Don’t Go Breakin’ My Hart:
The Early Evolution of the Reliability Branch of the
Common Law Mr. Big Admissibility Test

Jeremy Allen Henderson – henderja@uvic.ca

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Introduction

The Mr. Big technique is a Canadian investigative technique designed to elicit confessions to serious crimes by recruiting a suspect into a fictitious criminal organization. Its modern incarnation was developed by the RCMP in the 1990s, and has been utilized more than 350 times across Canada.¹ Up until very recently, these operations were conducted with surprisingly limited judicial oversight. This changed somewhat with the decision in *R v Hart*, where the Supreme Court laid out a framework for assessing the admissibility of Mr. Big confessions. This paper describes the origins of this framework and the principles that inspired its development, and evaluates to what extent applications of this test have realized its purpose.

Upon reviewing the *Hart* framework and its subsequent applications, this paper identifies three major analytical issues that, independently and cumulatively, diminish the protections afforded to the accused under the *Hart* framework. First, the approach taken by courts toward assessing the threshold reliability of Mr. Big confessions, which is inextricably bound up in the facts of *Hart*, has resulted in some inflation of the probative value of these statements. Second, the reluctance displayed by courts to assess the impact of simulated violence on reliability decreases the extent to which targets are protected from state excesses. Third, courts have generally not been assessing the prejudicial effects of Mr. Big investigations to the extent warranted by the circumstances, resulting in an extremely low standard of admission. Combined, these practices undermine the presumption of inadmissibility designated in *Hart* by rendering this obstacle ineffective in all but the most extraordinary cases.

It is important to note that in each of the cases discussed in this paper, the actual Mr. Big operation was designed and executed prior to the 2014 SCC decision in Hart. As such, police

¹ *R v Hart*, 2014 SCC 52 at para 56, [2014] 2 SCR 544 (“*Hart*”).
officers did not have the benefit of the guidance set out by the Court in Hart. As well, some of
the selected cases have been remanded back to trial court for reconsideration under the Hart
framework. Therefore, it is not suitable to draw inferences regarding law enforcement agencies'
responses to the requirements of Hart. These decisions do, however, provide some insight into
the judiciary's understanding of and response to the Hart framework. While trial judges have
always been alive to issues regarding the reliability, prejudice and abuse of process concerns that
characterize Mr. Big evidence, the Hart framework has provided courts with a standard
analytical tool to systematically respond to them. Unfortunately, the early jurisprudence suggests
that the fashion in which this tool is being used does not do enough to meaningfully ensure that
any admitted Mr. Big confessions are sufficiently reliable to found a conviction on or that the
accused’s right to a fair trial is adequately protected.

**Part I: An Overview of the Mr. Big Technique and Its Treatment in Canadian Law**

Briefly put, investigators create a fictional criminal organization that recruits individuals
suspected of involvement in serious unsolved crimes for the purpose of procuring a confession.
Keenan and Brockman describe the typical Mr. Big investigation as having three phases:
introduction, credibility building, and evidence gathering. During the introductory phase,
officers observe the suspect to understand his or her habits and routines. From this information, a
scenario is designed through which the suspect will be brought into the organization and contact
is initiated.

Once a relationship is established, operatives participate in scenarios of escalating
(perceived) criminality with the suspect, while the suspect enjoys financial and social benefits
provided by the group. Eventually, a meeting is set up between the suspect and the fictional

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crime boss, ‘Mr. Big’, for the purported purpose of vetting the target for advancement within the organization. During this meeting, Mr. Big, a trained interrogator, attempts to elicit an incriminating statement from the target. If successful, this evidence is acted upon and charges are laid.

Mr. Big operations have attracted a significant amount of controversy among both the legal community and the general public. The Royal Canadian Mounted Police attributes the controversy to the fact that “the technique calls attention to itself because of its effectiveness,”\(^3\) but the Supreme Court of Canada’s 2014 ruling in *Hart* identifies more substantive concerns. While the Court describes the method as “an effective investigative tool” that has “proved indispensible in the search for truth,”\(^4\) it also expresses deep concern about the “potent mix”\(^5\) of reliability issues and prejudice that arise in Mr. Big operations and the ensuing increased risk of wrongful convictions.

Statements derived from the Mr. Big investigative technique occupy a unique space in Canadian evidence law. Prior to the Court’s ruling in *Hart*, these confessions were typically found admissible under the statement of a party exception to the general rule against hearsay.\(^6\) These statements do not engage several procedural protections otherwise applicable to statements by the accused to police. The common law confessions rule, as described in *Oickle*, requires the Crown to prove the voluntariness of any confession made to a known ‘person in authority’ beyond a reasonable doubt.\(^7\) However, in a Mr. Big scenario, the suspect is unaware that he or she is confessing to a police officer, so the rule does not apply.\(^8\) Further, the accused’s

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4 *Hart*, supra note 1 at para 4.
5 *Ibid* at para 8.
6 *Ibid* para 63.
8 *Hart*, supra note 1 at para 64.
right to silence is not engaged during a Mr. Big interview, as the suspect is not legally detained by law enforcement.\textsuperscript{9}

Thus, while Mr. Big confessions give rise to similar concerns as statements made to persons in authority or under state detention, the legal protections applicable in these situations are inoperative in the Mr. Big context. Prior to \textit{Hart}, defence counsel had only two avenues to challenge the admissibility of Mr. Big confessions: the abuse of process doctrine, and the residual discretion available to trial judges to exclude otherwise admissible evidence on the basis that its prejudicial effects outweigh any probative value.\textsuperscript{10} Neither of these methods of exclusion had been particularly effective as a barrier to admission into evidence.\textsuperscript{11}

These gaps in the law of evidence appear even more problematic upon consideration of psychological research regarding confessions. In a review of relevant case law and psychological research, Moore and Keenan argue that “there is a fundamental disparity between legal and psychological notions of voluntariness.”\textsuperscript{12} They argue that the detention distinction, which renders a Mr. Big target’s right to silence inoperative, is immaterial, as the accused is nevertheless a “target of state control.”\textsuperscript{13} Further, they contend that “the perceived authority status of [an accused’s] interlocutors is moot with respect to the degree of psychological control that is being applied.”\textsuperscript{14}

One does not have to conclusively accept this limited psychological evidence to feel uneasy about the distinctions drawn regarding the constitutional and common law protections available to an accused person under investigation. On the contrary, the conflicting accounts of

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\textsuperscript{9} \textit{Ibid.}
\textsuperscript{10} \textit{Ibid} at para 65.
\textsuperscript{11} \textit{Ibid.}
\textsuperscript{13} \textit{Ibid.}
\textsuperscript{14} \textit{Ibid.}
the law and psychological research suggest that bright-line tests based on purported psychological states of mind ought to be met with scepticism. At a minimum, they certainly should not be relied upon to justify a mode of investigation that functions in the intervening legal vacuum. Until Hart, the admissibility of these confessions has depended on characterizations of states of mind by the judiciary that do not necessarily comport with verifiable psychological phenomena. These circumstances demand that courts take a more robust approach regarding the admissibility of Mr. Big evidence.

