“Mr. Big” Confessions, R v Hart, and a Proposal for a New Right of Appeal based upon Fundamental Post-Conviction Changes to the Law

by

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A thesis submitted in conformity with the requirements for the degree of Master of Laws

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2019

Abstract

In a 2014 decision, R v Hart, the Supreme Court of Canada (SCC) held that confessions obtained from undercover “Mr. Big” sting operations would henceforth by presumptively inadmissible as evidence in criminal trials. The new exclusionary rule was motivated by concerns about wrongful convictions arising from this type of confession, which is often unreliable and highly prejudicial to the accused. The advent of this new rule, however, casts doubt upon the reliability of past criminal convictions based upon “Mr. Big” confession evidence. Presently, there are only very limited avenues for post-conviction review based on subsequent fundamental changes to the law. Accordingly, a new statutory right of appeal is proposed to allow for reopening past cases when merited by fundamental post-conviction changes to the law.
Acknowledgments

I gratefully acknowledge the love, support and patience of my wife, Alisa, without which this project might never have been completed. I am thankful for my son, Wyatt, who was born into this world part-way through my LLM program; everyday his precious existence teaches me about what really matters in life and what I am working for. Last, but not least, I gratefully acknowledge my supervisor, Professor Hamish Stewart, for his thoughtful comments and guidance in completing this project.
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INTRODUCTION

Legal rules are meant to regulate outcomes in the criminal justice system. Therefore, it should not be surprising that unjust or misconceived rules, or gaps in legal doctrines, may contribute to miscarriages of justice. Such problems will hopefully be addressed as the law develops overtime. However, as aberrant laws are reformed and new laws are developed, there is seldom time taken to reflect on the continuing consequences of legal decisions made under discarded principles. Miscarriages of justice caused or contributed to by former laws may remain entrenched, though time and law marches forward. At present, inadequate mechanisms exist to remedy probable miscarriages of justice brought to light by post-conviction changes to the law.

Recent legal developments with respect to the “Mr. Big” investigative technique are emblematic of the issue. The Mr. Big technique is a type of undercover police operation where police trick suspects into joining a fake criminal gang. The gang is portrayed as a serious criminal enterprise, and one where crime pays. However, in order to gain membership in the gang and the rewards that it entails, suspects must confess any serious crimes they have committed in the past to the fake boss, an undercover officer commonly referred to as “Mr. Big”. If the suspect confesses the ruse quickly unravels and the suspect is arrested for his or her confessed crimes.

The Mr. Big technique is controversial. It expressly uses threats and inducements to elicit confessions from suspects. Even though such techniques are known to produce false confessions, until 2014 confessions elicited through Mr. Big operations were readily admitted into evidence without much, if any, judicial vetting. The legal protections that normally guard against state coercion in obtaining confessions were found inapplicable to Mr. Big confessions.

In 2014 the Supreme Court of Canada (SCC) acknowledged serious reliability and prejudice concerns with Mr. Big confessions, and the potential for abusive state conduct in the way police carry out Mr. Big operations. Accordingly, in *R v Hart*¹ the SCC pronounced a new common law rule of evidence deeming Mr. Big confessions presumptively inadmissible unless the Crown can prove sufficient threshold reliability to overcome the inherent prejudice that attaches to Mr. Big confessions.

¹ *R v Hart*, 2014 SCC 52 [*Hart (SCC)*].
confessions. Further, in *R v Mack*, the companion case to *Hart*, the SCC held that even were Mr. Big confessions are admissible, special instructions ought to be given to the jury about the inherent reliability and prejudice concerns with such evidence. These decisions fundamentally changed the approach to Mr. Big confessions under Canadian law.

Beyond changing the legal landscape prospectively, the *Hart* and *Mack* decisions cast doubt over past convictions based on Mr. Big confession evidence. The reliability concerns that motivated the SCC to declare such confessions presumptively inadmissible, and to require special jury instructions where such confessions are admitted, are no less applicable to pre-*Hart* cases than to post-*Hart* cases. This raises the specter of miscarriages of justice based on false confessions that were admitted and assessed under the old legal framework.

Despite this risk, there are very limited prospects for persons convicted prior to *Hart* and *Mack* to reopen their cases to have them assessed according to the new legal standards. Appeals based on post-conviction changes to the law are generally only available to accused who have pending appeals at the time the change to the law occurs. The only other avenue of recourse is a miscarriage of justice application to the federal Minister of Justice, which process is oriented towards fresh evidence and is expressly not meant to be a further layer of appeal. In the nearly five years since *Hart* and *Mack* were released, only three earlier cases have been or are in the process of being reviewed by way of appeal or ministerial review, even though hundreds of convictions based on this type of evidence occurred before *Hart* and *Mack*. This suggests that the existing review mechanisms are inadequate to address potential miscarriages of justice evinced by fundamental post-conviction changes to the law.

In a legal system that rightly allows for the evolution of the law, it is important to have effective mechanisms to reconsider past decisions based on discarded principles. Past decisions may prove to be unjust (at least prospectively) when measured against evolved legal principles and values. Accordingly, it is suggested that Parliament should establish a new statutory right of appeal to permit late or second appeals when fundamental post-conviction changes to the law suggest that an accused may have been wrongfully convicted as a result of the prior state of the law.

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2 *R v Mack*, 2014 SCC 58 [*Mack*].
This paper is divided into three parts. The first part discusses the false confession and wrongful conviction risk inherent with Mr. Big operations and then analyzes the pre- and post-\textit{Hart} legal frameworks governing the admissibility of such evidence. The second part analyzes how existing appeal and administrative review mechanisms have failed to respond to the risks of wrongful convictions highlighted by the \textit{Hart} and \textit{Mack} decisions. Accordingly, in the third part it is suggested that Parliament should create a new innocence-at-stake right of appeal based on fundamental changes to the law.

1 SCC Fundamentally Changes Legal Approach to “Mr. Big” Confessions

Long before the \textit{Hart} and \textit{Mack} decisions, legal and psychology scholars highlighted the false confession and prejudice hazards of Mr. Big confessions. However, despite these concerns, courts generally concluded that the legal limitations imposed on police in conducting custodial interrogations—namely, the accused’s right to silence and the confessions rule—did not apply in the non-custodial undercover context. Courts reasoned (dubiously) that suspects who were not detained did not require protection against state coercion. In \textit{Hart} and \textit{Mack} the SCC fundamentally reversed course, declaring presumptively inadmissible confession that were once presumptively admissible.

1.1 Mr. Big Operations, False Confessions, and the Risk of Wrongful Convictions

The Mr. Big investigative technique unashamedly relies upon threats and inducements to elicit confessions. Indeed, it is the use of such tactics—carefully calibrated to the particular vulnerabilities of the targeted suspect—that have made the technique so effective. Resultantly, it is exactly the sort of investigative technique that courts a risk of false confessions.
The Mr. Big technique is an innovation of Canadian policing. It dates back to at least 1901, although the use of the technique became more pervasive in the 1990s. Some commentators have suggested that use of the Mr. Big Technique became more prevalent after the SCC imposed restrictions on undercover tactics formerly used by police against suspects in custody. In modern times, the Mr. Big technique is typically employed in an effort to solve murder cases that have gone cold. Whatever the motivation of police, the technique has proven effective. In some cases the sting has even led to the discovery of a murder victim’s body. The Royal Canadian Mounted Police (RCMP) report that that the Mr. Big technique has been employed more than 350 times and has achieved a 95% conviction rate for operations that result in prosecutions.

While the specifics of each operation vary, Mr. Big operations typically follow the same three stages: (1) reconnaissance and initial contact, (2) relationship building and grooming the target for confession, and (3) an interview with Mr. Big. Throughout the operation undercover operatives may use coercive tactics, namely threats and inducements, to motivate the suspect to confess or make incriminating statements to undercover officers, or, ultimately, to Mr. Big.

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3 See King v Todd, (1901), 4 CCC 514 (Man KB).
5 R v Osmar, 2007 ONCA 50 at para 1 [Osmar].
6 See R v Copeland, 1999 BCCA 744 at para. 3; Mack, supra note 2, at para. 15.
7 Royal Canadian Mounted Police, “Undercover Operations” online: http://bc.rcmp-grc.gc.ca/ViewPage.action?siteNodeId=23&languageId=1&contentId=6941. Unfortunately, the available data does not describe how many of the 350 or more operations resulted in prosecutions.
8 Kouri T Keenan and Joan Brockman, Mr. Big: Exposing Undercover Operations in Canada (Winnipeg: Fernwood Publishing, 2010) at 18-19. This text, the only book in Canada devoted solely to Mr. Big operations, is based on a detailed study of 81 Mr. Big operations between 1988 and 2009. See also Moore et al, supra note 4, at 351-52; and Amar Khoday, “Scrutinizing Mr. Big: Police Trickery, the Confessions Rule and the Need to Regulate Extra-Custodial Undercover Interrogations” (2012) 60 Crim LQ 277 at 277-78.
Mr. Big operations are methodically planned out, and may be explicitly designed to exploit the target’s social, economic and psychological weaknesses. As Moore et al. describe 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 doesn’t have 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 naïve and uncomfortable around women, an appreciative female friend is made available. In effect, a new enhanced and promising social world is created for the suspect…

To orchestrate a credible fiction, undercover operatives often conduct extensive surveillance on the target of the operation before their initial approach. Surveillance may last for week or months; involve consultations with behavior profilers, psychologists, and forensic psychiatrists; and may even include wiretaps to intercept the target’s communications. This affords the undercover officers insight into the behaviours and daily routine of the target so that the initial approach and the subsequent operation can be methodically planned for maximum effectiveness.

Based on the accumulated intelligence, undercover officers will manufacture a situation to make first contact with the target. Common tactics include approaching the target while in custody, staging the breakdown of a vehicle and requesting assistance from the target, approaching the target at school or work, or offering the target employment. The object of making contact is for the undercover officer to befriend the target so that he or she can be successfully recruited into the fake criminal enterprise as a pretext to grooming the target to confess to Mr. Big.

The bulk of the operation is then consumed with the relationship building and grooming stage of the operation. Having befriended the target, the undercover officer will represent that he or she is a member of an organized criminal enterprise and that membership in the organization is lucrative. In the ensuing days, weeks, or months, undercover officers stage-manage a series of

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10 Moore et al, *supra* note 4, at at 381.
11 Keenan and Brockman, *supra* note 8, at 19.
12 Keenan and Brockman, *supra* note 8, at 53-58.
13 Keenan and Brockman, *supra* note 8, at 19.
“scenarios” where the target participates in increasingly serious simulated crimes on behalf of the organization. These scenarios reinforce the apparent legitimacy and criminal nature of the organization to the targets. Meanwhile, through the use of threats and inducements, the target is socialized to believe that serious criminality is rewarded by the organization, but that betrayal of the group will be met with violence. Throughout the operation undercover operatives repeatedly admonish the target that honesty and trustworthiness are paramount.

Financial and social inducements are used to cultivate the target’s desire to join, progress and remain in the fake criminal enterprise. Typically, the target is then given the opportunity to perform some low-level work for the organization for substantial remuneration relative to the task involved. In one case, the target was paid $1,800 for only twenty hours of work—a hefty sum for an otherwise impoverished individual. Another form of financial inducement is to hold out the prospect of a large future payout from an upcoming big job. Participation in the upcoming job is contingent, of course, on the target first obtaining the approval of Mr. Big. On the social front, undercover operatives provide the target with friendship and camaraderie, often involving entertainment and fine dining, which can be a welcome relief from the social isolation that often accompanies being publically accused of a serious crime.

