

The Law on Mr. Big Confessions

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Cases Commented On: *R v Magoon*, [2015 ABQB 351](#); *R v Campeau*, [2015 ABCA 210](#)

A Big operation is a common police sting tactic used to obtain confessions from suspects. It usually involves undercover police officers posing as members of a criminal organization and developing a friendly relationship with the suspect. The suspect is then asked to perform a series of seemingly illegal tasks, and is told those are tests to gain trust from the head of the criminal organization, Mr. Big. In the process, the police officers involved try to obtain evidence or a confession from the suspect in relation to an alleged crime. The operation culminates with a “job interview” between the suspect and the crime boss Mr. Big, which entails Mr. Big interrogating the suspect into his past criminal activities. Once the suspect admits to committing the crime, he or she is arrested. In this post I look at recent decisions in Alberta that have applied the law concerning the admissibility of Mr. Big confessions.

In *R v Magoon* the father of the victim and his partner were suspected of causing the death of 6-year-old Mieka Jordan through a series of physical abuses. A covert police operation was staged to try to discover the truth about the treatment of the victim. Two undercover officers posed as a couple to befriend the two suspects, Spencer Jordan and Marie Magoon, and involved them in what appeared to be a smuggling operation. During one of the scenarios in the Mr. Big operation, the police in Calgary attended the residence to arrest Jordan for the murder. This provided the pretext for a meeting between Jordan and Vic, an undercover officer who acted as a powerful member of the criminal organization. The meeting was for Vic to learn the truth of what happened in order to assist Jordan in getting rid of the charges. During this meeting, Jordan made admissions of violence against Mieka to Vic. The two suspects then went on to discuss the death of the victim in their hotel room, where their confessions were wiretapped (*Magoon*, at para 14-23).

In deciding the admissibility of these testimonies in *Magoon*, Madam Justice R.E. Nason applied the law set out by the Supreme Court of Canada (SCC) in *R v Hart*, [2014 SCC 52](#). This landmark 2014 SCC decision redefined the law concerning the admissibility of Mr. Big evidence. The Mr. Big tactics have been frequently used by police forces in Canada. However, *Hart* put into question the admissibility of confessions obtained under such method. In *Hart*, the SCC held that a Mr. Big confession could be unreliable, prejudicial and would encourage police misconduct. In *Hart*, the police suspected Hart of murdering his twin daughters. They targeted him for a Mr. Big operation where the undercover officers were trying to lure him to join a fictitious criminal organization. Hart was shown attractive benefits of working for the gang—he was taken to expensive restaurants and was flown across the country to carry out paid simulated criminal tasks carefully crafted by the police (*Hart* at para 58). This marked a stark contrast to his lifestyle prior to meeting the undercover officers—he was socially isolated, unemployed, and living on welfare (*Hart* at para 133). At first, Hart told Mr. Big that the death of his daughters was accidental, but after some further probing, he confessed to killing them (*Hart* at para 34-35).

The SCC recognized that the benefits of working for Mr. Big were powerful inducements for Hart to falsely confess. In recognizing the vulnerabilities of a target in a Mr. Big operation, *Hart* proposes a new test to assess the admissibility of Mr. Big confessions. Under this new test, confessions obtained during a Mr. Big operation are presumptively inadmissible unless the Crown can establish on a balance of probabilities that the probative value of the confession outweighs its prejudicial effects (*Hart* at para 85). In addition, the doctrine of abuse of process is considered in the second prong of the test to guard against state conduct that “society finds unacceptable, and which threatens the integrity of the justice system” (*Hart* at para 113). Furthermore, the trial judge retains the discretion to exclude evidence where its admission would compromise trial fairness (*Hart* at para 88).

R v Mack, [2014 SCC 58](#) was the first SCC ruling on a Mr. Big operation after *Hart*, and gave further clarification on how the *Hart* framework is to be applied. The confession obtained during a Mr. Big operation can be highly probative when there is confirmatory evidence and that the prejudicial effects to the accused is low. In *Mack*, the accused was gainfully employed and the amount of payment he received from working for Mr. Big was not significant (*Mack* at para 34-35, 59). *Mack* also provides guidance to trial judges on how to instruct juries in considering evidence stemming from a Mr. Big operation in order to reduce the prejudicial effects to the accused (*Mack* at para 51-54).

In *Magoon*, Justice Nason stated that confirmatory evidence is not necessarily a decisive factor to determine whether a Mr. Big confession is admissible. Rather, the existence of confirmatory evidence can provide a powerful guarantee of reliability (*Magoon* at para 10). The Mr. Big testimonies obtained from the two suspects in this case corroborated closely with the expert evidence concerning how the victim’s body injuries were caused. This made the evidence highly probative.

Mr. Big Evidence in Implicating a Party to the Crime

In *R v Campeau* the Alberta Court of Appeal has expanded the law to allow Mr. Big evidence to be admitted to implicate a party to the *actus reus*. *Campeau* suggests that Mr. Big evidence can be admissible against a third party of the crime provided that the evidence falls under the principled exception of hearsay as prescribed by *R v Khelawon*, [2006 SCC 57](#). In this case, Campeau challenged his conviction for manslaughter as a party to a robbery and killing. Up to this point, all the Mr. Big cases had involved only the accused’s own confession to a Mr. Big character. In *Campeau*, however, the Court of Appeal ruled the evidence made by the co-accused Worme concerning Campeau and others was admissible.