Several law reform proposals are suggested by interveners in Hart to respond to the specific reliability, prejudice, and abuse of process concerns surrounding Mr. Big confessions. The Association in Defence of the Wrongly Convicted (AIDWYC) proposes that the common law confessions rule ought to apply to confessions made to persons not in authority, as it does in the United States and England.\textsuperscript{15} The Canadian Civil Liberties Association (CCLA) suggests that a new voluntariness test for Mr. Big statements would “encourage reliable record keeping by the police and reduce the risk that trial courts will make decisions based on an incomplete or unreliable record.”\textsuperscript{16} The Criminal Lawyers’ Association of Ontario (CLA) proposes that the Court interpret s. 7 of the Charter purposively towards the end of excluding inherently unreliable evidence such as coerced statements.\textsuperscript{17} Henein, as an amicus curiae, argues that “where the state uses the means at its disposal to generate a confession of dubious reliability, it shall not enjoy the evidentiary benefit of that confession”\textsuperscript{18} and thus, in the interest of trial fairness, any uncorroborated Mr. Big confession ought not be admitted. As noted by the Court in Hart, “the

\textsuperscript{15} R v Hart, 2014 SCC 52 (Factum of the Intervener – Association in Defense of the Wrongly Convicted) at paras 11-13 [“AIDWYC factum”].

\textsuperscript{16} R v Hart, 2014 SCC 52 (Factum of the Intervener – Canadian Civil Liberties Association) at para 4 [“CCLA factum”].

\textsuperscript{17} R v Hart, 2014 SCC 52 (Factum of the Intervener – Criminal Lawyers’ Association of Ontario) at paras 10-11 [“CLA factum”].

\textsuperscript{18} R v Hart, 2014 SCC 52 (Factum of the Amicus Curiae – Marie Henein) at paras 71-75 [“Henein factum”].
of responding to the inherent risks of the Mr. Big investigative technique.

**Part II: A Summary of R v Hart and the New Mr. Big Confession Admissibility Test**

In 2014, the case of Hart provided the Supreme Court of Canada with an opportunity to extensively review the rules and principles that govern the admissibility of Mr. Big confessions. On August 4, 2002, Nelson Hart’s three-year-old twin daughters – Karen and Krista - drowned while playing in a park in Gander, Newfoundland under his supervision. Immediately after the incident, Hart denied drowning his daughters, a position he maintained one month later during an eight-hour interrogation at the police station. Two weeks later, he altered his story, revealing to police that he had a seizure while supervising his daughters and did not initially disclose this for fear of losing his driver’s licence. While the police continued to suspect Hart of wrongdoing, they did not have sufficient evidence at the time to lay charges.

Two years after suspending their investigation of Hart, the police reopened the case and decided to target Hart in a Mr. Big operation. After three months of lifestyle, which established that he was receiving social assistance and was socially isolated, police made contact with him in February 2005. One of the primary undercover officers, Jim, presented Hart with a job opportunity to drive trucks; from that point onwards, their relationship deepened. Hart was soon introduced to a second undercover officer, Paul. After several weeks, Jim and Paul revealed their membership in a criminal organization and invited Hart to continue working with them. After working with the officers and delivering purportedly illegal goods for more than two months, and being paid $4,470 plus expenses for his work, Hart became “fully immersed in his new fictitious life.”

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19 *Hart,* supra note 1 at para 82.
20 *Hart,* *supra* note 1 at para 28.
On April 10, 2005, Hart first confessed to murdering his daughters while having dinner with Jim. At this dinner, Jim had detailed the organization’s involvement with a prostitution ring in Montreal and described an occasion when he had assaulted a sex worker who had acted dishonestly. It was in response to this story that Hart made his confession.

Following this first statement, the operation continued for two months. Jim and Paul “constantly preached the importance of trust, honesty and loyalty within the organization”\(^\text{21}\) in advance of the meeting between Hart and Mr. Big. The undercover officers presented Hart with an opportunity to participate in a large job – with a $25,000 payment upon completion – on the condition that he was approved by their boss, Mr. Big.

The meeting between Mr. Big and Hart took place on June 9, 2005. Mr. Big directed the conversation towards the death of Hart’s daughters, citing concerns about police attention. Initially, Hart maintained that he had suffered a seizure and that the girls had accidentally drowned, but this was dismissed by Mr. Big as a lie. Eventually, after being pressed, Hart confessed to the killings and explained that he had “struck” his daughters, pushing them into the lake.\(^\text{22}\) This confession was followed up two days later with a re-enactment at the scene. After two more days, at the conclusion of a four-month operation costing $413,268, Hart was arrested and charged with two counts of first-degree murder.\(^\text{23}\) The confessions were admitted by the trial judge, but on appeal were found inadmissible by the Supreme Court of Newfoundland and Labrador (Court of Appeal), citing the violation of the accused’s right to silence under s. 7 of the Charter.\(^\text{24}\)

\(^{21}\) *Ibid* at para 31.
\(^{22}\) *Ibid* at para 35.
\(^{23}\) *Ibid* at para 38.
\(^{24}\) *Ibid* at para 44.
The facts in *Hart* have come to symbolize the surreal nature of these extensive undercover operations. The accused’s abject poverty and social isolation, the extent to which the undercover officers integrated into his life, and the significant inducements offered by the organization compelled the Supreme Court to respond to the broad latitude available to law enforcement through this technique. The new common law rule of evidence defined in *Hart*, which now applies to all statements procured through Mr. Big investigations, attempts to balance the investigative powers of law enforcement with the procedural rights of accused persons. In *Hart*, Moldaver J. conceives a “two-pronged approach that (1) recognizes a new common law rule of evidence, and (2) relies on a more robust conception of the doctrine of abuse of process to deal with the problem of police misconduct.”\textsuperscript{25} Taken together, these branches of analysis are directed at three problematic qualities of Mr. Big operations: concerns about reliability, the potential for prejudice, and the need to protect against abuse of power by the state.