Undercover operatives also use staged violence—which amount to implied threats—to reinforce to the target the importance of honesty and loyalty to the organization. In R v Terrico, for example, undercover officer staged a beating in a hotel room while the target was in the room next door; the purpose of the exercise was to impress upon the target that the undercover officers were ruthless and that dishonesty would be met with violence. Likewise, in R v Hathaway, undercover officer not only staged a beating of a woman for the target, but also threatened to kill

14 Keenan and Brockman, supra note 8, at 20.
15 Khoday, supra note 8, at 284; Keenan and Brockman, supra note 8, at 56 to 58; Moore et al, supra note 4, at 383.
16 R v Mentuck, 2000 MBQB 155 at 76.
17 Khoday, supra note 8, at 287-88.
18 R v Terrico, 2005 BCCA 361 at para 10 [Terrico].
her, her spouse, and her two year old child in the presence of the target who also happened to have a young child.19

In the final stage, the operation culminates with the target being interviewed by Mr. Big. Going into the meeting the target will know that his or her future with the organization, and all its attendant social and financial benefits, hinge upon winning the approval of Mr. Big. Through the aura of violence cultivated about the organization, the target will also be acutely aware of the violent consequences that can befall someone who Mr. Big disfavors. However, at the meeting the target will be confronted with a problem. Mr. Big will inform the target that he has learned that police suspect the target of a serious crime. Mr. Big will explain that the organization cannot afford the attention that the target might bring upon the organization if this matter is not resolved.20

Helpfully, though, Mr. Big will explain that he can resolve the target’s legal difficulties. Potential remedies include Mr. Big availing himself of corrupt contacts in the criminal justice system, arranging for evidence or witnesses to disappear, or having a terminally-ill member of the organization take responsibility for the crime.21 First, though, the target must confess, in detail, his or her “crime” to Mr. Big, both to prove his or her trustworthiness to Mr. Big, and to ensure that no loose ends are left unaddressed.22 Any protestations of innocence by the target will be dismissed by Mr. Big as lies. The target is thus confronted with a stark choice: confess, truthfully or falsely, or be expelled from the organization and potentially incur the wrath of violent criminal enterprise. If the target confesses the whole charade quickly unravels and the accused is arrested for the crime to which he or she has confessed to Mr. Big.

The nature and design of Mr. Big operations have engendered serious concerns about the risk of false confessions and resultant wrongful convictions. First and foremost, the use of threats and inducements is coercive. Targets may falsely confess out of fear that they or their loved ones will

19 R v Hathway, 2007 SKQB 48 at para. 10 [Hathway].
20 Keenan and Brockman, supra note 8, at 20-21.
21 Khoday, supra note 8, at 285-86.
22 Khoday, supra note 8, at 285.
be physically harmed if the target falls out of favor with Mr. Big or the fake criminal enterprise. Moreover, to avoid falling back into poverty or social isolation, or both, marginalized targets may be willing to say almost anything to maintain their ties to and benefit from membership in the fake criminal enterprise. The SCC has acknowledged that these sort of “coerced-compliant confessions”, the product of threats and inducements, represent the most common form of false confession.

Secondly, admonitions by undercover officers to targets that “honesty” is paramount may, perversely, have the opposite of their intended effect. These admonitions must be understood contextually from the perspective of the target. In the fake universe constructed by undercover officers the target is socialized to believe that criminality is not only permissible, but is rewarded. Targets are also groomed to believe that admitting to serious criminality will have no adverse consequences and that Mr. Big will be able to dispense with any legal trouble that the target might be in. This backwards social paradigm runs contrary to mainstream social norms and expectations. Thus, when Mr. Big dismisses any protestations of innocence as being dishonest, and when the target knows that Mr. Big will deal harshly within anyone suspected of being dishonest with him, the repeated admonitions to be “honest” may resonate with targets as admonitions to “tell Mr. Big what he seemingly wants to hear”.

If a target succumbs and falsely confesses to Mr. Big the risk of wrongful conviction skyrockets—particularly where there is no other evidence linking the accused to the alleged crime. Canadian wrongful convictions expert Bruce MacFarlane has observed that, short of being caught in the act, a confession is “the most powerful, persuasive, and damming evidence of

23 Moore et al, supra note 4, at 378-79; Maidment, supra note 9, at 102.
24 Moore et al, supra note 4, at 381.
27 Moore et al, supra note 4, at 378, 387.
guilt that the state can adduce.”

Juries tend to disbelieve claims of innocence in the face of confessions, and will often convict even in circumstances were strong inducements were used to elicit the confession. Building on this logic, Professor Richard Leo, a leading expert on false confessions, argues that a false confession is the most damning evidence that the state can adduce against a factually innocent accused.

False confessions are potent because they often have a ring of truth to them. There are two components to a false confession: a false admission (i.e. “I did it”) and a post-admission narrative that provides a detailed, albeit false, description of the motivation and manner in which the crime was supposedly committed. A false post-admission narrative may be contaminated with accurate information about the crime under investigation, whether provided intentionally or inadvertently by police through their questioning of the suspect, or whether gleaned by the suspect from media, which make the false confessions seem true.

False confession evidence can also cause a sort of tunnel vision. Once given, virtually everyone in the criminal justice system—often even defense counsel—view a confession as conclusive of the accused’s guilt. A confession, whether true or false, will often end investigative efforts that

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34 Leo, “False Confessions: Causes, Consequences, and Implications”, supra note 32, at 337.

might have otherwise uncovered exculpatory evidence.\textsuperscript{36} Moreover, confessions often trigger confirmation biases, where all other evidence—even evidence that may contradict the confession—will be interpreted as corroborative of the confession.\textsuperscript{37}

False confessions are also notoriously difficult to prove false.\textsuperscript{38} While DNA has proven the pervasiveness of false confessions, DNA evidence is only available in a small fraction of cases and using non-DNA evidence to prove factual innocence is fraught with challenges.\textsuperscript{39}

Moreover, in the Mr. Big context, not only will the jury hear the target’s admissions to Mr. Big, they will also hear evidence discrediting the target’s character, about how he or she admitted to serious criminality in order to further a budding career in organized crime. This sort of bad character evidence is usually not admissible because of the moral reasoning prejudice that it may cause, however such evidence is routinely admitted in Mr. Big cases to provide context for how the accused came to confess to Mr. Big.\textsuperscript{40} A target’s only hope of an acquittal may be to testify at trial and explain why he or she falsely confessed. However, “[a] jury may be loath to acquit an accused who has enthusiastically admitted to committing a crime with the hope of impressing their employer in organized crime.”\textsuperscript{41}

Moore \textit{et al} aptly summarize the risks inherent with Mr. Big Operations: “…in light of the invasiveness of the technique, its inherently coercive nature and the strong inducements held out to elicit confessions, there is a real concern that the technique may cause innocent people to falsely confess, giving rise to a risk of wrongful convictions.”\textsuperscript{42}

\textsuperscript{36} Kassin, “Why Confessions Trump Innocence”, \textit{supra} note 31, at 433.
\textsuperscript{38} MacFarlane, \textit{supra} note 29, at 476; Leo, “False Confessions: Causes, Consequences, and Implications”, \textit{supra} note 32, at 333.
\textsuperscript{40} See e.g. Osmar, \textit{supra} note 5, at paras 49-51; \textit{R v Bonisteel}, 2008 BCCA 344 at paras 39-55 [\textit{Bonisteel}]; \textit{R v Jeanvenne}, 2011 ONSC 7621 at paras 21-38.
\textsuperscript{41} Khoday, \textit{supra} note 8, at 290.
\textsuperscript{42} Moore \textit{et al}, \textit{supra} note 4, at 350.
1.2 Limited Legal Protections Pre-Hart

Despite the risks of false confession and the prejudicial bad character evidence that inevitably accompanies a Mr. Big confession, before Hart legal challenges to the admissibility of Mr. Big confessions were largely unsuccessful. As detailed below, the right to silence and the confessions rule were found inapplicable to Mr. Big confessions. Other creative attempts to exclude Mr. Big evidence were also unsuccessful, whether under the principled approach to hearsay, or based on a probative value versus prejudicial effect analysis. These decisions allowed Mr. Big operations to be conducted virtually in a legal vacuum, without legal limits designed to guard against the risks and prejudicial effects of false confessions outlined above.

1.2.1 The Right to Silence

The main legal protection against false confessions is an accused’s right to silence. It is a specific manifestation of the right against self-incrimination, which is considered a general organizing principle of the criminal law. At trial it is specifically protected by s 11(c) of the Charter, and the right to life, liberty and security of the person protected by s 7 of the Charter has been held to provide residual constitutional protection for the right to silence during the pre-trial period. The right to silence is closely related to, but broader than, that the confessions rule (discussed below). Thus, the right to silence protects “not only the negative right to be free of coercion

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43 Terrico, supra note 18, at para 49; Bonisteel, supra note 40, at paras 81-85; Osmar, supra note 5, at paras 52-53.
44 R v Ashmore, 2011 BCCA 18 at paras 32-40; R v Langlet, 2012 BCSC 1621 at paras 143-154.
46 Canadian Charter of Rights and Freedoms, s 11(c), Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), c 11 [Charter]. Section 11(c) provides that “Any person charged with an offence has the right:…(c) not to be compelled to be a witnesses in proceedings against that person in respect of the offense.”
47 R v Hebert, [1990] 2 SCR 151, 1990 CarswellYukon 7 at paras 100-103 [Hebert] (cited to Westlaw); Singh, supra note 45, at para 24.
48 Hebert, supra note 47, at para 117.
induced by threats, promises or violence, but also a positive right to make a free choice about whether to remain silent or speak to authorities." 49

In *R v Hebert* (which was not a Mr. Big case) the SCC held that the right to silence is not engaged by undercover operations targeted at individuals who are not in custody. The court reasoned that individuals who are not detained do not require the same protection as those who are detained because they are not under the control of the state. 50 Then, in *R v McIntyre* the SCC affirmed, based on *Hebert*, that the right to silence is not triggered by Mr. Big operations because the target is not detained and therefore not within the control of the state. 51 The *McIntyre* decision was subsequently followed in several reported Mr. Big cases. 52

The logic that targets of non-custodial undercover operations do not require protection from state coercion has been sharply criticised. Amar Khoday has argued that the “dichotomy between custodial versus extra-custodial undercover interrogations overlooks the immense power of the state outside of a detention facility.” 53 Just because a target does not perceive that he is being coercively manipulated by the state does not mean that the state is not exercising significant psychological control over the target. 54 Thus, Keenan and Brockman contend, “[t]he right to silence becomes meaningless if the police can simply switch to undercover operations to by-pass the right to remain silent and trick a suspect to talk to them.” 55

49 *Hebert*, supra note 47, at para 111.

50 *Hebert*, supra note 47, at para 131.

51 *R v McIntyre*, [1994] 2 SCR 480 aff’g (1993) 135 NBR (2d) 266 (NB CA) [*McIntyre*].


53 Khoday, supra note 8, at 287.


55 Keenan, supra note 8, at p 68.
A few years after *McIntyre*, in *R v White* the Supreme Court held that, in certain circumstances the right to silence may apply even though an individual is not detained.\(^{56}\) The court adopted four factors to contextually assess whether the right to silence is triggered in the absence of detention: (i) coercion (ii) existence of an adversarial relationship, (iii) reliability of the confession/statement, and (iv) the potential for abuse of power by state agents.\(^{57}\)

However, in only two cases—notably the majority of the Newfoundland and Labrador Court of Appeal in the *Hart* case and a trial level decision concerning a youth—did the court apply *White* to exclude a Mr. Big confession.\(^{58}\) However, in a number of other cases application of the *White* framework did not result in the exclusion of evidence.\(^{59}\)

Another possible trigger for the right to silence was suggested by the Ontario Court of Appeal in *R v Osmar*. While in that case the Court of Appeal applied *Hebert* and *McIntyre* to uphold the admission of Mr. Big evidence, in *obiter* Rosenberg J.A. hypothetically contemplated that “the right to silence recognized in *Hebert* could be extend to a case where the accused, although not in detention, was nevertheless under the control of the state in circumstances functionally equivalent to detention and equally needing protection from the greater power of the state.”\(^{60}\) However, in only two Mr. Cases was the character of a Mr. Big operation found to amount to “functional” detention of the target.\(^{61}\) In most cases, courts have found that the targets of Mr. Big operations were not “functionally” detained as contemplated by the *dicta* in *Osmar*.\(^{62}\)

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\(^{56}\) *White*, *supra* note 45, considered the admissibility of statements compellable by police from drivers under s 61 of the BC *Motor Vehicle Act*.

