in *Magoon* were confirmed in some respects by medical evidence and by subsequent intercepted communications between themselves.[92] Hales was consistently told that he could leave the organization without consequences at any time, and when he confessed he directed Mr. Big to the remote area where the victim's remains were discovered.[93] These cases demonstrate the difficulty facing judges in balancing the many factors going to reliability and prejudice of statements emerging from complex Mr. Big operations. They also provide some early indication that, in most cases, courts are likely to admit Mr. Big statements and offer an instruction to sensitize juries to the reliability and prejudice problems.

IV. BROADER IMPLICATIONS OF *HART* AND *MACK*

This final part of the analysis will explore the implications of *Hart* and *Mack* that go beyond the narrow context of Mr. Big operations. Most obviously, there is the potential for the admissibility framework developed in *Hart* to be applied in other kinds of undercover operations. *Hart* also reveals that the Supreme Court remains willing to rely on common law rules of evidence to protect Charter rights in the context of self-incriminating statements to police. Finally, it will be argued that *Hart* and *Mack* may suggest a new approach to unreliable prosecution evidence of other kinds.

1. Application to Other Undercover Operations

In *Hart*, Moldaver J. specified that the new common law rule of evidence, the first prong of the two-pronged approach to the admissibility of Mr. Big statements, applies when "the state recruits an accused into a fictitious criminal organization of its own making and seeks to elicit a

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[90] *Keene*, *supra*, note 79, at paras. 100 and 149.

[91] *Ledesma*, *supra*, note 81, at paras. 122-124.

[92] *Magoon*, *supra*, note 82, at paras. 84-94.

[93] *Hales*, *supra*, note 80, at paras. 66 and 69.

confession from him".[94] While he explicitly left open the possibility that the rule might be extended to other contexts in the future, at this point the new rule of evidence applies only to evidence obtained in Mr. Big operations.[95] Interestingly, there is no similar language in *Hart* to limit the application of the second prong of the admissibility analysis to the Mr. Big context. Arguably, then, the reinvigorated doctrine of abuse of process as described in *Hart* might be applicable outside the precise context of Mr. Big operations.

One Court has already applied the abuse of process doctrine as outlined in *Hart* to another kind of undercover operation. In *R. v. Derbyshire*,[96] the accused confessed to undercover officers who were posing as gangsters. The officers accosted her in a parking garage, ordered her into her car and aggressively demanded that she tell them everything she knew about the murder they were investigating. The accused immediately complied but her self-incriminating statements were excluded on the basis that the police tactics amounted to an abuse of process under *Hart*. Justice Wood explained that the undercover officers' conduct:

> resulted in the type of unfair coercion described by Justice Moldaver in *Hart*. Ms. Derbyshire's confession … was obtained by intimidation and implied threats of harm. She was never given a choice which would have permitted her to walk away without disclosure. This was an abuse of process.[97]

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[94] *Hart*, *supra*, note 1, at para. 85.

[95] See *id*., footnote 5. One undercover tactic that might be brought within the sphere of application of the new rule is the one used in *R. v. Welsh*, [2013] O.J. No. 1462, 2 C.R. (7th) 137 (Ont. C.A.). An undercover police officer posed as a spiritual advisor and practitioner of Obeah, a system of spiritual and mystical beliefs practised in the West Indies. The officer elicited self-incriminating statements from two men accused of murder by claiming that he could use his mystical powers to protect them from prosecution if they gave him the details of the murder. The statements were admitted at trial and the accused were convicted. The Ontario Court of Appeal dismissed the appeals, reasoning that the accused confided in the Obeahman not for any spiritual purpose but for the corrupt purpose of protecting themselves from the justice system (*id*., at paras. 69-73). While there are important differences between a Mr. Big operation and the spiritually-themed operation in *Welsh*, one common factor is the high level of psychological manipulation involved.

[96] [2014] N.S.J. No. 689, 2014 NSSC 371, 18 C.R. (7th) 61 (N.S.S.C.).