Under the first prong, any Mr. Big confession is deemed presumptively inadmissible. This presumption can be overcome by the Crown if it can show, on a balance of probabilities, that the probative value of the evidence outweighs its prejudicial effects.\textsuperscript{26} Placing the onus on the Crown is justified on the basis that the state plays a key role in producing these statements and wields significant power in the operation’s design and implementation.\textsuperscript{27} Dufraimont describes the test as “admirably straightforward” and “deeply familiar,”\textsuperscript{28} given its resemblance to evidence rules governing the admissibility of similar fact evidence, character evidence, and the general residual judicial discretion to exclude. The Court goes on to provide additional guidance regarding specific factors that ought to be considered in the Mr. Big context.

\textsuperscript{25} Ibid at para 84.
\textsuperscript{26} Ibid at para 85.
\textsuperscript{27} Ibid at para 91.
\textsuperscript{28} Lisa Dufraimont, “R v Hart: Standing up to Mr. Big” (2014) 12 CR-ART 294 at 294.
The first step of the common law test is to assess the probative value of the evidence, an exercise that “necessitates some weighing of the evidence.” The probative value of a Mr. Big confession is derived from the reliability of the confession, and thus determining whether a confession is reliable is the focus at this stage of the test. The Court breaks this assessment into two steps. First, trial judges must assess the extent to which the circumstances of a confession give rise to concerns regarding reliability. These circumstances include, but are not limited to, “the length of the operation, the number of interactions between the police and the accused, the nature of the relationship between the undercover officers and the accused, the nature and extent of the inducements offered, the presence of any threats, the conduct of the interrogation itself, and the personality of the accused, including his or her age, sophistication, and mental health.”

The Court particularly emphasizes the importance of assessing the mental health and age of the accused, as these qualities are linked to increased risk of wrongful convictions. It also specifies the need to avoid a mechanical evaluation of these factors, calling instead for a focus on the central question of how these factors and the circumstances as a whole could affect the reliability of the statement.

After considering the circumstances of the operation, the task shifts to assessing the content of the confession for markers of reliability. These markers include a high level of detail, the subsequent discovery of additional evidence, the identification of holdback evidence and, a description of mundane details of the crime scene. Sensibly, “[t]he greater the concerns raised by the circumstances, … the more important it will be to find markers of reliability.”

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29 Hart, supra note 1 at para 95.
30 Ibid at para 99.
31 Ibid at para 102.
32 Ibid at para 103.
33 Ibid at para 104.
34 Ibid at para 105.
did not make confirmatory evidence a strict requirement for admission, choosing instead to merely describe it as a “powerful guarantee of admissibility.”

After the probative value of the statement is assessed, the analysis shifts to the “more straightforward and familiar exercise” of measuring prejudicial effect. The Court identifies both moral and reasoning prejudice as concerns arising from Mr. Big operations. Investigations that involve the accused in simulations of violent crime or reveal unsavory details about an accused’s past may give rise to further moral prejudice, while exceedingly long and complex investigations raise additional concerns of reasoning prejudice. Regardless of the specific nature of the scenario, the aura of criminality surrounding the target of a Mr. Big operation necessarily results in some prejudicial effect against the accused.

The second prong of protections identified in Hart is a reinvigoration of the abuse of process doctrine. While this doctrine is not applied to the facts of Hart, the Court identifies it as a necessary tool to protect targets of Mr. Big investigations from police excesses and abuses. Aside from a brief discussion of developments in the abuse of process doctrine in Part IV, this paper does not engage with this second prong. Rather, this paper focuses narrowly on the early development of the Hart common law test and whether it provides effective protections against unreliable evidence and undue prejudice against the accused.

**Part III: Applications of the Hart Framework and the Calibration of Threshold Reliability**

In Hart, Moldaver J. characterizes the assessment of probative value within the new common law test as requiring a preliminary weighing of the evidence to determine its threshold

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36 Ibid at para 105.
37 Ibid at para 106.
38 Ibid at para 106.
39 Ibid at paras 111-113.
reliability.\textsuperscript{40} This is not a novel concept in the law of evidence; for example, a preliminary consideration of the reliability of expert witness testimony is required at the stage of determining admissibility.\textsuperscript{41} While the question of ultimate reliability is reserved for the trier of fact, judges, as arbiters of admissibility, act as gatekeepers who determinations of guilt or innocence from being based on unreliable information. Given the large degree of prejudice that necessarily attaches to Mr. Big evidence, the importance of this gatekeeping role is evident: it would be devastating to an accused person and the administration of justice if a particularly unreliable Mr. Big confession was submitted to a jury for consideration.

Fortunately, the Court offers some guidance to trial judges regarding the exercise of this gatekeeping function with respect to Mr. Big confessions. As described in Part II, the threshold reliability, and thus probative value, of Mr. Big statements is considered in two stages. First, judges assess the circumstances surrounding the confession to determine to what extent they give rise to questions of reliability. For example, they should consider to what extent any inducements offered to an accused undermine the reliability of any confession given. Given the general coercive structure of the Mr. Big operation template, some doubt ought to attach to the reliability of any statements at this stage of the analysis. The second step is to examine the contents of the confession itself for markers of reliability, such as consistency between the confession given and unreported details of the alleged crime. If the content of the confession sufficiently overcomes the doubts raised by its circumstances, some probative value is established, which is then weighed against potential prejudicial effects.

Characterizing this exercise as an assessment of threshold reliability indicates that the confession does not need to be so reliable that it can be relied upon to demonstrate the accused’s

\textsuperscript{40} Ibid at para 94.
\textsuperscript{41} R v Abbey, 2009 ONCA 624 at para 87, 97 OR (3d) 330.
This is reflected in the differing burdens of proof that the Crown must meet at the gatekeeping and determination of guilt stages. While the former requires only that the Crown show on a balance of probabilities that the probative value of the evidence outweighs its prejudicial effects, the latter demands proof of guilt beyond a reasonable doubt. This distinction is warranted and ought to be regarded as uncontroversial: these different tasks attract different standards. That being said, the assessment of threshold reliability ought to be sufficiently rigorous so that it presents a genuine obstacle to admissibility that will not be frivolously overcome. Through an analysis of several applications of the *Hart* common law test, this section raises the question of whether the threshold reliability analysis that underlies determinations of probative value has been properly calibrated toward this end. An examination of how some of the factors identified in *Hart* have been treated in subsequent decisions reveals that perhaps the questions of reliability raised by the circumstances in which these confessions take place are undervalued such that the balance of the test improperly tends toward admissibility.