\(^{57}\) *White*, *supra* note 45, at paras 53-68.


\(^{60}\) *Osmar, supra* note 5, at para 42.


\(^{62}\) See e.g. *R v Earhart*, 2011 BCCA 490 at paras 72-75; *McDonald, supra* note 52, at paras 229-42; *Decoine-Zuniga, supra* note 59; at para 100.
Overall, aside from a few one-off cases, courts routinely denied targets of Mr. Big operation the protection of the right to silence.

1.2.2 The Confessions Rule

The common law confessions rule—another manifestation of the right against self-incrimination—provides residual protection for accused who make incriminating statements to authorities. It requires the prosecution prove beyond a reasonable doubt the voluntariness of confessions before they may be admitted into evidence. The rule is intended to protect individuals from the coercive power of the state and to ensure that no person is conscripted against themselves except by their own free will.

There are two strands of the confessions rule: one concerned with statements made to persons in authority, and another concerned with whether trickery used by police is so egregious to shock the conscience of the community. In Oickle, the Supreme Court of Canada set out a robust formulation of the common-law confessions rule. The voluntariness analysis required by the rule is determined through a contextual inquiry that considers the circumstances in which the inculpatory statement was made, with particular regard to: (i) any threats or inducements made to the accused, (ii) whether the statement was made in oppressive circumstances, (iii) whether the accused had an operating mind at the time the statement was made, and (iv) the extent of any police trickery used to elicit the statement.63 The confessions rule is concerned with the voluntariness and reliability of inculpatory statements made the accused, the hazard of false confessions, and the “overriding concern of the criminal justice system that the innocent must not be convicted.”64

In R v Hodgson, however, the Supreme Court of Canada emphasized that the confessions rule only applies to statements made by the accused to a “person in authority”.65 Broadly defined, a “person in authority” includes anyone involved in the arrest, detention, examination or

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63 Oickle, supra note 25, at paras 47-71.
64 Oickle, supra note 25, at para 36.
prosecution of the accused. However the accused must also reasonably believe that the person who receives the incriminating statement is a person in authority. Accordingly, the confessions rule would usually not apply to statements to undercover police officers, because the accused will usually not subjectively and reasonably believe that the undercover officer is, in fact, a state agent.

In *R v Grandinetti*, the Supreme Court specifically held that the confessions rule did not apply to a Mr. Big confession. Applying *Hodgson* and *Oickle*, on behalf of the unanimous Supreme Court of Canada Abella J. reasoned:

The appellant believed that the undercover officers were criminals, not police officers, albeit criminals with corrupt police contacts who could potentially influence the investigation against him. When, as in this case, the accused confesses to an undercover officer he thinks can influence his murder investigation by enlisting corrupt police officers, the state’s coercive power is not engaged. The statements, therefore, were not made to a person in authority.

Despite the effects of *Hodgson* and *Grandinetti*, it remained theoretically possible for a Mr. Big confession to be excluded as a result of undue police trickery under the second branch of the confessions rule. This branch emerged from 1981 decision in *Rothman v The Queen*, where the SCC expressly endorsed police use of trickery to solve crimes. An oft-cited passage from the concurring judgment of Lamer J. provides: “[i]t must also be borne in mind that the investigation of crime and the detection of criminals is not a game to be governed by the Marquess of Queensbury rules. The authorities, in dealing with shrewd and often sophisticated criminals, must sometimes of necessity resort to tricks or other forms of deceit and should not through the rule be hampered in their work.” Lamer J. held, however, that an otherwise voluntary statement to a person in authority could still be excluded if the conduct employed by the state to elicit the statement would bring the administration of justice into disrepute. For this to occur, Lamer J.

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66 *Hodgson, supra* note 65, at para 16.
68 *R v Grandinetti*, 2005 SCC 5. See also *Earhart, supra* note 62, at paras 76-78; and *Langlet, supra* note 44, at para 97.
69 *Rothman v The Queen*, [1981] 1 SCR 640 [*Rothman*].
70 *Rothman, supra* note 69, at 697.
said, there must be a clear connection between the obtaining of the statement and the impugned state conduct, and the conduct must be such that it “shocks the community”. By way of examples, Lamer J. suggested that a police officer posing as a chaplin to hear an inmate’s confession, posing as a legal aid lawyer to elicit a statement, or injecting a diabetic suspect with a truth serum on the pretext that it was insulin would be conduct that would require judicial repudiation. 71

In *Oickle*, the Supreme Court reaffirmed that undue police trickery could render a confession inadmissible. The court held that this principle is concerned with preserving the integrity of the justice system and that “[t]here may be situations in which police trickery, though neither violating the right to silence nor undermining voluntariness per se, is so appalling as to shock the community”. 72 Several appellate court decisions specifically contemplated that the manner of a Mr. Big operation, if conducted in an egregious way, could hypothetically meet the “shock the community” standard. 73

There is a doctrinal weakness to this branch of the confessions rule. As noted by Amar Khoday, there is no logical connection between whether or not police trickery shocks the conscience of the community versus whether it undermines the reliability of the confession obtained through that trickery. 74 It is the latter with which the law ought to be concerned. Inoffensive police trickery that grossly undermines the reliability of any statement thereby obtained would not run afoul of the “shocks the community” standard.

In any event, while this strand of the confession rule was theoretically applicable to Mr. Big Operations, the “shocks the community” threshold set an impossibly high-bar. In no reported Mr. Big case was police conduct found to shock the community, not even in the circumstances of staged violence in *Terrico* or *Hathway* noted above. Any theoretical protection afforded by this rule proved illusory.

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73 Osmar, *supra* note 5, at para 48; Bonisteel, 40 at paras 90-93; Earhart, *supra* note 62, at para 84.
1.3 Inadequate Legal Protections

Thus, in the pre-Hart era, confession evidence elicited through Mr. Big operations largely evaded the legal rules meant to protect individuals against the coercive power of the state. Khoday characterized the pre-Hart state of the law as “a gaping hole in the criminal justice system which law enforce officials have exploited.” Moore et al observed: “[t]he threats and inducements employed in the latter stages of Mr. Big operations may greatly exceed those which, if employed by a traditional person in authority, would render any subsequent statement involuntary.” Thus, by the time the SCC heard the Hart and Mack cases, many were calling for the court to impose restrictions on the Mr. Big technique, which had theretofore operated with few legal constraints.

1.4 Hart & Mack: Fundamental Changes to the Law

1.4.1 R v Hart: A New Common Law Rule of Evidence

Factually, Hart is an especially tragic case. The accused, Nelson Hart, was an unsophisticated, uneducated, socially isolated, impoverished individual. He was accused of murdering his twin three-year-old daughters who drowned one day when Mr. Hart took them to a park. Police became suspicious of Mr. Hart because of his odd behavior on the day of the drowning and because he gave conflicting accounts of what occurred. At first, Mr. Hart, who could not swim, said that he panicked when one of his daughters fell into the water. He therefore forgot to take his second daughter with him when he raced home to get his wife to help. Curiously, Mr. Hart did not use either of the two cell phones in his vehicle to call for help, nor did he stop at a gas station or the hospital that he passed on his way home to fetch his wife. By the time he and his wife returned to the park Mr. Hart’s second daughter was in the water and

76 Khoday, supra note 8, at 280.
77 Moore et al, supra note 4, at 359.
78 Hart (NLCA), supra note 58, at para 7.
79 Hart (SCC), supra note 1, at para 16.
both ultimately died of drowning.\textsuperscript{80} Mr. Hart later told police that he had a seizure on the day the twins drowned, but did not initially want to admit to that fact because he was concerned about losing his driver’s license.\textsuperscript{81} Police suspected foul play but had no evidence to suggest that the twins’ death was anything other than a tragic accident.\textsuperscript{82}

Two years later, police launched an intensive Mr. Big operation against Mr. Hart in relation to his daughters’ deaths.\textsuperscript{83} Mr. Hart was initially recruited to do some delivery jobs for a fake criminal organization concocted by police. The gang was portrayed as being tougher than the Hells Angels and one that would use violence against its own members who stepped out of line.\textsuperscript{84} Membership, however, had its rewards. Over time, undercover officers involved Mr. Hart in simulated crimes of escalating severity, for which Mr. Hart was paid nearly $16,000.\textsuperscript{85} To Mr. Hart the undercover officers quickly became his best friends. Not only did they lift him out of poverty and wine and dine him on lavish trips across the country, but they provided a lonely man with companionship that he desperately craved.\textsuperscript{86} Undercover operatives held out the prospect of an upcoming big job that would net Mr. Hart an additional $25,000.\textsuperscript{87} However, first he would have to obtain approval by the gang’s boss—i.e. Mr. Big.

When Mr. Hart met with the boss he initially tried to maintain that his daughters’ deaths was simply an accident. However, when Mr. Big repeatedly dismissed that account as a lie, Mr. Hart said that he killed his daughters to keep his brother-in-law from getting custody of his children.\textsuperscript{88} Mr. Hart gave conflicting explanations for how he supposedly drowned his daughters, and

\textsuperscript{80} R v Hart, 2007 NLTD 74 at paras 3-4 [Hart (Voir Dire)]; Hart (SCC), supra note 1, at paras 17-18.
\textsuperscript{81} Hart (Voir Dire), supra note 80, at para 8; Hart (SCC), supra note 1, at para 21.
\textsuperscript{82} Hart (SCC), supra note 1, at paras 19, 22.
\textsuperscript{83} Hart (SCC), supra note 1, at paras 23-24.
\textsuperscript{84} Hart (Voir Dire), supra note 80, at para 17; Hart (NLCA), supra note 58, at para 8; Hart (SCC), supra note 1, at paras 29, 223.
\textsuperscript{85} Hart (NLCA), supra note 58, at para 6.
\textsuperscript{86} Hart (Voir Dire), supra note 80, at paras 21-23.
\textsuperscript{87} Hart (NLCA), supra note 58, at para 6.
\textsuperscript{88} Hart (Voir Dire), supra note 80, at para 25-26; Hart (NLCA), supra note 58, at para 11; Hart (SCC), supra note 1, at paras 34-35.
there was no evidence to support the bizarre brother-in-law motive. Ultimately, Mr. Hart was convicted of his daughters’ murder on the strength of his Mr. Big confession.

The SCC was persuaded that these facts called for the imposition of new rules to constrain the use of Mr. Big operations. While Karakatsanis J. would have dealt with the case under the rubric of section 7 of the Charter and the White framework, instead the majority decided to create a new common law rule of evidence to address the reliability concerns inherent in Mr. Big confessions. In crafting the new rule Moldaver J. emphasized the need to strike the right balance between guarding against wrongful convictions stemming from false confessions while ensuring that police are “not deprived of the opportunity to use their skill and ingenuity in solving serious crimes.”

The SCC acknowledged inherent reliability concerns with Mr. Big confessions. It noted that Mr. Big operations are carefully calibrated to induce confessions, and that as a matter of common sense the potential for false confessions increases in proportion to the nature and extent of threats and inducements held out to the target. The court further conceded that it would be “dangerous and unwise” to assume that Mr. Big confessions are reliable because the accused does not know that person pressuring him to confess is an undercover police officer.