The Court found that the evidence of Worme against Campeau met the criteria of necessity and reliability under the principled exception in *Khelawon* (*Campeau* at para 14) as the testimony was not obtained by abusive police conduct. The *Campeau* Mr. Big operation used a truth verification strategy which involved telling the target that the fictional criminal organization could cover up the crime for him if the crime boss knew the truth. This was distinguished from the technique used in *Hart*, which was a strategy of false bragging (were you tough enough for our organization) (*Campeau* at para 21).

The Court of Appeal distinguished *Campeau* from the decision of the British Columbia Court of Appeal in *R v Bradshaw*, [2015 BCCA 195](#) on the basis of the facts. In *Bradshaw*, the accused was implicated in two murders by a former co-accused Thielen who refused to testify at trial, but agreed to re-enact the case for the police. The re-enactment was videotaped but was not under

oath. During the re-enactment, Thielen inculpated Bradshaw to the murders (*Bradshaw* at para 6). The British Columbia Court of Appeal overturned the guilty verdict of Bradshaw from the lower court as it deemed that the re-enactment was hearsay evidence that did not demonstrate circumstantial guarantees of trustworthiness necessary to meet the threshold reliability test (*Bradshaw* at para 32). Thielen initially took full responsibility for the murders during his conversation with Mr. Big. Sometime later he implicated Bradshaw. As both Bradshaw and Thielen were present at the crime scene, forensic evidence could not decisively prove Thielen's story. As it was not possible for the jury to determine the truth of Thielen's testimony without cross-examining him, the court set aside the verdict of Bradshaw.

Mr. Big Evidence in Other Jurisdictions

The Mr. Big technique is a Canadian invention (*Hart* at para 56), and it has solved many cold cases in Canada. Nonetheless, Australia is the only jurisdiction outside Canada that adopts the technique (see Timothy E Moore et al, "Deceit, Betrayal and the Search for Truth: Legal and Psychological Perspectives on the 'Mr. Big' Strategy" 55 Crim LQ 348 2009-2010 at 353).

The Mr. Big technique is not used in the United Kingdom and the United States (see Moore et al, at 353). Nevertheless, the confession obtained from the suspect during the Mr. Big operation in *R v Proulx*, [2005 BCSC 184](#) conducted by Canadian authority on UK soil was admissible for the purposes of an extradition proceeding in the UK, where the accused was extradited and tried in Canada (*Proulx* at para 28). Nonetheless, whether the evidence itself would be admissible in a criminal trial in the UK was never determined (*Proulx* at para 51).

The Mr. Big technique is not used in the United States (see *R v Osmar*, [2007 ONCA 50](#) at para 55) and no cases have been found using the Mr. Big technique on American soil (see *Hart*, Factum of the amicus curiae at para 25 n 51). Nonetheless, it is worth noting that the American authorities used the evidence collected in a Mr. Big operation conducted in Canada to convict Sebastian Burns and Atif Rafay—two Canadians accused of a triple murder that took place in the US (see [here](#)).

The Implication to Future Mr. Big Operations

The SCC in *Hart* raised concerns that the Mr. Big technique could induce false confession (*Hart* at para 72). Although there is an absence of precise data, false confession has been recorded by researchers around the world as a phenomenon that occurs with regularity (see Steven M Smith et al, "Using the 'Mr. Big' Technique to Elicit Confessions: Successful Innovation or Dangerous Development in the Canadian Legal System?" (2009) 15:3 Psychology, Public Policy & L 168 at 180). Innocent people falsely confess due to psychological pressure placed upon them during police interrogations and confession contamination (see Brandon L Garrett, "The Substance of False Confessions" (2010) 62 Stan L Rev 1051, at 1053). Confession contamination could happen when police, inadvertently or intentionally, prompt the suspect on a little known detail of the crime, which provokes innocent people to not only falsely confess but also offer "surprisingly rich, detailed, and accurate information" (Garrett, at 1054) of the crime. Also, targets in Mr. Big operations are often exposed to simulated violent retribution by the crime boss first hand such as seeing a fellow member of the crime group being severely beaten as a result of disloyalty (see *R v Bonisteel*, [2008 BCCA 334](#) at para 15). The coercive nature of some of the scenarios could be a factor that induces unreliable confessions.

The presence of highly probative corroborative evidence seems to be an important element of the admissibility of Mr. Big confession, particularly considering a person could potentially lose his or her liberty, the possibility of dishonest witnesses giving a false testimony, the frailties of human eyesight and memories, and the increased availability of forensic and DNA testing. In *Mack*, the confessions were subsequently confirmed by the finding of physical evidence that were highly probative. The *Hart* framework has tightened the rules on admissibility for evidence obtained during a Mr. Big operation, but it is still possible to admit Mr. Big confessions that are not corroborated by physical evidence and obtain a conviction. *Campeau* the Alberta Court of Appeal has extended the rule further to allow Mr. Big confession to be used against a third party of a crime, but there is a strong argument to be made that such evidence should only be admissible if other evidence exists to corroborate the Mr. Big confession.

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