It is important to keep in mind that while this section heavily critiques the reasoning underlying parts of the the admissibility decisions in the cases cited, this does not necessarily entail that the conclusion reached in each case is invalid. While this paper points to the treatment of specific factors within the *Hart* framework, in most, if not all, of the cases cited, the overall weighing of the evidence appears reasonable and the conclusions on admissibility appear justifiable. In essence, this paper seeks to highlight certain aspects of the *Hart* framework that ought to be treated with caution in order to avoid conflating superficial comparisons with *Hart* with the scrupulous examination of reliability that the Mr. Big common law test requires.
Nature of the Relationship between the Target and Undercover Officers

The relationship between Hart and the undercover officers who befriended him was characterized by the Court as intimate and approximating familial. The two primary operatives in that case were described by the accused as “best friends” who were “like brothers.” Hart’s purported willingness to leave his wife was identified as further evidence of the significant emotional bond he shared with these officers. Hart’s prior social isolation rendered him acutely susceptible to the organization’s “promise of friendship,” which in turn negatively affects the reliability of his statements. The centrality of these relationships to Hart’s life provided a strong incentive to preserve them, even at a significant risk or cost.

The general concern illustrated by the specific facts in Hart is that as the relationship between an accused and an investigatory officer becomes increasingly personal, the risk of an unreliable statement also increases. However, the Court does not specify that only relationships which grow as intimate as those in Hart give rise to reliability concerns. Presumably, the risk of a false statement can be exacerbated at any stage of a relationship depending on the dynamic between the individuals involved. At the very least, there is no evidence to suggest that the risks of wrongful confession are unique to the relationship dynamic seen in Hart. Therefore, a sufficiently sophisticated analysis of this factor must entail more than a cursory evaluation of whether the relationship in a given case is similar enough to that in Hart to give rise to similar reliability concerns. Across the country, however, it appears that trial courts applying the Hart test have largely opted for this problematic comparative approach instead of conducting a more fulsome analysis. Courts are effectively asking “Is this relationship similar in character and intensity to that in Hart?”, rather than assessing the relationship’s impact on the reliability of the

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42 Hart, supra note 1 at para 136.  
43 Ibid.  
44 Ibid.
impugned confession. In order for the probative value of a confession to be properly known, the relationships in each case ought to be assessed on their own merits.

In some cases, these comparisons are explicit. The Court of Appeal for British Columbia has twice used the very close relationship in Hart as a point of reference. In Johnston, it notes that the officers “did not engrain themselves in [the accused’s] life to the same extent as occurred in Hart,” and the inquiry into the relationship effectively concludes at that stage. This is notably similar to the assessment in West, where the Court of Appeal notes that “police did not engrain themselves in Mr. West’s life, as they did with Hart.” Based on the factual record of these cases, this does not appear to be incorrect: the relationships in question clearly did not rise to the level seen in Hart. However, this is not the question posed in Hart. Rather, the test requires an assessment of what impact, if any, the investigator-suspect relationship could have on the reliability of any statements gathered during the operation. A mere distinguishing of the relationship from that found in Hart does not constitute a sufficient inquiry into this point. While it is certainly not an error to make comparisons to the facts of Hart, only a thorough consideration of a relationship’s impact on the reliability beyond this comparison is adequate to ensure that the probative value ascribed to a Mr. Big confession is appropriate.

More often, the comparisons are made without explicit reference to Hart, but cite reasoning that is inextricably entangled in its facts. For example, in Streiling, officers formed a close relationship with the accused. When asked to characterize his relationship with one of the officers, Mr. Streiling reported that he “loved the guy.” Upon recognition of this statement, the court goes on to diminish its significance by comparing the situation to that of Hart. The court neutralizes the factor by concluding that the relationship “did not detract from Mr. Streiling’s

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45 R v Johnston, 2016 BCCA 3 at para 67, CarswellBC 3 [“Johnston”].
46 R v West, 2015 BCCA 379 at para 86, CarswellBC 2594 [“West”].
47 R v Streiling, 2015 BCSC 597 at para 120, CarswellBC 2140 [“Streiling”].
ability to be his own man,“48 an oblique yet clear allusion to Hart. His “social connections outside of the organization”49 were cited as further evidence of the unlikelihood that the relationship would adversely impact reliability. While the judgment effectively distinguishes the facts in Streiling from the facts in Hart, it does not engage directly with the question of whether the relationship dynamic in Streiling gives rise to its own unique reliability concerns. This critical question is, unfortunately, left unanswered.

In some cases, judges do conduct a more fulsome analysis of the relationship factor, considering directly the impact that the dynamic of the particular case has on the reliability of the evidence gathered. For example, in M.M., the relationship was characterized as an “employer-employee friendship,”50 and the Court explored the extent to which that particular dynamic negatively affected the reliability of the confession. While the relationship is explicitly distinguished from that in Hart, the inquiry does not rest there: the entire circumstances of the relationship are considered in depth.51 This admirable analysis, which goes beyond mere comparison to the facts of Hart, ought to be the standard methodology employed by trial judges as they assess the relationship factor.

A recurring analysis conducted by lower courts is whether the relationship between the accused and undercover officers replaced or interfered with other relationships in the accused’s life. For example, in Tingle, the court found that the friendship between the officers and the target “did not supplant other relationships [he] had with friends and family, as is seen in other cases such as Hart.”52 In Mildenberger, the court made reference to the accused’s maintenance of his relationships with his family as if to suggest they were evidence that the relationship with

48 Ibid.
49 Ibid.
50 R v MM, 2015 ABQB 692 paras 79-83, CarswellAlta 2177 [“MM”].
51 Ibid at para 84.
52 R v Tingle, 2015 SKQB 184 at para 122, CarswellSask 410 [“Tingle”].
investigators did not significantly influence the reliability of his statement.\textsuperscript{53} Further, in \textit{Magoon}, the Alberta Court of Queen’s Bench notes that there was “no attempt to undermine or destroy the relationship between the accuseds,”\textsuperscript{54} citing the fact as if it were an indicator of reliability. The destruction of any of the accused’s outside relationships certainly should be regarded as having a negative effect on the reliability of a confession. For example, Hart’s professed willingness to leave his wife appropriately gives rise to significant concerns. However, it does not follow that a positive inference should be drawn from the continuation of the accused’s relationships outside of the investigation.