Secondly, the court acknowledged the prejudicial effect of the bad character evidence that accompanies Mr. Big Confessions. It causes both “moral prejudice” and “reasoning prejudice.” The former creates a risk that the jury may convict the accused because the accused is the type of person who would commit the offense charged; the latter distracts the jury with extraneous acts of misconduct. This leaves the accused in a precarious position: testifying becomes a tactical necessity to explain away the confession to Mr. Big, but the jury will be disinclined to believe

89 Hart (Voir Dire), supra note 80, at para 26; Hart (NLCA), supra note 58, at para 11-12; Hart (SCC), supra note 1, at para 36.

90 Hart (SCC), supra note 1, at para 3.

91 Hart (SCC), supra note 1, at paras 68-69.

92 Hart (SCC), supra note 1, at para 72.

93 Hart (SCC), supra note 1, at para 74.
the accused because his or her character has been tarnished by all the bad character evidence. In sum, Moldaver J. concluded that ‘[p]utting evidence before a jury that is both unreliable and prejudicial invites a miscarriage of justice.”

Thirdly, the court acknowledged the risk of police misconduct inherent in Mr. Big operations. The court expressed concern about the aura of violence often cultivated by undercover officers to impress upon targets the importance of honesty and loyalty to the fake criminal gang. Noting that no Mr. Big case had ever been stayed as a result of abusive police tactics, the court further expressed concern that the current legal framework would allow police misconduct to escape judicial oversight and constraint.

To address these concerns the majority adopted a new, two-pronged rule of evidence for determining the admissibility of Mr. Big confessions. The rule proceeds on the premise that Mr. Big confessions are presumptively inadmissible. Under the first prong, the Crown may can overcome the presumption of inadmissibility by showing on a balance of probabilities that the probative value of the confession outweighs its prejudicial effect. Under the second prong, even if the evidence has sufficient probative value to be put the trier of fact, it may nevertheless be excluded if the accused demonstrates that the evidence was obtained by police in a manner amounting to an abuse of process.

The probative value of a Mr. Big confession is a function of its reliability. The state bears the onus of proving reliability because it is it is the party that “creates the potent mix of a potentially unreliable confession accompanied by prejudicial character evidence.”

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94 Hart (SCC), supra note 1, at para 76.
95 Hart (SCC), supra note 1, at para 77.
96 Hart (SCC), supra note 1, at para 78.
97 Hart (SCC), supra note 1, at paras 79-80.
98 Hart (SCC), supra note 1, at paras 85-86.
99 Hart (SCC), supra note 1, at para 99.
100 Hart (SCC), supra note 1, at para 91.
requires a contextual assessment of the circumstances in which the impugned Mr. Big confession was made, including:

- a) the length of the operation;
- b) the number of interactions between police and the accused;
- c) the nature of the relationship between the undercover officers and the accused;
- d) the nature and extent of inducements offered;
- e) the presence of any threats;
- f) the conduct of the Mr. Big interrogation; and
- g) the personality of the accused, including his or her age, sophistication, and mental health. \(^{101}\)

Beyond the circumstances of the confession, the court must assess whether the confession itself contains any markers of reliability. These could include: the level of detail contained in the confession, including whether it contains mundane details that would not likely have been known by a false confessant; whether the confession leads to the discovery of additional evidence; or whether the confession identifies elements of the crime that were not released publicly (sometimes called “holdback information”). \(^{102}\) While emphasizing that the existence of confirmatory evidence is not a “hard and fast requirement,” Moldaver J. observed that “[t]he greater the concerns raises by the circumstances in which the confession was made, the more important it will be to find markers of reliability in the confession itself or the surrounding evidence.” \(^{103}\)

Once the probative value, or reliability, of a Mr. Big confession is determined, it must be weighed against the prejudicial effect of admitting the confession along with its accompanying bad character evidence. The majority held that the risk of prejudice can be mitigated by excluding particularly prejudicial pieces of evidence that are not essential to the narrative of the confessions; and that limiting instructions to juries may also help to attenuate the risks of

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\(^{101}\) Hart (SCC), supra note 1, at 102.

\(^{102}\) Hart (SCC), supra note 1, at para 105.

\(^{103}\) Hart (SCC), supra note 1, at para 105.
prejudice.\textsuperscript{104} Ultimately, whether probative value outweighs prejudicial effect is balancing exercise for the trial judge. The decision to admit or exclude evidence will attract deference on appeal.\textsuperscript{105}

Under the second prong of the new common-law rule, a Mr. Big confession that would otherwise be admissible under the first prong may nevertheless be excluded where police conduct in eliciting the confession is proven to be abusive. The reason for allowing exclusion on this basis is to ensure that there are inherent limits on state power; the courts cannot simply forgive police misconduct because it ultimately obtains a demonstrably reliable confession.\textsuperscript{106} Acknowledging that Mr. Big operations are too varied for a bright-line rule, Moldaver J. held that “police conduct, including inducements and threats, becomes problematic…when it approximates coercion…the police cannot be permitted to overcome the will of the accused and coerce a confession.”\textsuperscript{107} Examples of coercive tactics include the use or threat of violence against the accused or preying on the accused’s vulnerabilities (like youth, addiction, or mental health problems).\textsuperscript{108} Confessions obtained by coercion will be inadmissible on the basis of abuse of process.

Applying this new test to the facts in Hart, the majority ruled that Mr. Hart’s alleged confessions had to be excluded. The majority emphasized that, from the outset, Mr. Hart was socially isolated, unemployed and living on welfare.\textsuperscript{109} Then, the Mr. Big operation totally changed his Mr. Hart’s life: the money he was paid lifted him out of poverty and the mock-friendship provided by undercover officers ended his social isolation.\textsuperscript{110} Mr. Hart, therefore, had powerful inducements to falsely confess, because he knew is ticket out of poverty and newfound

\begin{footnotes}
\item[104] Hart (SCC), supra note 1, at para 107.
\item[105] Hart (SCC), supra note 1, at paras 108-110.
\item[106] Hart (SCC), supra note 1, at para 112.
\item[107] Hart (SCC), supra note 1, at para 115.
\item[108] Hart (SCC), supra note 1, at paras 116-117.
\item[109] Hart (SCC), supra note 1, at para 133.
\item[110] Hart (SCC), supra note 1, at paras 134-138.
\end{footnotes}
friendship depended on it.\textsuperscript{111} Moreover, these reliability risks were not mitigated by any confirmatory evidence or markers of reliability in the confession itself.\textsuperscript{112} Indeed the inconsistent and bizarre explanations that Mr. Hart gave for how and why he supposedly killed his daughters only cast further doubt on the reliability of these statements.

1.4.2 \textit{R v Mack}: Cautioning the Jury About the Reliability and Prejudice Concerns with Mr. Big Confessions

In Mack, the SCC further held that special instructions should be given to the jury when Mr. Big confessions are admitted into evidence. These instructions speak to the difference between threshold reliability for admissibility purposes versus ultimate reliability for fact-finding purposes. Reliability and prejudice concerns do not disappear simply because a Mr. Big confession is legally admissible under Hart.\textsuperscript{113}

Thus, the special instructions required under Mack are meant to give juries the tools they need to (i) contextually assess the ultimate reliability of any admissible Mr. Big confession evidence, and (ii) understand the limited use to which any accompanying bad character evidence can be put for determining whether the accused is guilty.\textsuperscript{114} While there is “no magical incantation that must be read to juries by trial judges in all Mr. Big cases”, generally trial judges should instruct juries that they ultimately get to decide the reliability of the confession and the judge should review with the jury the relevant factors and evidence that bear on the confession’s reliability.\textsuperscript{115}

Regarding bad character evidence, judges should instruct jury that this evidence was admitted for the limited purpose of providing context for the confession, judges should remind the jury that the simulated criminal activity was fabricated and encouraged by agents of the state, and that such evidence may not be relied on to convict the accused.\textsuperscript{116}

\begin{itemize}
\item \textsuperscript{111} \textit{Hart (SCC)}, supra note 1, at para 139.
\item \textsuperscript{112} \textit{Hart (SCC)}, supra note 1, at para 141-44.
\item \textsuperscript{113} \textit{Mack}, supra note 2, at para 44.
\item \textsuperscript{114} \textit{Mack}, supra note 2, at para 50.
\item \textsuperscript{115} \textit{Mack}, supra note 2, at para 52.
\item \textsuperscript{116} \textit{Mack}, supra note 2, at para 55.
\end{itemize}
1.4.3 Hart and Mack Fundamentally Changed the Law

The Hart and Mack decisions constitute fundamental changes to the law.\textsuperscript{117} This can be distinguished from mere incremental changes to the law, which result from the extension of existing legal principles to new fact scenarios. Fundamental changes, by contrast, have been variously described as: "dramatic shifts" in the law;\textsuperscript{118} substantial shifts in the law;\textsuperscript{119} a radical reversal to the law that was not simply the "logical and predictable corollary of earlier decisions;"\textsuperscript{120} or "fundamental restatements of the law which overrule established authority and send the law in a new direction."\textsuperscript{121} Hart and Mack meet these standards.

First, the Moldaver J’s "principled rule of evidence" is a new rule, not an incremental extension of existing principles. Indeed, Moldaver J. expressly acknowledged that attempts to extend existing legal protections to the Mr. Big context had failed.\textsuperscript{122} The new rule thus sets the law off in a new direction.

The first prong of the Hart test reversed the starting point for assessing the admissibility of Mr. Big confessions. Prior to Hart such confessions were presumptively admissible under the declarations against interest exception to rule against hearsay regardless of the apparent (un)reliability of the statement or the prejudice caused by the accompanying character evidence. Under the new rule in Hart Mr. Big confessions are presumptively inadmissible unless the Crown can prove sufficient indicia of reliability to justify their reception.

Regarding the second prong of the Hart rule, while it is framed in terms of abuse of process, in substance this part of the test subjects Mr. Big confessions to an analysis remarkably similar to


\textsuperscript{119} R v Albus, 2015 SKCA 121 at para 14.

\textsuperscript{120} R v Fertal (1993), 145 AR 225 (CA).

\textsuperscript{121} R v R(R)(1994), 19 OR (3d) 448, 1994 CarswellOnt 80 at para 31 (CA)(cited to WL) [R(R)].

\textsuperscript{122} Hart (SCC), supra note 1, at para 64.
the voluntariness analysis required by the confessions rule.\textsuperscript{123} Under both rules the court must
determine whether police conduct, including the use of threats and inducements, has overborne
the will of the accused.\textsuperscript{124} And, under both legal rules, where a confession is the product of
coercion, as opposed to a voluntary exercise of free will by the accused, it is inadmissible
regardless of its probative value. What is fundamentally novel about this facet of the Hart
decision is that it all but overrules the ratio of Grandinetti, where the Supreme Court exempted
Mr. Big confessions from the voluntariness analysis on the basis that the targets of Mr. Big
operations do not subjectively know that they are speaking to persons in authority.

As for Mack, the special jury instructions required by this case are also new. Prior to Mack there
was no legal requirements that juries be instructed about the specific dangers of Mr. Big
confessions. Courts had previously rejected efforts by defendants to call expert evidence about
the reliability problems with Mr. Big confessions, reasoning that the jury could form its own
judgment based on their own experience.\textsuperscript{125} This reasoning is contradicted by the conclusion in
Mack that trial judges must charge juries about the specific reliability and prejudice hazards of
Mr. Big evidence in order to equip juries with the tools necessary to fairly assess evidence
arising from a Mr. Big operation.

2 Constraints on Addressing Potential Miscarriages of Justice

In view of the fundamental legal developments wrought by the Hart and Mack decisions, there
have been several calls to reopen past cases based on Mr. Big evidence to see if they would pass
muster under the new legal standard. Under current law there are two potential pathways to
review: an appeal or a ministerial review application under s 696.1 of the Criminal Code.