[97] *Id*., at para. 89. See also *R. v. M. (S.)*, [2015] O.J. No. 5173, 2015 ONCJ 537 (Ont. C.J.), which was released as this article was going to press. In that case, the trial judge excluded self-incriminating statements made by a young person in circumstances that amounted to an abuse of process. The statements were elicited by the young person's father acting as a police agent. The young person was subjected to manipulative trickery and his vulnerabilities, including his youthfulness, were exploited.

This ruling appears consistent with the principles laid out in *Hart*, in particular the holdings that coercive tactics can amount to an abuse of process and that a confession obtained with threats of physical violence must be excluded. Time will tell if other courts will apply the doctrine of abuse of process as laid out in *Hart* to undercover operations outside the Mr. Big context.

2. Common Law Evidence Rules to Protect Charter Rights

There is a tradition in self-incrimination law of relying on common law rules of evidence to protect the accused's Charter rights and interests. In *R. v. Oickle*,[98] the Supreme Court rejected the idea that the Charter subsumes the common law confessions rule, which remains the pre-eminent legal safeguard for suspects subjected to police interrogation. Later, in *R. v. Singh*,[99] the Supreme Court grappled with the relationship between the voluntary confessions rule and the pre-trial right to silence under section 7 of the Charter. The majority held that the voluntariness rule "effectively subsumes the constitutional right to silence in circumstances where an obvious person in authority is interrogating a person who is in detention".[100] The holding in *Singh* was not that the pre-trial right to silence does not apply when detainees are interrogated by police, but rather that that Charter right is adequately protected by the common law exclusionary rule.

Hart continues this tradition of using common law evidence rules to protect the accused in contexts where the Charter is also engaged. Justice Moldaver acknowledged that the reliability and prejudice concerns surrounding Mr. Big confessions raise Charter issues, including the accused's right to a fair trial.[101] However, he determined that the common law rule of evidence was the best safeguard to adopt in this context, reasoning that "our common law rules of evidence are, and must be, capable of protecting the constitutional rights of the accused".[102] Moreover, Moldaver J. held that the two-pronged admissibility framework for Mr. Big confessions reflects and gives expression to the Charter principle against self-incrimination.[103] That principle is not a free-standing right, but rather a general principle that grounds a number of specific rights in the Charter and

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[98] [2000] S.C.J. No. 38, [2000] 2 S.C.R. 3 (S.C.C.) [hereinafter "*Oickle*"].

[99] [2007] S.C.J. No. 48, [2007] 3 S.C.R. 405 (S.C.C.) [hereinafter "*Singh*"].

[100] *Id*., at para. 39.

[101] *Hart*, *supra*, note 1, at para. 121.

[102] *Id*.

[103] *Id*., at para. 123.

in the common law, and the new two-pronged approach has emerged as a new addition to that set of safeguards. The majority's decision to fashion a precise new admissibility framework rather than require the principle against self-incrimination to be applied directly in every Mr. Big case was probably wise, since that principle is notoriously broad and conceptually uncertain. Still, it is noteworthy that common law rules continue to be used to protect Charter rights in the self-incrimination context.

3. A New Approach to Unreliable Prosecution Evidence?

One of the fundamental purposes of the law of evidence is to protect the innocent from being convicted on the basis of unreliable evidence. The Supreme Court's judgments in *Hart* and *Mack* carry the potential to enhance that protection in two ways. First, *Hart* lends weight to the controversial notion that trial judges have discretion to exclude evidence on reliability grounds. Second, *Hart* and *Mack* together break new ground by adopting both an exclusionary rule and jury instructions to deal with the same reliability problems. These cases raise the possibility that such overlapping safeguards will be adopted to respond to reliability concerns surrounding other forms of prosecution evidence. These two lines of argument will be addressed in turn.