Given the inherent reliability issues characteristic of Mr. Big investigations, courts should be reticent about drawing this sort of positive inference regarding the probative value of a statement from the circumstances of an investigation. While a specific relationship can be seen as not particularly concerning with respect to its impact on reliability, it would be improper to leap from this lack of a negative inference to the existence of a positive one. This is particularly true in the context of the Hart test, which was developed as a specific response to the particular reliability risks inherent in this investigative technique. The framework of the common law test suggests that circumstances ought to be examined for the extent to which they put reliability into question; any positive claims regarding reliability ought to be derived from the contents of the confession itself. Any positive inferences drawn from the circumstances of the confession, rather than from its internal markers of reliability, effectively undermine the presumption of inadmissibility that governs Mr. Big evidence.

\textsuperscript{53} \textit{R v Mildenberger}, 2015 SKQB 27 at para 64, CarswellSask 594 [“Mildenberger”].
\textsuperscript{54} \textit{R v Magoon}, 2015 ABQB 351 at para 29, CarswellAlta 975 (Note that the co-accuseds in this case are a married couple who were jointly the targets of a Mr. Big investigation.) [“Magoon”].
Nature and Extent of Inducements Offered

The package of inducements held out to a target over the course of a Mr. Big operation is to be assessed as part of the circumstances surrounding the confession that give rise to reliability concerns.\textsuperscript{55} This package typically includes cash payments totalling several thousand dollars, travel to various locations within Canada, meals and drinks, and hotel stays. It is also not uncommon for the organization to give the accused tickets to social events, such as an Ultimate Fighting Championship event\textsuperscript{56} or a rock concert.\textsuperscript{57} \textit{Hart} provides limited guidance to other courts regarding the effects of such inducements on the reliability of a confession. However, the application of the new common law test to the facts of \textit{Hart} provides an extraordinary example of the overwhelming influence such inducements can have on an accused’s actions. The nearly $15,000 in cash that Hart was paid over the course of the investigation “lifted [him] out of poverty.”\textsuperscript{58} He experienced a profound change in lifestyle as a result of the operation. A potential $25,000 payday was being held over his head at the time he confessed to Mr. Big. Beyond these financial incentives, the promise of friendship and camaraderie drew Hart even further into the world of the fictitious organization.\textsuperscript{59} Given the accused’s known and documented poverty and social isolation, it is evident that these inducements would have strongly influenced Hart’s decisions and actions.

It is not necessary, however, for inducements to reach this level of intensity for them to give rise to reliability concerns. Rather, the presumption of inadmissibility would suggest the opposite: that inducements, as a category, give rise to reliability concerns that must be overcome by the Crown. A more typical target of police investigation will likely fit a different profile than

\textsuperscript{55} \textit{Hart, supra} note 1 at para 102.  
\textsuperscript{56} \textit{MM, supra} note 50 at para 90.  
\textsuperscript{57} \textit{Johnston, supra} note 45 at para 21.  
\textsuperscript{58} \textit{Hart, supra} note 1 at para 134.  
\textsuperscript{59} \textit{Ibid.}, at para 136.
that of Hart. Not every target of a Mr. Big operation will be so destitute that they cannot afford a bed\textsuperscript{60} nor so isolated that their only relationship in life is with their spouse. In comparison to Nelson Hart, it would be easy to characterize many, if not most, accused persons as being financially well-off – but to do so is dangerous. Improper comparisons to Hart – explicit or implicit – can diminish the deleterious effects on reliability attributable to the inducements offered to an accused person. In effect, this may trivialize the impact of such inducements to such an extent that it could result in the admission of unreliable evidence.

It is analytically useful to identify two significant categories of inducements: tangible inducements and prospective inducements. Tangible inducements include all inducements that the accused actually receives during the course of an operation. For example, the cash payments and meals that Hart received from the while under investigation are tangible inducements. Prospective inducements, on the other hand, refer to future opportunities for benefits to the accused. A common prospective inducement in Mr. Big cases is the promise of a large payment upon completion of a future task that requires the accused to be admitted into the inner circle of the organization. The vetting interview with Mr. Big typically takes place at this stage, and the scenario is designed to elicit a confession in exchange for continuing and deepening involvement with the association. The prospect of a large payout is designed to motivate the accused to present an account of events that satisfies Mr. Big’s demands.

Other forms of prospective inducements, tailored to the characteristics of individual suspects, have been used occasionally. In one notable variation on the Mr. Big scheme, the target is offered assistance regarding a police investigation into the alleged crime. The promise of an end to the investigation or the prevention of an arrest is held out so long as the target tells Mr. Big the details he wishes to hear. This is seen in Streiling, where Mr. Big pushes the accused for

\textsuperscript{60} Hart, at para 135.
further and different details until his account was consistent with the available scientific
evidence.\textsuperscript{61} Another type of inducement involves the children of the accused. In \textit{Magoon},
undercover officers allow one of the accused to believe that the organization would be able to
help him secure the return of his children from foster care.\textsuperscript{62} It would be difficult to maintain the
position that this type of inducement would not impact the accused’s decision to confess to the
extent that it impacts the reliability of their statement.

The case of \textit{Balbar}\textsuperscript{63} illustrates the potential of a significant undervaluation of the effects
of tangible and prospective inducements offered to the accused. While the court does not make
explicit reference to the facts of \textit{Hart}, its conclusions suggest that the notorious facts of that case
coloured the understanding of the various inducements offered to the accused in \textit{Balbar}. In this
case, the inducements offered were all but dismissed as possible sources of reliability concerns
regarding his confession to the organization.

In its extensive review of the investigation, the court found that the accused was
supporting himself with a monthly income of $1,000, which he received from disability
payments and the resale of stolen copper wire.\textsuperscript{64} He was sharing a basement suite in Kamloops
with a friend, and was known to be addicted to methamphetamines before and during the
investigation.\textsuperscript{65} Over the course of the investigation, he received approximately $4,130 with the
opportunity to earn $20,000 upon completion of an upcoming job.\textsuperscript{66}

In light of these circumstances, the court holds that it was “likely” that the money was an
incentive driving Mr. Balbar’s behaviour with respect to the criminal organization. It declined,

\begin{itemize}
  \item \textsuperscript{61} Streiling, supra note 47 at para 114.
  \item \textsuperscript{62} Magoon, supra note 54 at para 94.
  \item \textsuperscript{63} \textit{R v Balbar}, 2014 BCSC 2285, CarswellBC 4056 ("Balbar").
  \item \textsuperscript{64} \textit{Ibid}, at para 258.
  \item \textsuperscript{65} \textit{Ibid}, at paras 258, 271.
  \item \textsuperscript{66} \textit{Ibid}, at para 202.
\end{itemize}
however, to find that this had any impact on the reliability of his confession.\textsuperscript{67} In the very same paragraph, the court finds that “he appeared to be poor, \textit{but there is no evidence that he was in desperate straits or lacking basic food and accommodation.}”\textsuperscript{68} The court pays significant attention to an apparently casual and dismissive statement by the accused that $20,000 was not much money to him, a statement that very obviously flies in the face of his financial reality.\textsuperscript{69}

The court also dismissed the possibility that the social inducements held out by the organization had an impact on the reliability of the accused’s statements. It is noted that Balbar was “not particularly socially isolated” as he had both “friends and relationships with women.”\textsuperscript{70} References were made to the accused’s social networks as an indicator of his lack of susceptibility to social inducements. While prospective lifestyle perks – including the possibility of his own apartment and “his choice of any of the sex trade workers”\textsuperscript{71} working in a fictitious Nanaimo massage parlour – were noted in the reasoning, they seem to be given minimal, if any, weight by the court.