However, legal barriers exist for convicted persons to launch late or second appeals based on
post-conviction changes to the law, and publicly available information shows that only a single

\textsuperscript{123} See Elizabeth Sukkau and Joan Broackman, “‘Boys, You Should All Be In Hollywood’: Perspectives
on the Mr. Big Investigative Technique” (2015) 48:1 UBC L Rev 47 at 51. See also Adelina Ifene, “The
Hart of the (Mr.) Big Problem” (2016) 63:1-2 Crim LQ 151 at 152 describes the Hart decision has having
changed the common law confession rule to apply it to Mr. Big operations.

\textsuperscript{124} Oickle, supra note 25, at paras 57-58; Hart (SCC), supra note 1, at para 115.

\textsuperscript{125} Osmar, supra note 5, at paras 67-68; Bonisteel, supra note 40, at para 69.
pre-\textit{Hart} Mr. Big case has made it passed the preliminary assessment phase of the ministerial review process. The dearth of appeals or ministerial reviews of pre-\textit{Hart} convictions suggest that existing mechanism to review past convictions based on fundamental post-conviction changes to the law are inadequate.

\subsection*{2.1 Pre-\textit{Hart} Convictions Based on Mr. Big Confessions Should be Revisited}

The \textit{Hart} and \textit{Mack} decisions raise the specter of wrongful convictions. The reliability, prejudice and police misconduct concerns that motivated the \textit{Hart} and \textit{Mack} decisions would also have been present in earlier cases involving Mr. Big confessions. However, such cases were decided without the benefit of the new legal parameters established in \textit{Hart} and \textit{Mack} to help avert miscarriages of justice.

Following the release of the \textit{Hart} decision the Association in Defense of the Wrongfully Convicted (AIDWYC, now known as Innocence Canada) called for an audit of all prior Mr. Big convictions. In particular, AIDWYC expressed concern about the prospect of wrongful convictions in cases where there was no confirmatory evidence to support a confession, or where the supposedly confirmatory evidence was itself suspect. Accordingly, AIDWYC called for past convictions to be held to the new standard established in \textit{Hart}.\textsuperscript{126}

Academic commentary echoes AIDWYC’s concerns. According to Katherine Campbell, the \textit{Hart} decision “calls into question of the validity of sentences currently being served for convictions obtained through reliance on evidence obtained [through Mr. Big operations].”\textsuperscript{127} Amar Khoday and Jonathan Avey similarly contend that because “\textit{Hart} constitutes a new watershed rule and previously unrecognized bedrock procedural element that is essential to the fairness of a proceeding” the failure in past cases to subject Mr. Big confessions to adequate judicial scrutiny poses “a serious, substantial, and intolerably high risk of an unreliable

\begin{itemize}
\item[\textsuperscript{126}] See David Dias, “AIDWYC wants audit for all Mr. Big convictions” (August 14, 2014) online: https://www.canadianlawyermag.com/legalfeeds/aidwyc-wants-audit-for-all-mr-big-convictions-5879/
\item[\textsuperscript{127}] Kathryn M. Campbell, \textit{Miscarriages of Justice in Canada: Causes, Responses, Remedies} (Toronto: University of Toronto Press, 2018) at p 104. See also Terry Pedwell, “Stricter Rules Needed in ‘Mr. Big’ Police Stings: Supreme Court,” \textit{Global News}, 31 July 2014, online: https://globalnews.ca/news/1484222/supreme-court-to-rule-on-mr-big-stings/
verdict.”  

Or, as Professor Maidment bluntly contends: “[u]ndoubtedly, innocent men and women in Canada are currently serving prison sentences based on the false confessions elicited through these elaborate stings.”

In sum, there is a real risk that in earlier cases convictions were obtained on the strength of evidence that would now be considered inadmissible under Hart, or for which specific cautionary instructions would be required under Mack. In the absence of earlier Mr. Big evidence being filtered through the reliability and fairness lens now mandated by the SCC, there is a real risk that some accused were wrongfully convicted based on confession evidence now acknowledged to be unreliable. This merits re-assessing past convictions based on the Hart and Mack standards.

2.2 Appeals Only Available for Accused “Still in the Justice System”

However, in order to avail oneself of a fundamental post-conviction change to the law on appeal, an accused’s case must generally still be pending before the courts at the time the change occurs. In earlier cases, where rights of appeal have expired, the conviction is considered final and courts have been loathe to allow late appeals. This poses a significant hurdle for seeking judicial redress of miscarriages of judges that may have resulted from application of former legal principles.

In R v Wigman the Supreme Court held that to raise post-conviction changes to the law on appeal an accused must “still be in the justice system”:

The appropriate test is whether or not the accused is still in the justice system. As expressed in the Crown’s factum, this test affords a means of striking a balance between the “wholly impractical dream of providing perfect justice to all those convicted under the overruled authority and the practical necessity of having some finality in the criminal process.” Finality in criminal proceedings is of the utmost importance but the need for finality is adequately served by the normal operation of res judicata: a matter once finally judicially decided cannot be relitigated. Thus a person convicted under [an overruled precedent] will not be able to reopen his or her case, unless, of course, the conviction is not yet final. In Ref. re Man. Language Rights…the court observed that res judicata


129 Maidment, supra note 9, at 89.
would even preclude the reopening of cases decided by the courts on the basis of constitutionally invalid laws. The res judicata principle would apply with at least as much force to cases decided on the basis of subsequently overruled case law.\footnote{R v Wigman, [1987] 1 SCR 246 [Wigman].}

Subsequently, in \textit{R v Thomas}, the Supreme Court explained that to still be “in the justice system” the accused must have launched or still be able to launch an appeal within the usual appeal periods following conviction, or the accused must have been granted an extension of time to pursue an appeal.\footnote{R v Thomas, [1990] 1 SCR 713 at para 5 [Thomas].}

For accused who did not file their appeals on time, appellate courts have statutory authority to extend time to appeal.\footnote{Criminal Code, RSC 1985, c C-46, s 678(2) [Criminal Code].} Courts will generally consider the following factors when exercising their discretion about whether to grant an extension: (i) whether the applicant showed a bona fide intention to appeal within the appeal period; (ii) the extent of the delay and applicant’s explanation for it; (iii) the merits of the proposed appeal; (iv) whether extending time to appeal would unduly prejudice one of the other parties, and (v) the interests of justice.\footnote{See e.g. R v Smith, 1990 CarswellBC 1309 at para 5 (BCCA); R v Roberge, 2005 SCC 48 at para 6 [Roberge].} In \textit{R v Roberge} the SCC held that “the ultimate question is always whether, in all the circumstances and considering the factors referred to above, the justice of the case requires that an extension of time be granted.”\footnote{Roberge, supra note 133, at para 6.} In \textit{Thomas}, however, Sopinka J. cautioned that because of the impossibility of doing “perfect justice” courts should not “artificially” bring accused back into the system by granting inordinate extensions of time to appeal.\footnote{Thomas, supra note 131, at para 7.}

To date, the only two provincial appellate court decisions on extending time to appeal a Mr. Big conviction based on Hart have dismissed the applications because of concerns about delay. In \textit{R v Wilson}, on the strength of a Mr. Big confession the accused was convicted of first degree murder...
in June 2007; in April 2015 he applied for an extension of time to launch an appeal based on Hart (which was released in July 2014). There was evidence that the accused had intended to appeal his conviction in 2007 but such appeal ultimately did not proceed, in part because it was thought that an appeal could not succeed based on the state of the law at the time. Mr. Wilson claimed that he had maintained his innocence while incarcerated to his own detriment, and the Crown did not claim that any special prejudice would result if a new trial were ordered after a successful appeal by Mr. Wilson.

Nevertheless, citing Thomas, Southin J.A. held that “an applicant who is ‘out of the system’ will not be granted an extension of time to appeal solely on the basis of a change to the law.” Then, in considering whether there were “exceptional circumstances” that warranted granting an extension of time, Southin J.A. concluded that Mr. Wilson had not adequately explained the nearly eight year delay in pursuing his appeal and that because the trial judge had carefully cautioned herself about the reliability hazards of Mr. Big confessions it was “unrealistic” to consider that she would have excluded the confession under Hart. Notably though, Southin J.A. did not indicate that there were any internal or circumstantial markers of reliability to the confession itself that would overcome the presumption of inadmissibility that now arises under Hart.

Similar reasoning was used to deny the extension of time application in R v Carlick. Remarkably, leave was denied despite the court concluding that the applicant had arguable—albeit not strong—grounds of appeal that: the jury in her case was inadequately instructed as required under to Mack; that her confession to Mr. Big was inadmissible under the abuse of process prong of Hart; and that improper opinion evidence from a police officer was

136 R v Wilson, 2015 BCCA 270 (in Chambers) [Wilson].
137 Wilson, supra note 136, at paras 4-5.
139 Wilson, supra note 136, at paras 6-7.
140 Wilson, supra note 136, at para 11.
141 R v Carlick, 2018 YKCA 5 (in Chambers) [Carlick].
admitted at trial. In the end, though, the court concluded that inordinate delay “which is greatly attributable to Ms. Carlick” militated against extending time to appeal.

At the Supreme Court level, only two applications to extend time and appeal based on Hart have been successful: R c Perreault and R v Johnston. Both cases followed closely on the heels of the Hart decision. In both instances the accused were convicted of murder on the basis of Mr. Big confessions and appeals from conviction challenging the admissibility of the confessions on reliability grounds were dismissed. In both cases the Supreme Court remanded the case back to the provincial court of appeal for decision in accordance with Hart. Notably, in Perreault the second appeal was successful on the basis that the jury instruction failed to provide the necessary warnings about reliability and prejudice as required in Mack. In Johnston, after assessing the admissibility of the impugned Mr. Big confession under the Hart framework, the second appeal was dismissed.

It is difficult to draw general inferences from a limited data set of only four cases, however a few observations can be made. Perreault #2 and Johnston #2 illustrate that provincial appellate courts are well suited to the task of revisiting a conviction on the basis of new legal standard. The second appeal for both cases were heard within a matter of months of being remanded by the Supreme Court and both cases proceeded on the existing record without fresh evidence. The reversal of outcome in the Perreault #2 case shows how impactful a new legal standard can be,

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142 Carlick, supra note 141, at paras 56-57 and 62-64.
143 Carlick, supra note 141, at para 69.
144 It is unknown how many unsuccessful applications there were as the Supreme Court does not give reasons for leave decisions.
145 R c Perreault, 2013 QCCA 834, leave to appeal to SCC granted 2014 CanLII 62247 [Perreault #1].
146 R v Johnston, 2014 BCCA 144, leave to appeal to SCC granted 2015 CanLII 8573 [Johnston #1].
147 In Perreault #1 leave to appeal and extension of time were requested prior to the release of the Hart decision: see Supreme Court of Canada, “Docket 35484: Alain Perreault v. Her Majesty the Queen”, online: https://www.scc-csc.ca/case-dossier/info/dock-regi-eng.aspx?cas=35484. In Johnston #1 leave to appeal and extension of time were not sought until a few months after the Hart decision was released: see Supreme Court of Canada, “Docket 36144: Gary Donald Johnston v. Her Majesty the Queen”, online: https://www.scc-csc.ca/case-dossier/info/dock-regi-eng.aspx?cas=36144.
148 R c Perreault, 2015 QCCA 694 at paras 90-100 [Perreault #2].
149 R v Johnston, 2016 BCCA 3 [Johnston #2].
since the adequacy of the jury instruction had been raised as a ground of appeal and rejected in Perreault #1.