On the question of discretion, it is well established that trial judges have discretion to exclude Crown evidence where its prejudicial effect outweighs its probative value.[104] What has been less clear is the extent to which judges have discretion to exclude evidence on the basis that it is unreliable. Historically, Canadian law has tended to treat reliability as a question that goes only to the weight and not to the admissibility of evidence.[105] In *Hart*, however, the Supreme Court put the reliability of the evidence at the centre of the admissibility analysis. In enunciating a new rule of evidence that requires trial judges to weigh the probative value of Mr. Big confessions against their prejudicial effect, Moldaver J. made it clear that the admissibility of such statements turns largely on

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[104] *R. v. Grant*, [2015] S.C.J. No. 9, [2015] 1 S.C.R. 475, 2015 SCC 9, at para. 19 (S.C.C.); *R. v. Seaboyer*, [1991] S.C.J. No. 62, [1991] 2 S.C.R. 577 (S.C.C.); *R. v. Corbett*, [1988] S.C.J. No. 40, [1988] 1 S.C.R. 670 (S.C.C.). For defence evidence, exclusion is permitted only where its prejudicial effect substantially outweighs its probative value.

[105] See especially *R. v. Buric*, [1996] O.J. No. 1657, 48 C.R. (4th) 149 (Ont. C.A.), affd [1997] S.C.J. No. 38, [1997] 1 S.C.R. 535 (S.C.C.). See also *R. v. Duguay*, [2007] N.B.J. No. 337, 50 C.R. (6th) 378 (N.B.C.A.); *R. v. Hodgson*, [1998] S.C.J. No. 66, [1998] 2 S.C.R. 449, at para. 2 (S.C.C.) ("the quality, weight or reliability of evidence is a matter for the jury").

their reliability.[106] Assessing probative value, he explained, "requires weighing the evidence and assessing its reliability".[107] Weighing the reliability of evidence at the admissibility stage is unavoidable, the majority held, even though it "thrusts trial judges into a domain that is typically reserved for the jury".[108]

The discussion in *Hart* of the trial judge's role in assessing reliability at the admissibility stage might be interpreted restrictively to apply only to Mr. Big confessions. However, Moldaver J.'s analysis of the role of reliability in the admissibility analysis is framed in broad terms and draws on cases pertaining to other areas of evidence law.[109] It therefore seems more plausible to interpret *Hart* as empowering trial judges generally to exclude evidence on the basis that it is unreliable.[110] In this way, *Hart* has the potential to broaden the trial judge's discretion to exclude evidence in a way that protects the innocent from wrongful conviction.[111]

Turning to the question of the overlapping safeguards of an exclusionary rule and cautionary jury instructions, Moldaver J. explained the need for this multifaceted approach to Mr. Big statements in *Mack*:

> The common law rule of evidence that was set out in *Hart* was intended to respond to the evidentiary concerns raised by Mr. Big operations. However, while this rule responds to these two evidentiary concerns, it does not erase them. The focus of the rule is to determine whether a Mr. Big confession should be admitted into evidence. It does not decide the ultimate question of whether the confession is reliable, nor does it eliminate the prejudicial character evidence that accompanies its admission. Thus, even in cases where Mr. Big confessions are admitted into evidence, concerns with their reliability and prejudice will persist.

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[106] *Hart*, *supra*, note 1, at paras. 94-98.

[107] *Id*., at para. 96.

[108] *Id*., at para. 97.

[109] For example, Moldaver J. supported his conclusions by relying on quotations from *R. v. Abbey*, [2009] O.J. No. 3534, 2009 ONCA 624, 97 O.R. (3d) 330 (Ont. C.A.) and *R. v. Humaid*, [2006] O.J. No. 1507, 81 O.R. (3d) 456 (Ont. C.A.), cases concerning expert evidence and hearsay, respectively.

[110] David M. Tanovich, "*Hart*: A Welcome New Emphasis on Reliability and Admissibility" (2014) 12 C.R. (7th) 298, at 302-303 ("where there is reason to be concerned about the reliability of a particular type of evidence, a trial judge must now ensure that there is sufficient threshold reliability in the particular case to give the evidence the necessary probative value to warrant its admission").

[111] For commentaries suggesting that trial judges should be empowered to exclude unreliable evidence to protect the innocent, see Kent Roach, "Unreliable Evidence and Wrongful Convictions: The Case for Excluding Tainted Identification Evidence and Jailhouse and Coerced Confessions" (2007) 52 Crim. L.Q. 210; Dufraimont, *supra*, note 75.