Taken together, the court does not find that these financial and social inducements had any significant deleterious effect on the reliability of the accused’s confession. At paragraph 352, the Court states that “while there were several inducements of a type that could have had a coercive impact on an undercover target, there is no evidence that any of the inducements actually had that effect on Mr. Balbar. The only evidence is that Mr. Balbar liked the work, the easy money, and the lifestyle.”\textsuperscript{72} With respect, this finding does not comport with the test set out in \textit{Hart} and fails to sufficiently address the concerns that the test is designed to address. In a Mr.

\textsuperscript{67} \textit{Ibid}, at para 348.
\textsuperscript{68} \textit{Ibid} [emphasis added].
\textsuperscript{69} \textit{Ibid}, at para 350.
\textsuperscript{70} \textit{Ibid}, at para 262.
\textsuperscript{71} \textit{Ibid}, at para 351.
\textsuperscript{72} \textit{Ibid}, at para 352.
Big investigation, where the evidence is unclear regarding any actual effect of the inducements on the accused, the reasonable conclusion, particularly in the circumstances of Balbar, is that the inducements had some effect.

In considering the inducements offered to an accused person, the question is to what extent they produce reliability concerns, not whether they produce reliability concerns. The very nature of inducements in the Mr. Big context gives rise to reliability concerns. This ought to be taken as a given. In this case, the reticence to assign any negative value to the inducements on the basis that coercion was not conclusively demonstrated artificially inflates the probative value of the statement. This, in turn, tips the outcome of the Hart analysis towards admissibility, which partially yet significantly undermines the presumption of inadmissibility that Hart imposes.

It is important to clarify, at this point, that it is unlikely that the court’s diminishment of the inducements made to Balbar resulted in a miscarriage of justice. While the circumstances in which the confession was made gives rise to reliability concerns, it appears reasonable for the court to have found that these concerns were overcome by the quality of the confession and the confirmatory evidence derived from it.\(^73\) In turn, this probative value was able to outweigh the prejudicial effects of the evidence, the evidence was admitted, and ultimately, the accused was convicted. On the facts and the law, this appears to be a just outcome.

This, however, does not diminish the importance of assigning appropriate weight to the inducements held out during the operation. By minimizing the effects of these inducements, which arguably form the backbone of any Mr. Big operation, the court in Balbar contributes to an erosion of the protections that the Hart test is meant to provide. If the inducements to Mr. Balbar cannot be said to give rise to reliability concerns, it is difficult to see what magnitude of incentive would. If Hart is treated, as it seems to be here, as establishing the threshold magnitude

\(^{73}\) Ibid, at paras 358-366.
that the effect of inducements must reach in order to be considered detrimental to a confession’s reliability, the common law test would protect only the severely disadvantaged from the spectre of unreliable Mr. Big evidence. In effect, the test would do little to protect a more typical target against the vast investigatory resources of the state.

**Part IV: Judicial Treatment of Violence and Threats Within the Hart Reliability Test**

To a certain extent, threats and violence are essential to the premise of the Mr. Big investigatory technique. In order to convey the organizational values of honesty, trust and loyalty to the accused, the police cultivate “[a]n aura of violence” and demonstrate that betrayal and dishonesty will not be tolerated by the organization. In other words, violent themes are used to create an environment in which a self-interested accused would choose to be honest about their past activities rather than risk the potential consequences of a lie.

This aura of violence manifests in many different forms. In *Hart*, the investigation featured at least one overt display of mild violence. At one point, one undercover operative “slapped another undercover officer across the fact in front of the respondent, ostensibly because he had spoken to others about their business dealings.” Other cases feature more graphic displays of simulated violence. In *Johnston*, the accused participated in a simulated kidnapping of a purported debtor and his girlfriend, who were then subjected to a simulated beating out of his eyesight. These ‘victims’ were ultimately transported to a remote cabin and bound to chains. At this point, the accused left the cabin while an undercover officer “fired three shots to make it appear the victims had been killed.” In *Streiling*, the accused was present in a hotel

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74 Hart, supra note 1 at para 59.
75 Ibid, at para 30.
76 Johnston, supra note 45 at para 30.
suite while an officer, behind the bathroom door, simulated an assault against a female officer with the purported intent of inducing an abortion.  

While many Mr. Big operations are marked by these violent simulations, they are not ubiquitous. In *Mildenberger*, the criminality of the investigation is limited to tax evasion; while references are made to another branch of the organization engaged in violence, the accused never encounters it. This case clearly demonstrates that violent simulations are not an absolutely necessary component of the Mr. Big investigatory process.

In the handful of cases in which *Hart* has been applied, limited attention has been paid to the effects of violence and threats on the reliability of a Mr. Big confession. Indeed, in the application of the common law test in *Hart* itself, the potential impact of the aura of violence is not examined. It seems as though the ‘presence of threats’ factor has been interpreted narrowly as referring to threats against the accused themselves. This interpretation mirrors the treatment of threats under the confessions jurisprudence, where the Crown must show the absence of threats against the accused beyond a reasonable doubt. Given this established rule, it is unsurprising that investigators have adeptly avoided direct threats against the accused in the Mr. Big context.