The Wilson and Carlick cases also, in a way, suggest the suitably of fresh appeals as an efficient means of addressing alleged miscarriages of justice evinced by a post-conviction change to the law. Effectively, the extension of time applications in these cases served as de facto leave to appeal applications, as are required in other contexts at the provincial appellate level and for all appeals to the Supreme Court that are not as of right. A court of appeal chambers application is a relatively low-cost, accessible mechanism for adjudicating whether there is any prima facie merit to a claim of wrongful conviction grounded in a subsequent legal change. One would hope however that, contrary to the result in Carlick, where there are arguable grounds of appeal that the court would then elect to reconsider the case on the merits. Nevertheless, provincial courts of appeal are experienced at vetting the threshold merit of proposed appeals to determine whether further judicial resources should be devoted to the case. As will be suggested below in Part III, allowing for a fresh appeal based on a fundamental post-conviction change to the law is the most sensible approach to addressing alleged miscarriages of justice evinced by post-conviction changes to the law, especially as compared to the ministerial review process described in the next section.

2.3 Ministerial Review Applications

Once an accused’s rights of appeal have been exhausted or expired any surviving conviction is considered final. Thereafter, the only further avenue for review is an application to the federal Minister of Justice under Part XXI.1 of the Criminal Code. This Part is titled “Applications for Ministerial Review – Miscarriages of Justice” and it allows the Minister to direct a new trial or appeal in cases where “the Minister is satisfied that there is a reasonable basis to conclude that miscarriage of justice likely occurred.”150

The review process involves four stages: (i) preliminary assessment, (ii) investigation, (iii) investigation report to the Minister, and (iv) decision by the Minister. Most of the process is

150 Criminal Code, supra note 132, s 696.3(3)(a).
handled by lawyers in the Criminal Convictions Review Group (CCRG) of the Department of Justice, though the final decision on any application rests with the Minister.\textsuperscript{151}

While this process serves an important fail-safe function in the criminal justice system—providing a legal mechanism for reopening cases that are otherwise considered final—the process, as it currently exists, suffers from a number of frailties.

First, submitting an application is quite onerous.\textsuperscript{152} Applicants must tender official copies of the entire court record that resulted in the conviction for which review is requested, including transcripts of all proceedings, all written arguments, and copies of all decisions.\textsuperscript{153} Obtaining these records is both time consuming and quite costly,\textsuperscript{154} especially for persons that are incarcerated.

Applications must also be supported by “new matters of significance” that were not considered by the courts or considered by the minister in a previous review application.\textsuperscript{155} In part this reflects the fact that applications for ministerial review are expressly not meant to be a further layer of appeal.\textsuperscript{156} What qualifies as a “new matter of significance” is not defined in the legislation, but according to the Department of Justice it will generally comprise “new information that has surfaced since the trial and appeal” (emphasis added).\textsuperscript{157} This characterization, while itself somewhat ambiguous, suggests that the ministerial review process is primarily geared towards the discovery of new exculpatory evidence or the discrediting of

\begin{thebibliography}
\bibitem{Campbell} Campbell, \textit{supra} note 127, at 198.
\bibitem{Regulations} \textit{Regulations Respecting Applications for Ministerial Review – Miscarriages of Justice}, SOR/2002-416, s 2(2).
\bibitem{Costs} For example, in Ontario court transcripts cost at least $4.30 per page. The cost increases to $6.00 or $8.00 per page to obtain a transcript within five business days or 24 hours, respective. See \textit{Fees for Court Transcript Regulation}, O Reg 94/14.
\bibitem{Criminal Code} \textit{Criminal Code}, \textit{supra} note 132, s 696.4(a).
\bibitem{Criminal Code note} \textit{Criminal Code}, \textit{supra} note 132, s 696.4(c).
\end{thebibliography}
prior incriminating evidence. This inference is further supported by the existence of the investigative phase of the review process, which itself is oriented to assessing the reliability and credibility of the new “information” submitted by an applicant.

The evidence-based character of the ministerial review process presents a potential barrier to review for persons advancing their case on the basis of a post-conviction change to the law. A change to the law does not produce new information bearing upon factual innocence or guilt, although, like the new rule in Hart, it can provide a new perspective and lens through which to assess existing information. However, advancing arguments about innocence based in law is admittedly akin to an appeal, which the ministerial review process is expressly not supposed to be.

Beyond this issue, the ministerial review process is also painstakingly slow. For example, in the notorious wrongful conviction case of David Milgaard it took three years for the review process to run its course. To be fair, and especially in circumstances where fresh evidence is tendered, there will be inherent time requirements to investigate the veracity of the “new matters of significance” and their potential impact on the conviction in question. Nevertheless, when innocence is at stake, delays in the magnitude of years start to become inordinate.

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158 See Andrea S. Anderson, “Wrongful Convictions and and Avenues of Redress: The Post-Conviction Review Process in Canada” (2015) 20 Appeal: Review of Current Law and Law Reform 5 at p 9. Regarding new exculpatory evidence see Roberts v British Columbia (Attorney General), 2018 BCSC 1027, (discussing the potential for new DNA testing to amount to a “new matter of significance”); and Winmill v Canada (Justice), 2015 FC 710 at para 33 and Walchuck v Canada (Justice), 2015 FCA 85 at para 17 (noting that determinations about whether new evidence is significant is approach in a manner similar to how appellate courts approach the admission of fresh evidence on appeal). Regarding the discrediting of prior incriminating evidence see R v Unger, 2005 MBQB 238 at para 52 (concluding that the withdrawal of hair fiber and jailhouse informant evidence amounted to a new matter of significance).

159 Scullion, supra note 151, at p 191; Campbell, Miscarriages of Justice in Canada, supra note 127, at p 196-97.

160 Patricia Braiden and Joan Brockman, “Remedying Wrongful Convictions through Applications to the Minister of Justice under Section 690 of the Criminal Code” (1999) 17 Windsor Yearbook of Access to Justice 3 at p 4, 22-23; Anderson, supra note 158, at p 14; Campbell, Miscarriages of Justice in Canada, supra note 127, at p 198.

161 Campbell, Miscarriages of Justice in Canada, supra note 127, at p 200, 205-06
The ministerial review process has also been criticized for its lack of independence. While presiding over the review process the Minister is also a representative of federal government, which might be found liable to an accused who was wrongfully convicted and imprisoned.\textsuperscript{162} There is also a perception that, as chief federal law enforcement officer, the Minister has too much of an adversarial connection to criminal prosecutions to later judge whether a prosecution went awry.\textsuperscript{163} These types of concerns have lead to several commissions of inquiry to recommend that a completely independent review body be established to conduct post-conviction review.\textsuperscript{164}

To date, there is only one report of a pre-Hart Mr. Big case that has advanced past the preliminary assessment stage of the ministerial review process. In \textit{R v Skiffinton}, the accused was convicted of murdering his fiancée on the strength of a Mr. Big confession; his 2004 appeal from conviction was dismissed as was his application for an extension of time and leave to appeal to the Supreme Court to have his case heard along with the Hart and Mack appeals.\textsuperscript{165} Three years after the Hart decision was release, in June 2017 Mr. Skiffington applied for ministerial review of his conviction, and a year later the CCRG advised that Mr. Skiffington’s application was proceeding to the investigation stage.\textsuperscript{166} We only know of Mr. Skiffington’s preliminary success

\begin{footnotes}
\item[162] While in most wrongful conviction case it would likely be the provincial government, if any, who is liable to the accused for the wrongful conviction, liability might also attach to the federal government in the event of negligent or abusive conduct by members of the RCMP or if the wrongful conviction was for drug offenses that were prosecuted by federal prosecutors.
\item[163] Braiden and Brockman, \textit{supra} note 160, at p 27; Scullion, \textit{supra} note 151, at p 194; Andersen, \textit{supra} note 158, at p 12; Campbell, \textit{Miscarriages of Justice in Canada, supra} note 127, at p 201-02.
\item[165] \textit{R v Skiffington,} 2004 BCCA 291, leave to appeal to the SCC refused 2013 CarswellBC 3326.
\item[166] See \textit{R v Skiffington,} 2019 BCSC 178 at para 5 [\textit{Skiffington (2019)}]. This decision concerns Mr. Skiffington’s application for bail pending the outcome of the ministerial investigation. While not provision of the \textit{Criminal Code} authorizes the court to grant a convicted person bail pending the outcome of a s 696.1 application, in \textit{R v Phillion,} [2003] OJ No 3422 (Ont SCJ), the court determined on constitutional and common law grounds that the court had inherent jurisdiction to grant bail in such circumstance.
\end{footnotes}
in the review process because of his application for bail pending the outcome of the ministerial investigation.

In granting bail the court observed “in its decision in Hart, the Supreme Court of Canada fundamentally altered the legal landscape of Mr. Big Confessions.” Mr. Skiffington argued that the new threshold screening of Mr. Big confessions required by Hart amounted to “new matters of significance” for the purposes of a s 696.1 application. The crown tried to resist the bail application on the basis that a change to the law could not amount to a “new matter of significance”. The court agreed with Mr. Skiffington that, in the circumstances of his case, the new screening requirement in Hart could ground a ministerial review application:

Moreover,… as a matter of pure logic, the change in law brought about by Hart would seem to be a new matter of significance. The key piece of evidence on which the applicant’s conviction rests was admitted without any admissibility screening. Post-Hart, such screening would be mandatory and the onus to justify its reception would rest with the Crown. A finding of inadmissibility would be based on the essential unreliability of the confession itself. Thus, the applicant’s conviction is potentially based on a piece of evidence that should not have been received in evidence and whose reliability is inherently suspect.\(^\text{167}\)

In so holding the court has laid a legal foundation for miscarriage of justice applications under s 696.1 being based on a post-conviction change to the law that casts new light upon the evidence used to convict an accused. Indeed, the above passage encapsulates well the rationale for reassessing pre-Hart convictions based on Mr. Big confessions. Given these conclusions, though, what seems most remarkable is that Mr. Skiffington’s case is, so far as can be gleaned from public sources, the only pre-Hart Mr. Big case that has advanced beyond the preliminary assessment stage. While there may be other unpublicized pre-Hart case churning through the review process, the fact that five years after Hart was issued there is but a single known case that has just past the preliminary review stage indicates how inefficient the ministerial review process is relative to second appeals (like in Perrault and Johnston).

\(^{167}\) Skiffington (2019), supra note 166, at paras 43-44.
3 A New Right of Appeal Based on Fundamental Post-Conviction Changes to the Law

As the foregoing analysis indicates, miscarriage of justice claims based on post-conviction changes to the law are more amenable to being addressed in an effective and efficient manner through the courts, as compared to the ministerial review process. However, legal obstacles exist to pursuing late or second appeals based on post-conviction changes to the law. A logical solution, then, would be for Parliament to legislatively provide for a new right of appeal when a fundamental post-conviction change to the law, like Hart, suggests that miscarriages of justice may have occurred in earlier cases.

3.1 The Proposal: A New Right of Appeal

It follows from the fact that all rights of appeal are statutory that Parliament could enact a new right of appeal in the Criminal Code to allow late or second appeals based on fundamental post-conviction changes to the law. Providing an express right to appeal on this basis would, in the case of late appeals, alleviate the harshness of the often strictly applied test for an extension of time to appeal, and it would obviate the need for courts to contort that test in cases where they were otherwise inclined to allow a late appeal. Likewise, for persons who had already exhausted their rights of appeal prior to the fundamental legal change, providing for a new express right of appeal would save meritorious cases from otherwise having to pursue a time and cost intensive ministerial review application.

Mirroring s 675 of the Criminal Code, the new right of appeal being proposed here might be phrased as follows:

**Right to appeal based on a fundamental post-conviction change to the law**

675.1 (1) In this section “fundamental post-conviction change to the law” means a change to the law that:

(a) declares an offense under the Criminal Code, or an element of such an offense, to be unconstitutional;

(b) declares inadmissible, or presumptively inadmissible, any type or class of evidence that prior to the change was admissible or presumptively admissible; or
(c) such other change to the law, which in the opinion of the court of appeal or judge thereof, significantly alters or overrules existing legal rules or principles, or establishes new foundational rules or principles;

but it does not include a change to the law that:

(d) merely extends or limits an existing legal rule or principle through its application or non-application, as the case may be, to a new fact scenario; or

(e) subject to subparagraphs (b) and (c) above, arises merely from the amendment or repeal of an Act or Regulation of the Parliament of Canada, or a provision thereof.