> It then falls to the trial judge to adequately instruct the jury on how to approach these confessions in light of these concerns.[112]

The logic of this argument seems unimpeachable. It is plainly true that an admissibility rule does not exhaust concerns about reliability and prejudice with a suspect species of evidence like confessions in Mr. Big operations. However, what might not be immediately apparent is that this line of reasoning represents a significant departure from the prior Canadian law of evidence.

When the prosecution relies on evidence that raises reliability concerns, the law of evidence provides for two basic methods for addressing those concerns: excluding the evidence or educating the jury about the reliability problems through expert evidence or, more commonly, through cautionary instructions.[113] Arguably, the best way to protect against wrongful convictions on the basis of unreliable evidence would be to exclude the evidence where the danger of unreliability is very high and to admit the evidence but educate the jury about the reliability concerns in other cases.[114] Before *Hart*, however, Canadian courts generally resisted suggestions the same form of unreliable prosecution evidence should be subject to both an exclusionary rule and cautionary instructions. Rather, the strong tendency in Canadian law has been to subject each form of unreliable evidence to only one kind of evidentiary rule.[115] For example, eyewitness identification evidence and unsavoury witness testimony have been recognized as potentially unreliable forms of evidence that raise a risk of wrongful convictions. In those contexts, the law of evidence provides for cautionary instructions to address the reliability problems with the evidence.[116] Attempts to suggest that evidence of these kinds should, on occasion, be excluded, have generally been rebuffed.[117] Similarly, expert evidence on eyewitness identification evidence has been rejected as unnecessary largely because of the availability of cautionary jury

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[112] *Mack*, *supra*, note 5, at para. 44.

[113] Dufraimont, *supra*, note 75, at 280.

[114] For fuller argument, see *id*., at 321-25.

[115] See *id*., at 278, labelling this tendency an implicit "principle of exclusivity".

[116] See *R. v. Hibbert*, [2002] S.C.J. No. 40, [2002] 2 S.C.R. 445 (S.C.C.), on eyewitness evidence and *R. v. Vetrovec*, [1982] S.C.J. No. 40, [1982] 1 S.C.R. 811 (S.C.C.); *R. v. Brooks*, [2000] S.C.J. No. 12, [2000] 1 S.C.R. 237 (S.C.C.), on unsavoury witness testimony.

[117] See *e.g.*, *Mezzo v. R.*, [1986] S.C.J. No. 40, [1986] 1 S.C.R. 802 (S.C.C.) (the frailties of eyewitness evidence go to weight, not admissibility); *R. v. MacDonald*, [2000] N.S.J. No. 143, 184 N.S.R. (2d) 1, 2000 NSCA 60 (N.S.C.A.) (judges have no discretion to exclude unreliable jailhouse informant testimony).

instructions.[118] In the context of confessions in ordinary police interrogation, on the other hand, the protection against wrongful convictions that the law provides is the voluntary confessions rule, an exclusionary rule. Canadian courts have not developed a practice of delivering cautionary instructions to juries about confessions that are admitted, even though concerns about the reliability of confessions are undoubtedly not exhausted by application of the exclusionary rule.[119]

It should be acknowledged that there are areas of evidence law where exclusionary rules and jury instructions operate routinely in the same doctrinal space. Most notably, evidence of the accused's bad character may be excluded or admitted subject to a limiting instruction. In that context, the concern about the evidence is prejudice, not reliability. The evidence is inadmissible to support prohibited propensity reasoning, but admissible for other purposes. Properly understood, limiting instructions on bad character evidence are not an additional evidentiary protection on top of the exclusionary rule; they are internal to the operation of the exclusionary rule. Using limiting instructions to explain to a jury the permissible and impermissible uses of evidence is just one accepted method of enforcing exclusionary rules.[120] Perhaps for this reason, Moldaver J. commented in *Mack* that the challenge of delivering limiting instructions to contain the prejudicial effect of Mr. Big evidence is "more familiar" than the challenge of instructing the jury on the dangers of unreliability.[121]

Where the problem with the evidence is its reliability, there are typically no permissible and impermissible uses to be contrasted. When an eyewitness identifies a suspect, or an accused confesses under police interrogation, or a jailhouse informant reports that the accused confessed in custody, the difficult question is not how the evidence can be used but

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[118] *R. v. McIntosh*, [1997] O.J. No. 3172, 35 O.R. (3d) 97 (Ont. C.A.).