Descriptions of the violence involved in Mr. Big operations are regularly considered, however, under the abuse of process doctrine, reinvigorated in the second prong of *Hart*. In fact, whereas the *Hart* common law test has not resulted in the exclusion of any Mr. Big confessions (other than that of Hart himself), the abuse of process doctrine has resulted in an exclusion. In *Laflamme*, the Quebec Court of Appeal issued a stay of proceedings on the grounds that the violence exhibited during the Mr. Big operation constituted an abuse of process. This case draws

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78 *Streiling*, supra note 47 at para 111.
80 *Oickle*, supra note 7 at paras 47-57.
81 *R v Laflamme*, 2015 QCCA 1517, CarswellQue 8901.
a distinction between simulated violence perpetrated against members of the organization, which constitutes an abuse of process, and that directed toward third parties, which, in the Court of Appeals’s view, does not rise to this level.\textsuperscript{82} This distinction is founded upon the idea that intra-group threats are likely to be interpreted as indirect threats to the accused, whereas threats to outsiders merely go to establishing an aura of violence. While this difference makes intuitive sense in the scheme of Mr. Big operations generally, it could diminish the impact that exposure to violence has on the reliability of confessions if the \textit{Laflamme} distinction is imported into the reliability analysis.

While direct, explicit threats are broadly recognized as not conducive to eliciting reliable confessions, they are not the only means by which investigators can instil fear in the accused. Mr. Big operations are replete with indirect threats and environmental intimidation that also ought to be regarded as negatively affecting the reliability of confessions. As reported by Moore and Keenan, police operatives have testified that the purpose of simulated assaults and killings is to “show the suspect that the criminal organization doesn’t take kindly to persons who betray it, and that its members will resort to deadly force to deal with persons who do so.”\textsuperscript{83} A distinction between intra-group and externally directed violence is not drawn here. As such, despite the \textit{Laflamme} distinction, it is important that courts engage in a comprehensive analysis of threats during the probative value and prejudicial effect analyses as well as during the abuse of process assessment. Relegating violence to the exclusive domain of the second prong of \textit{Hart} has the indirect effect of inflating the probative value of Mr. Big confessions, which in turn effectively undermines the protections the test is believed to provide.

\textsuperscript{82} Ibid, at paras 84-87.
\textsuperscript{83} Moore and Keenan, supra note 12 at 50.
Part V: Issues Regarding Prejudicial Effect in the *Hart* Common Law Test

If the probative value of a Mr. Big confession is established, the next task under the Hart framework is to assess the prejudicial effect of admitting the details of the operation into evidence. In *Hart*, Moldaver J. suggests that this is a “more straightforward and familiar” analytical task for trial judges than that of assessing probative value. In the cases following *Hart*, several analytical issues with respect to prejudicial effect have arisen.

**Variation Across Mr. Big Investigations**

In his proclamation that the prejudicial effect of Mr. Big investigations is “a fairly constant variable,” Moldaver J. has, perhaps inadvertently, stymied the analysis of this element by trial judges. In many post-*Hart* applications of the Mr. Big common law test, prejudicial effect is treated as a given value or standardized handicap that the Crown must overcome. For example, in *Streiling*, the prejudicial effect of the Mr. Big confession is never discretely analyzed. Rather, the judgment proceeds directly from the task of assessing the reliability of the confession to that of determining its admissibility. At para. 147, the judgment states: “[w]hile there is clearly some prejudice associated with the confession, [the court is] of the view that this is outweighed by its probative value.” However, at no point in the judgment is the nature and extent of these prejudicial effects considered. Similar disengagement from the prejudicial effect analysis is seen in *Magoon*, where the trial judge determined that, since the accused was being tried by judge-alone, “the prejudicial effect of the statements is not a concern in this case.”

Such nominal acknowledgement of the general prejudice that attaches to Mr. Big confession does not constitute a full assessment of prejudicial effect. To realize the underlying

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84 *Hart*, supra note 1 at para 106.
86 *Streiling*, supra note 47 at para 147.
87 *Magoon*, supra note 54 at paras 108-9.
principles of *Hart* and protect accused persons from the dangers of these undercover operations, substantial engagement with the question of prejudice is necessary in each case. While, as Moldaver J. anticipates, the results of this analysis will often be similar from case to case, the specific prejudicial effect of a given operation ought not be assumed to be ‘average’; such a finding must be rooted in an analysis of the facts of the case.

The importance of this individualized approach to prejudicial effect is clear upon an examination of the variability between Mr. Big operations. Depending on the nature of the operation and the personality of the accused, among other things, an accused person may do or say something that gives rise to additional prejudice beyond the base amount attributable to an affiliation with organized crime and criminal activity. For example, in *Hart*, the accused was principally engaged in moving purportedly illegal goods on behalf of the organization. 88 While a certain amount of prejudice attaches to this simulated criminal behaviour, other cases clearly give rise to greater amounts of prejudice. In *West*, the criminal organization that recruited the accused holds itself out to be producing pornography featuring underage girls. 89 In *Streiling*, the Mr. Big narrative includes a scenario in which the accused threatens violence against an officer posing as a customs official. 90 As these examples indicate, the degree of prejudice that will attach to an accused person can vary considerably with the circumstances of an investigation. While it was not incorrect of Moldaver J. to characterize prejudicial effect as a “fairly constant variable,” 91 trial judges must be vigilant against treating it as merely a constant.

88 *Hart*, supra note 1 at para 145.
89 *West*, supra note 46 at para 15.
90 *Streiling*, supra note 47 at para 111.
91 *Hart*, supra note 1 at para 108
Several post-\textit{Hart} cases make reference to the notion that judge-only trials mitigate the risk of prejudice infiltrating the deliberative process.\textsuperscript{92} While this is a valid distinction to note, it does give rise to questions regarding the utility of the \textit{Hart} framework in the judge-only context. Most applications of the \textit{Hart} common law test will occur in judge-and-jury trials for murder charges,\textsuperscript{93} and thus the \textit{Hart} test principally addresses the concerns arising in this context. While the threat of prejudice is diminished somewhat in judge-only trials, “[t]he spectre of moral or reasoning prejudice is always a concern, regardless of who is sitting in judgment of the guilt or innocence of the accused.”\textsuperscript{94} Therefore, it is critical that, even in a judge-only trial, prejudicial effect is assessed substantially and is not merely referred to as a practice of rote formality. If prejudicial effect is not fulsomely considered, the test for admissibility is effectively reduced to a function of reliability, with the trial fairness concerns identified in \textit{Hart} going unaddressed.\textsuperscript{95}