(2) A person who is convicted by a trial court in proceedings by indictment may appeal to the court of appeal against his conviction, based on a fundamental post-conviction change to the law, with leave of the court of appeal or judge thereof.

(3) The court of appeal or a judge thereof may grant leave to appeal under subsection (2) where the applicant demonstrates:

(a) a fundamental change to the law has occurred since his conviction or since the disposition of any appeals from his conviction;

(c) given his circumstances, that the applicant sought leave to commence an appeal under subsection (2) within a reasonable time after learning of the fundamental change to the law referred to in sub-paragraph (a);

(d) a prima facie case that had the fundamental change to the law referred to in sub-paragraph (a) been applicable at the time of the applicant’s trial the applicant may not have been convicted; and

(e) granting leave to appeal is in the interest of justice.

(4) The court of appeal or judge thereof may grant leave to appeal under subsection (a) notwithstanding that:

(a) under the doctrine of res judicata, or otherwise, the applicant had previously exhausted his rights of appeal under this Part or under the Supreme Court Act;

(b) the applicant’s intention to appeal arose only after he learned of the fundamental change to the law; or

(c) the applicant made no effort to appeal his conviction prior to the fundamental change to the law.
The proposed definition of a “fundamental post-conviction change to the law” is meant to codify the common law definition of a “fundamental” change to the law (discussed above). While this casts the definition of a fundamental change to the law somewhat expansively, the breadth of the proposed definition is tempered by the requirement that before any case is reopened on the basis of a fundamental post-conviction change to the law the would-be appellant obtain leave from a court of appeal.

Requiring would-be appellants to obtain leave would achieve at least two objectives. First, it would allow for a summary adjudication of whether any given change to the law constitutes a “fundamental change”. Along with the proposed definition, as outlined above there is also an existing body of jurisprudence to guide this sort of determination, and once the decision is made in respect of a given change to the law it can then be applied to subsequent leave applications based on the same change to the law.

Second, requiring leave would allow courts of appeal to screen out obviously unmeritorious appeals, even when fundamental changes to the law occur. For example, if a proposed appeal were based on the Hart decision and the record showed ample confirmatory evidence supporting the reliability of the Mr. Big confession, that careful instructions were given to the jury about the reliability of the confession and the limited use to which bad character evidence can be put, and there was otherwise no suggestion of abusive conduct on the part of police in conducting the Mr. Big operation, then, notwithstanding that Hart amounts to a fundamental change to the law, there would simply be no merit to the proposed appeal. In such circumstances, wasting time and expense on a full appeal hearing could be avoided by denying leave.

The four proposed factors that an applicant would have to satisfy to obtain leave are meant to impose appropriate limitations on accessing the new right of appeal. Requiring that the applicant demonstrate the occurrence of a fundamental, as opposed to incremental, change to the law is meant to ensure that the new right of appeal is only triggered rarely when truly monumental shifts in the law occur. The purpose of the second factor, that applicants seek leave within a reasonable time, given his circumstances, after learning of the legal change is meant to allow courts to refuse to hear appeals that are pursued in such a dilatory manner and so long after the applicant learned of the change that the applicant never had a serious intention to try to avail himself of the legal development. The third proposed factor would not only provide a basis for
courts of appeal to dismiss obviously unmeritorious appeals, but it would require that a rational connection exist between the change to the law that the appellant relies upon and the conviction to be appealed. It also imposes a higher standard than simply an arguable ground of appeal. This is meant to strike a balance between the need for additional post-conviction review in the wake of fundamental legal developments with the fact that persons availing themselves of this right of appeal have been convicted, the presumption of innocence has been displaced, and that a lot of time may have elapsed between the applicant’s conviction and the legal development upon which he or she hopes to rely. The fourth factor, the interests of justice, is meant to confer residual discretion upon the court to deny leave when all of the other criteria for leave are meant but to grant leave might result in a perversion or miscarriage of justice.

The third proposed subsection is meant to legislatively displace the common law barriers that typically bar late or second appeals based on fundamental post-conviction changes to the law. Dispensing with the doctrine of res judicata would allow for a second appeal even though a prior appeal was not successful. Further, providing that leave may be granted even though the applicant only formed an intention to appeal and took steps to commence an appeal after learning of a fundamental change to the law is meant to overcome the factors in the extension of time to appeal test upon which courts typically rely to deny time extensions to appeal based on post-conviction changes to the law.

Granted, expert legislative draftspersons might, for good reasons, suggest alternate wording to the phrasing proposed above. There is no particular magic to proposed wording. The point is to suggest the overall structure of a new legislative right to appeal based on fundamental post-conviction changes to the law. Such occurrences will presumably be rare. In the case of Mr. Big operations, for instance, it took nearly twenty-five years of courts readily admitting Mr. Big confessions into evidence for the Supreme Court to finally recognize a gap in the law requiring a new solution. When such developments occur and bear upon the correctness or justness of a prior conviction, a right to appeal like the one proposed above would allow affected persons to access or re-access Canada’s appellate courts whose raison d’etre is error correction and ensuring uniformity in the application of the law. This is exactly the type of forum where potential miscarriages of justice evinced by post-conviction changes to the law should be addressed.
3.2 Overcoming the Finality Principle

The first obvious objection to the proposed new right of appeal is that it flies in the face of the finality principle, the importance of which has been repeatedly affirmed by Canadian courts. There are at least three responses to this objection.

First, finality is not an absolute value in and of itself. It is instrumental to balancing the ever-increasing demand on the justice system with the limited resources available to deliver justice services. It recognizes that both litigants and society have limited time and money to devote to any particular case. When the Supreme Court speaks about the impossibility of doing “perfect” justice, it is talking about the impracticality of tugging at every loose thread to see what might unravel or endlessly second-guessing decisions made after each side has had the chance to put their best case forward. However, just because endless time and resources cannot be devoted to every case does not mean that additional time and resources should not be devoted to individual cases or a class of cases when subsequent developments reveal serious grounds to question whether the original decision was right.

Second, on a related note, if finality were an absolute value then there should be no remedy even when wrongful convictions are subsequently discovered. This, of course, contravenes basic notions of fairness and justice. Thus, if there is to be a mechanism to correct grave miscarriages of justice, and there should be, it simply becomes a policy question of what that mechanism should look like and who should pull its levers. The end result is the same: finality yields to the imperative of doing justice.

Third, the ministerial review process under s 696.1 of the Criminal Code, is itself an abrogation of the finality principle. The only remedies available to the Minister when he or she is satisfied that a miscarriage of justice likely occurred is to refer the case back to the courts, either for a further appeal or a re-trial. The key difference between the current ministerial review process and the proposed new right of appeal is who makes the decision about whether further judicial scrutiny is warranted. Arguably, giving the discretion back to the courts vests the decision in a more independent decision maker.
3.3 Concerns About Retroactivity

A second potential area of concerns relates to the retroactive application of the law. There is a general presumption against giving retroactive effect to new laws because people are unable to adjust their past actions to comport with the new standard. Unfairness may result if people are held to a standard that they did not know, and could not have known that they had to meet. It might be suggested, therefore, that if fresh appeals were allowed based on the Hart decision, then the state may be unfairly retroactively disentitled from relying on confession evidence that was obtained by means that were deemed acceptable at the time the confessions were obtained. It might further be suggested that if accused are permitted to rely on post-conviction changes to the law to seek acquittals, then it would open the door to the Crown relying on post-acquittal changes to the law to re-prosecute. Neither objection holds up to scrutiny.

In at least some cases the Hart decision will necessarily apply with retroactive effect. Ben Juratowich has described the phenomenon of “adjudicative retroactivity” as follows:

> When a judge expresses a common law rule that is contrary to or not based on existing authority and makes a decision based on that rule, the newly expressed rule is applied to facts that predate the expression of the rule. Such a decision also supplies a new rule for future cases even where the facts giving rise to those cases occurred prior to the formation of the rule. In these ways a rule formed at a later time is applied to facts arising prior to that formation as though the rule was operative at the time of those facts occurring. This outcome satisfies the definition of retroactivity: the application of a new law to a past event as though it was the law at the time of that event. 168

Thus, for cases that were “still in the justice system” at the time the Hart decision was released, and for prosecutions commencing after the Hart decision that involve Mr. Big operations that occurred prior to the release of the decision, the Hart decision will apply retroactively.

Providing for an express right of appeal based on fundamental post-conviction change to the law simply extends the natural adjudicative retroactivity. Doing so is within Parliament’s

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jurisdiction. At common law there is simply a presumption against giving retroactive effect to new laws;\textsuperscript{169} subject to constitutional limitations, the presumption against retroactivity can be overcome by express statutory language or where the legislative intent to give retroactive effect to a law is “plainly manifested by unavoidable inference”.\textsuperscript{170} Constitutionally, the only limitations on retroactive laws in the criminal field are the Charter protections against retroactive criminal offenses or retroactive increases in punishment.\textsuperscript{171}

The Charter further addresses any concern that retroactively giving accused the benefit of fundamental post-conviction changes to the law would open the door to the Crown obtaining a second chance at prosecuting an individual. Section 11(h) of the Charter guards against double jeopardy: “Everyone charged with an offense has the right...(h) if finally acquitted of the offence, not to be tried for it again….” The plea of autrefois acquit in the Criminal Code gives effect to this constitutional right.\textsuperscript{172} Therefore, allowing defendants to avail themselves of fundamental post-conviction legal changes does not open the door to the Crown revisiting past acquittals.

Finally, from a policy perspective, special consideration ought to be given to legal developments that are instituted to specifically address risks of wrongful convictions. As Juratowich contends, society “properly has an interest in criminal convictions obtained on the basis of the best legal rule, not in convictions obtained under rules later deemed to have been inappropriate” and thus “the interest of the individual in only being subjected to the force of the criminal law by the most just legal rules, even if only deemed to be so after the facts giving rise to the charge, will always outweigh any other interests in the case.”\textsuperscript{173}

\textsuperscript{169} Gustavson Drilling (1964) Ltd v Minister of National Revenue, [1977] 1 SCR 271.
\textsuperscript{170} Dikranian v Quebec (Attorney General), 2005 SCC 73 at para 33.
\textsuperscript{171} Whaling v Canada (Attorney General), 2014 SCC 20 at para 55 citing ss 11(g) and (i) of the Charter.
\textsuperscript{172} Criminal Code, supra note 132 s 607-609; R v Van Rassell, 1990 1 SCR 225.
\textsuperscript{173} Juratowich, supra note 168, at p 193.
3.4 Factual versus Legal Innocence

Finally, it might be objected that allowing fresh appeals based on post-conviction changes to the law might allow the factually guilty to re-open their cases on the basis of legal technicalities. Rather than correcting a miscarriage of justice, allowing the guilty to go free, it could be argued, would itself amount to a miscarriage of justice. While this is a fair concern, there are a number of possible responses.

First, factual innocence is not required to obtain an acquittal under Canadian law. A reasonable doubt as to guilt is enough. The reasonable doubt standard is, in part, meant to guard against the prospect of wrongful convictions. It follows, therefore, that the factually guilty can be and are acquitted of crimes they actually committed in order to ensure that the factually innocent are not wrongfully convicted.