[119] See Dufraimont, *supra*, note 75, at 286 (Canadian law "treats the confessions rule as the exclusive solution to the false confessions problem and provides no way of controlling the use of unreliable confessions that may come before the jury despite the rule"). Canadian courts have also rejected the possibility of educating the jury about the danger of false confessions through expert evidence: see *R. v. Osmar*, [2007] O.J. No. 244, 44 C.R. (6th) 276 (Ont. C.A.); *R. v. Warren*, [1995] N.W.T.J. No. 7, [1995] 3 W.W.R. 371 (N.W.T.S.C.).

[120] Justice Rothstein put it this way in *R. v. White*, [2011] S.C.J. No. 13, [2011] 1 S.C.R. 433, 2011 SCC 13, at para. 30 (S.C.C.) [hereinafter "*White*"]:

> The goal of excluding evidence as inadmissible or providing a limiting instruction is essentially the same: to prevent the jury from considering the evidence, either with respect to the entire case (for admissibility) or with respect to one or more issues (for a limiting instruction). Moreover, the same rules of evidence govern admissibility and the need for limiting instructions.

[121] *Mack*, *supra*, note 5, at para. 55.

whether it is true. An instruction warning the jury about the danger of unreliability is not a limiting instruction but a cautionary instruction that "leaves evidence for the jury to consider, but warns them to be careful with it".[122] It is these cautionary instructions that, up to now, have tended to be employed only in areas where exclusion of evidence is not an option.

The new framework for Mr. Big evidence under *Mack* and *Hart* marks a shift in the law by applying both an exclusionary rule and cautionary instructions to the same form of unreliable evidence. This shift opens the possibility that such overlapping safeguards will be applied to other forms of evidence that raise reliability concerns. If confessions to Mr. Big that have survived the two-pronged admissibility analysis still require a cautionary jury instruction, why should the same not be true of confessions in traditional police interrogation that have survived the voluntariness inquiry? Interestingly, in the recent case of *R. v. Pearce*,[123] the Manitoba Court of Appeal overturned a murder conviction on the ground that the trial judge erred in failing to instruct the jury on risk of false confessions in case where the confession was voluntary but still raised reliability concerns. The Supreme Court's judgment in *Mack* lends support to this approach by suggesting that both an exclusionary rule and cautionary instructions will sometimes be needed to adequately control for problems of reliability. The Court's adoption of a multifaceted approach to Mr. Big evidence in *Hart* and *Mack* may lay the foundation for acceptance of similar overlapping safeguards in other areas of evidence law.

V. CONCLUSION

The Supreme Court's recent judgments in *Hart* and *Mack* are rich in implications. Most importantly, the cases place some restraints on Mr. Big operations and the evidence they generate. Police should be encouraged to be more circumspect in mounting these operations and the courts should be more vigilant in assessing the resulting confessions. The judgments also have ramifications beyond the Mr. Big context. They may be relied on in future cases to place some limits on other kinds of undercover operations. And finally, the Court's approach to the reliability problems of Mr. Big confessions carries the potential to enhance

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[122] *White*, *supra*, note 120, at para. 34.
[123] [2014] M.J. No. 202, 13 C.R. (7th) 270 (Man. C.A.).

protections against wrongful conviction based on other forms of unreliable evidence. *Hart* can be read as recognizing trial judges' discretion to exclude unreliable evidence, while *Hart* and *Mack* together suggest that both an exclusionary rule and a rule requiring cautionary jury instructions may be needed to respond to serious concerns about the reliability of prosecution evidence.