\textbf{General Prejudicial Effect Associated with Organized Crime}

Judicial engagement with the general prejudice arising from a Mr. Big operation is critical to ensuring that the \textit{Hart} test effectively minimizes the risks inherent in the investigative technique. This need for a vigilant examination of a Mr. Big confession’s prejudicial effects is clearly identified by the Court in \textit{Hart}. At paras. 106-107, Moldaver J. sets out the approach that courts ought to employ in assessing the prejudicial effects of a Mr. Big confession, requiring a consideration of the potential for both moral and reasoning prejudice.\textsuperscript{96} \textit{Hart} also calls for courts to mitigate the risk of prejudice “by excluding certain pieces of particularly prejudicial evidence that are unessential to the narrative” and through “limiting instructions to the jury.”\textsuperscript{97} While it is

\begin{itemize}
\item \textsuperscript{92} Streiling, \textit{supra} note 47 at para 19; Magoon, \textit{supra} note 54 at paras 107-8.
\item \textsuperscript{93} Criminal Code, RS C 1985, c C-46, s. 469.
\item \textsuperscript{94} R v Villeda, 2011 ABCA 85, CarswellAlta 436 at para 18, cited in Streiling, \textit{supra} note 47 at para 20.
\item \textsuperscript{95} \textit{Hart}, \textit{supra} note 1 at para 7.
\item \textsuperscript{96} \textit{Ibid}, at paras 106-7.
\item \textsuperscript{97} \textit{Ibid}, at para 107.
\end{itemize}
evident that the Court in *Hart* is demonstrably attune to the issues of prejudice, the robustness of this protection may be compromised by its presentation in *Hart*, as well as by its treatment in *Mack*.

Kaiser argues that the potential prejudicial effects of Mr. Big investigations, as described in *Hart*, are effectively discounted to the point of impotence in *Mack*. In this critique, he describes an accused’s involvement with organized crime as “a virtual invitation to prejudgment that may be irascible.”\(^{98}\) This description is fitting and reflects the general prejudice that attaches to organized criminal activity throughout Canadian criminal law. For example, s. 718.2(a)(iv) of the *Criminal Code* states that “evidence that the offense was committed for the benefit of, at the direction of or in association with a criminal organization… shall be deemed to be aggravating circumstances”\(^{99}\) for the purposes of sentencing. Similarly, s. 467.14 mandates that a person charged under s. 467.11 (participation in the activities of a criminal organization), s. 467.12 (commission of an offence for a criminal organization) or s. 467.13 (instructing the commission of an offence for a criminal organization) must serve their sentence consecutively to any other punishment arising from the same event.\(^{100}\) Inarguably, the *Criminal Code* imposes particularly severe consequences on these offenses committed in an organized crime context, reflecting and reinforcing a broad social norm about the particular stigma ascribed to such acts.

Trial judges are well acquainted with the task of assessing the potential prejudicial impact of evidence. However, the assessment techniques and corrective measures employed to limit the prejudicial impact of character evidence, principled exceptions to the rule against hearsay or similar fact evidence are not necessarily directly transferrable to the Mr. Big context. As noted

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\(^{99}\) *Criminal Code*, RS C 1985, c C-46, s. 718.2(a)(iv).

by Henein in her *amicus curiae* factum in *Hart*, Mr. Big investigations place the defence in a “Catch-22” position, “whereby seeking to edit or exclude the discreditable conduct evidence would threaten to undercut [the defence’s] only means of explaining to the jury why the accused would have made the confession and why it’s not true.”

Given this unusual incentive dynamic, it is evident that the required inquiry into the prejudicial effects under the *Hart* test bear particular significance.

In subsequent applications of the *Hart* common law test, this general prejudicial effect is sometimes given scant consideration by trial and appellate courts. For instance, in *Mack*, Moldaver J. discharges the requirement of assessing prejudicial effect in a single paragraph, concluding that any prejudice is “limited” as the appellant was not involved in violent scenarios, the operation did not reveal prejudicial details of his past, and his involvement was limited to “assisting with repossessing vehicles and delivering packages”. While this analysis is neither unhelpful nor inappropriate, it is incomplete. No reference is made to the general prejudicial effect of affiliation with a criminal organization, which is far from insignificant. As a result, the reasons read as if one could not reasonably infer any substantial prejudicial effect from the facts in *Mack*, leading to the problematically straightforward conclusion (in *obiter dicta*) that the confession “would clearly be admissible.”

This characterization mitigates the significance of the general moral prejudice attached to Mr. Big evidence, and troublingly enables lower courts to do the same.

**Conclusion**

This paper identifies three patterns of interpretation in the post-*Hart* jurisprudence that give rise to concerns regarding the ability of the test to reign in the investigative technique. First, a

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101 Henein factum, supra note 18 at para 55.
102 *R v Mack*, 2014 SCC 58 at para 35, CarswellAlta 1701 [“*Mack*”].
103 *Mack*, supra note 102 at para 33.
number of decisions appear to be using the exceptional facts of *Hart* as a benchmark for the
types of police actions that give rise to reliability concerns, in effect rendering anything less as
not giving rise to substantial reliability concerns. This approach undervalues the significant
reliability concerns raised in almost all Mr. Big operations, and thus undermines the presumption
of inadmissibility that the Court created for this type of evidence. Second, several courts have
examined the impacts of violence on the accused almost exclusively under the abuse of process
prong of the *Hart* framework. This has arguably resulted in some courts undervaluing the
reliability concerns created by threats of violence. Third, in many cases, the analysis of
prejudicial effects has been cursory, assuming that these effects are effectively constant across
Mr. Big operations. While prejudicial effects are, as Moldaver J. stated, a “fairly constant
variable,”\(^\text{104}\) there are nonetheless meaningful differences between the types of prejudice
accused’s will face. Further, little attention is given to the significant prejudicial effects in all Mr.
Big operations as result of the accuseds’ newfound associations with organized crime. While the
Court in *Hart* ought to be lauded for its efforts to reign in Mr. Big, the subsequent case law
suggests that perhaps more attention ought to be paid to each of the individual steps of the
analysis.

When applying the *Hart* admissibility test, trial judges ought to keep in mind the
fundamental principles that it is designed to protect. It is unrealistic to expect an accused person
who is subjected to the full power and resources of the state during a Mr. Big investigation to be
able to withstand the overwhelming pressure to confess. As long as these operations are
continuing to be used by Canadian law enforcement, the interests of both the accused and society
at large can only be served if additional measures are taken to ensure that any confessions

\(^{104}\) *Hart*, supra note 1 at para 108.
admitted under this framework provide strong guarantees of reliability and uphold the integrity of the trial process. These principles of fundamental justice demand nothing less than a full, rigorous analysis by the judiciary. Therefore, it is critical that trial judges faced with the formidable task of applying and developing the *Hart* common law test do so such that the “just balance” aspired to by Moldaver J. can be realized.  

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