Secondly, there is no such thing as a verdict of “innocence” under Canadian law. Through the criminal process the accused is either convicted or they are acquitted, they are found guilty or not guilty. As the Ontario Court of Appeal explained, the purpose of the criminal trial is not to pronounce upon the factual innocence of the accused but to determine whether the Crown has proven its case to requisite standard of proof. Thus, “[t]o recognize a third verdict in the criminal trial process would, in effect, create two classes of people: those found to be factually innocence and those who benefit from the presumption of innocence and the high standard of proof beyond a reasonable doubt.”

Third, the fact that a fundamental change to the law of evidence has occurred may signal doubt about the factual guilt of persons convicted under the earlier iteration of the rules. As the Supreme Court has observed, “[r]ules of evidence and principles governing the admissibility of evidence exist in the first place because experience teaches that certain types of evidence can be presumptively unreliable (or prejudicial) and can undermine the truth seeking function of a

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175 R v Solano, 2011 ONSC 5575 at para 16.
177 Mullins-Johnson, supra note 176, at para 25.
Likewise, the Ontario Court of Appeal has held that individual rules of evidence are meant to help determine whether the allegations against an accused are true, and “[w]here the established process hinders the search for the truth, it should be modified unless due process or resource based considerations preclude such modifications.” Thus, fundamental changes to rules of evidence, as occurred in Hart, may directly bear upon the confidence that can be had in the ascertainment of truth through trials that were conducted under the previous rules.

Wrongful convictions from false confessions are particularly insidious. In the absence of new exculpatory evidence it may never be possible to prove that a confession was false. Thus, it may be that the doubt cast by a new exclusionary rule of evidence, like that developed in Hart, is the best hope for a false confessor to prove that he or she was wrongfully convicted.

CONCLUSION

Given that the Hart and Mack decisions were meant to help avert wrongful convictions, it is surprising that only a handful of pre-Hart cases have been reopened to be reassessed according to the new legal standard. The reliability and prejudice concerns that motivated the court to establish the new rules pronounced in these cases are no less applicable to cases that were decided before the release of Hart and Mack. While exact data about the number of pre-Hart convictions based on Mr. Big confessions is not available, there are potentially hundreds of individuals who were convicted of serious crimes—often murder with its attendant life sentence—on the strength of confession evidence that is now recognized to be inherently unreliable and prejudicial. The risk of pre-Hart wrongful convictions is palpable yet there is near total inaction by the justice system to respond to this risk.

One explanation for this inactivity may be the limited avenues of post-conviction review available under Canadian law. For accused who did not immediately exhaust their rights of appeal after conviction, Canadian courts have proven very reluctant to allow late appeals based on fundamental post-conviction changes to the law. For others who have already availed

themselves (unsuccessfully) of their rights of appeal, a further appeal based on post-conviction legal development is barred by the doctrine of res judicata, and thus the only potential avenue of redress is an application for ministerial review under s. 696.1 of the Criminal. This latter review mechanism is expressly not a further right of appeal and is calibrated for instances were new exculpatory evidence comes to light. The Hart and Mack decisions illustrate, however, that even in the absence of new exculpatory evidence, changes to the law can give rise to serious concerns about the reliability of verdicts obtained under now discarded legal principles.

The new right of appeal proposed above is meant to help loosen the stranglehold that the finality principle has on the criminal justice system when, from time to time, watershed legal developments cry out for revisiting past decisions. Allowing for a fresh right of appeal in the wake of a fundamental post-conviction change to the law plays to the strength of Canadian appellate courts to determine whether, applying proper legal principles, a conviction is sustainable. It’s a function that appellate already discharge for accused who are still “in the justice system” at the time a fundamental legal change occurs. The proposed new right of appeal would simply expand this function to persons who may no longer be “in the justice system” in the sense that their case is still pending before the courts but who are still very much in the system in the sense that they are prison—perhaps wrongfully.

Intentionally so, the new right of appeal would have application beyond the Mr. Big context. It would allow persons convicted of crimes that are later struck down as unconstitutional to reopen their cases to confront the apparent injustice of keeping incarcerated those persons serving sentences for offenses that were constitutionally invalid. For example, anyone still serving a prison sentence for the prostitution offenses that were struck down in Canada (Attorney General) v Bedford. Looking forward, the proposed right of appeal may also have application if Canadian courts eventually determine that forensic bite-mark evidence should no longer be admissible, which evidence has largely been scientifically discredited but is still sometimes being admitted in Canadian courtrooms. In these situations, in the Mr. Big context, and in

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181 Canada (Attorney General) v Bedford, 2013 SCC 72.

other circumstances that will invariable arise in the future, the proposed right of appeal is meant to help ensure that when the law rightly evolves to confront the risks of wrongful convictions, post-conviction legal developments can be fairly applied to past cases to, in turn, help ensure that the application of past legal principles did not produce miscarriages of justice.

BIBLIOGRAPHY

LEGISLATION

*Canadian Charter of Rights and Freedoms*, s 11(c), Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, c 11

*Criminal Code*, RSC 1985, c C-46.

*Fees for Court Transcript Regulation*, O Reg 94/14

Ontario *Criminal Appeal Rules*, SI/93-169

*Regulations Respecting Applications for Ministerial Review – Miscarriages of Justice*, SOR/2002-416,

*Supreme Court Act*, RSC 1985, c S-2

JURISPRUDENCE

*Canada (Attorney General) v Bedford*, 2013 SCC 72

*Dikranian v Quebec (Attorney General)*, 2005 SCC 73

*Gustavson Drilling (1964) Ltd v Minister of National Revenue*, [1977] 1 SCR 271

*King v Todd*, (1901), 4 CCC 514 (Man KB)

*R v Albus*, 2015 SKCA 121

*R v Ashmore*, 2011 BCCA 18

*R v Bonisteel*, 2008 BCCA 344

*R v Brown* (1992), 127 AR 89 (ABCA)

*R v Brown*, [1993] 2 SCR 918
R v Butorac, 2010 BCSC 1173

R v Carlick, 2018 YKCA 5

R v Copeland, 1999 BCCA 744

R v Decoine-Zuniga, 2013 ABQB 536

R v Earhart, 2011 BCCA 490

R v Fertal (1993), 145 AR 225 (CA)

R v Grandinetti, 2005 SCC 5

R v Hart, 2007 NLTD 74

R v Hart, 2012 NLCA 61

R v Hart, 2014 SCC 52

R v Hathway, 2007 SKQB 48

R v Hebert, [1990] 2 SCR 151

R v Hodgson, [1998] 2 SCR 449

R v Jeanvenne, 2011 ONSC 7621

R v Johnston, 2014 BCCA 144

R v Johnston, 2016 BCCA 3

R v Jones, [1994] 2 SCR 229

R v Kakegamic, 2010 ONCA 903

R v Langlet, 2012 BCSC 1621

R v Mack, 2014 SCC 58
R v McDonald, 2013 BCSC 2344

R v McIntyre (1993), 135 NBR (2d) 266 (NBCA)

R v McIntyre, [1994] 2 SCR 480

R v Mentuck, 2000 MBQB 155

R v Mullins-Johnson, 2007 ONCA 720

R v Niemi, 2012 ONSC 6385

R v Oakes, [1986] 1 SCR 103

R v Oickle, 2000 SCC 38

R v Osmar, 2007 ONCA 50

R c Perreault, 2013 QCCA 834

R c Perreault, 2015 QCCA 694

R v Phillion, [2003] OJ No 3422

R v R(R)(1994), 19 OR (3d) 448 (CA)

R v R(N.R.), 2013 ABQB 288

R v R(N.R.), 2014 ABQB 118

R v Redd, 1999 CarswellBC 1412 (BCSC)

R v Roberge, 2005 SCC 48

R v Rouvarajah, 2013 SCC 41

R v Singh, 2007 SCC 48

R v Skiffington, 2004 BCCA 291
R v Skiffington, 2019 BCSC 178

R v Smith, 1990 CarswellBC 1309 (BCCA)

R v Smith, 2014 ONSC 3939

R v Solano, 2011 ONSC 5575

R v Terrico, 2005 BCCA 361

R v Thomas, [1990] 1 SCR 713

R v T(W.P.) (1993), 63 OAC 321 (CA)

R v Unger, 2005 MBQB 238

R v Van Rassell, 1990 1 SCR 225

R v Vuozzo, 2013 ABCA 130

R v W(D), [1991] 1 SCR 742

R v Welsh, 2013 ONCA 190

R v White, [1999] 2 SCR417

R v Wigman, [1987] 1 SCR 246

R v Wilson, 2015 BCCA 270

Roberts v British Columbia (Attorney General), 2018 BCSC 1027

Rothman v The Queen, [1981] 1 SCR 640

Walchuck v Canada (Justice), 2015 FCA 85

Whaling v Canada (Attorney General), 2014 SCC 20

Winmill v Canada (Justice), 2015 FC 710
SECONDARY MATERIALS


Anderson, Andrea S., “Wrongful Convictions and Avenues of Redress: The Post-Conviction  

2nd ed (Winnipeg: Fernwood Publishing, 2009)

Barsky, Rachel and Adam JE Blanchard, “Preventing Parole: The Effect of Innocence Claims on  
Parole Eligibility”, CanLII Authors Program,  
2018 CanLII Docs 312, [http://www.canlii.org/t/2dp6](http://www.canlii.org/t/2dp6)

Botting, Gary *Wrongful Conviction in Canadian Law*, (Markham: LexisNexis Canada Inc.,  
2010)

Braiden, Patricia, and Joan Brockman, “Remedying Wrongful Convictions through Applications  
to the Minister of Justice under Section 690 of the Criminal Code” (1999) 17 *Windsor Yearbook of Access to Justice* 3

Campbell, Kathryn M., *Miscarriages of Justice in Canada: Causes, Responses, Remedies*  
(Toronto: University of Toronto Press, 2018)

Jason Chin and D’Arcy White, “Forensic Bitemark Identification Evidence in Canada” (2019)  
52:1 *University of British Columbia Law Review* 57

Connors, Christina J., Marc W. Patry and Steven M. Smith, “The Mr. Big technique on trial by  
jury” (2019) 25:1 *Psychology, Crime & Law* 1

Cutler, Brian L, Keith A. Findley, and Timothy E. Moore, “Interrogations and False  
Confessions: A Psychological Perspective, 18 *CCLR* 154
David Dias, David “AIDWYC wants audit for all Mr. Big convictions” (August 14, 2014) online: https://www.canadianlawyermag.com/legalfeeds/aidwyc-wants-audit-for-all-mr-big-convictions-5879/


Kassin, Saul M., Steven A. Drizin, Thomas Grisso, Gisli H. Gundjonnson, Richard A. Leo, and Allison D. Redlich, “Police-Induced Confessions: Risk Factors and Recommendations” (2010), 34 Law & Hum. Behav. 3


Khoday, Amar, “Scrutinizing Mr. Big: Police Trickery, the Confessions Rule and the Need to Regulate Extra-Custodial Undercover Interrogations” (2012) 60 Crim LQ 277

Khoday, Amar, and Jonathan Avey, ”Beyond Finality: R v Hart and the Ghosts of Conviction Past” (2017) 40 Manitoba Law Journal 111


MacFarlane, Bruce, “Convicting the Innocent: A Triple Failure of the Justice System” (2006) 31 Man LJ 403

Maidment, MaDonna When Justice is a Game: Unraveling Wrongful Convictions in Canada (Winnipeg: Fernwood Publishing, 2009)


Smith, Steven M., Veronica Stinson, and Marc W. Patry, “Using the ‘Mr. Big’ Technique to Elicit Confessions: Successful Innovation or Dangerous Development in the Canadian Legal System?” (2009) 15:3 Psychology, Public Policy, and the Law 168

Sukkau, Elizabeth, and Joan Brockman, “‘Boys, You Should All Be In Hollywood’: Perspectives on the Mr. Big Investigative Technique” (2015) 48:1 UBC L Rev 47


GOVERNMENT DOCUMENTS
