Opposing Mr. Big in Principle

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I. THE MR. BIG TECHNIQUE

The Mr. Big technique is often used as a last resort for cases that have gone cold, or where the police strongly suspect someone of committing a crime but have thus far not been able to obtain any other evidence. Undercover officers pose as members of a profitable underworld organization and offer a quick path to riches for the suspect. The suspect is hired to carry out various tasks for the organization, to encourage the thinking that he or she is moving up in the organization. At some point, as a reward for past good service, the undercover officers promise to introduce the suspect to a figure higher up within the organization, a “Mr. Big”. It is at this point that the undercover officers, including the fictional “Mr. Big”, may try to use certain leverage to induce a suspect to confess to a past crime. One approach is to try and convince a suspect to describe a past crime in order to prove that he or she is a bona fide criminal, worthy of the organization. Another approach is to tell the suspect that the police are onto him or her and are actively searching for evidence. If the accused describes the crime in detail, what happened, and where any remaining evidence can be found, the organization can get him or her out of it by cleaning things up and getting rid of any incriminating evidence. This has the potential additional benefit of encouraging the suspect to point out where corroborative evidence can be found. It is easy to see why the practice has been used for about two decades. As of 2008, according to an RCMP spokesperson, the technique has enjoyed a 75% confession rate and a 95% conviction rate.1

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1 Assistant Professor, Faculty of Law, University of Manitoba. The author would like to thank the Legal Research Institute of the University of Manitoba for their generous support towards this project. Special thanks also go to Adam Nathanson for his research.
Controversy is, however, starting to increase with respect to the use of the technique. Kouri Keenan and Joan Brockman are quite critical of the technique as a serious state intrusion into citizen privacy and a recipe for false confessions. The intention behind this paper is to make a case for excluding Mr. Big confessions under the Canadian principled approach to hearsay evidence. The basic argument being advanced is that the Mr. Big technique has certain salient features that should trigger an overdue scrutiny from our courts as to the threshold reliability requirement of the principled hearsay approach. The technique carries a very substantial risk of producing false confessions and wrongful convictions, a concern that strikes at the very heart of why Mr. Big confessions as hearsay statements should be treated with great care before being admitted into evidence. My position is that Canadian courts need to invoke the principled approach to hearsay evidence in order to exclude Mr. Big confessions from evidence, at least on a case-by-case basis. I will also go a little further and argue that the concerns involved with the technique are so salient that perhaps the principled approach requires not just a case-by-case analysis of Mr. Big confessions, but also a general exclusionary rule against them. Two possible constructions for this general exclusionary rule will be put forward. One is a modified confessions rule that is reconfigured to specifically exclude Mr. Big confessions. Under this rule, the fact that the statement was not made to someone that the accused perceived as being a state authority would no longer be an obstacle to the exclusion of evidence. The focus of the new rules would squarely be on the voluntariness requirements, such as the absence of oppressive circumstances, coercion, and inducements, and not on whether the accused was aware that the officers were state authorities. The alternative, if courts are unwilling to revise the confessions rule, is to recognize Mr. Big confessions as a particular category of admission by a party that is presumptively inadmissible. Having

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1 Chris Gardner, "R.C.M.P. clarify & defend the 'Mayerthorpe Mr. Big' operation", RCMP Watch (4 February 2009), online: <http://www.rcmpwatch.com>.

said that, I will also suggest that Mr. Big confessions may sometimes be admitted in limited circumstances where the concerns about threshold reliability in individual cases are minimal; for instance, where there is corroborating evidence. I wish to stress at this point that the focus of this article is on how Mr. Big confessions should be viewed through the lens of evidentiary reliability that is germane to the law on hearsay evidence. I will not be directly discussing potential issues of human rights, constitutional liberties, or state intrusion on privacy. This is not to say that these issues are not important. Indeed, this can and should be a fruitful avenue for future research. I wish to keep a more narrow focus for the present time. The discussion now begins with an overview of the principled approach to hearsay.

II. COMMON LAW AND ITS APPLICATION TO THE MR. BIG TECHNIQUE

A. THE PRINCIPLED APPROACH TO HEARSAY EVIDENCE

Hearsay evidence consists of statements made outside of court offered as proof of the truth of their contents. The general rule used to be that hearsay evidence could not be admitted unless it fell within recognized exceptions, such as dying declarations or declarations in the course of a duty. These exceptions were criticized as highly rigid and technical, so much so that they could impair the search for truth either by the admission of evidence that was not particularly helpful, or by the exclusion of evidence that could reliably assist in determining what happened. The Supreme Court of Canada (SCC) has now set out a different framework for the admission of hearsay evidence: the principled approach. There are two key determinants, necessity and reliability. Necessity speaks to the inability to obtain the evidence from a witness directly. This includes circumstances such as the witness recanting on

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3 *R v Azaiga*, [2006] 42 CR (6th) 42, 73 WCB (2d) 340 (Ont Sup Ct).
the stand, dying, fleeing the jurisdiction, becoming insane, or becoming too traumatized to take the stand. In circumstances such as these, it may be necessary to obtain hearsay evidence from somebody who heard what the witness said out of court. The other key determinant is whether the circumstances surrounding the making of the out-of-court statement are such as to give the statement sufficient indicia of reliability. The SCC has made a further distinction between threshold reliability and ultimate reliability. Threshold reliability speaks to whether a judge decides on a voir dire that the out-of-court statement satisfies the reliability requirement of the principled approach so as to allow its admission as hearsay evidence. Ultimate reliability speaks to the degree to which the trier of fact (i.e., judge or jury) will rely on the hearsay evidence in deciding the issues of a case. The SCC also provided guidelines on how the principled approach interacts with the existing hearsay exceptions, as follows:

(a) Hearsay evidence is presumptively inadmissible unless it falls under an exception to the hearsay rule. The traditional exceptions to the hearsay rule remain presumptively in place.

(b) A hearsay exception can be challenged to determine whether it is supported by indicia of necessity and reliability, required by the principled approach. The exception can be modified as necessary to bring it into compliance.

(c) In “rare cases”, evidence falling within an existing exception may be excluded because the indicia of necessity and reliability are lacking in the particular circumstances of the case.

(d) If hearsay evidence does not fall under a hearsay exception, it may still be admitted if indicia of reliability and necessity are established on a voir dire.

A Mr. Big confession easily qualifies as a hearsay statement. It is a statement made by the accused out of court and offered by the Crown as proof of the

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truth of its contents in order to establish the accused’s guilt beyond a reasonable doubt. A natural question is whether any of the existing exceptions are applicable to Mr. Big confessions.

B. THE CONFESSIONS RULE AND ADMISSIONS

An important preliminary question is how Mr. Big confessions are categorized in terms of which recognized hearsay exception the Mr. Big confessions are admitted into evidence under. This preliminary question is important to address at the outset because the legal ramifications can be significant. Admissions—out-of-court statements made by a party and against his or her interests—may be used by the opposing side against the party that made the statement. The party making the admission does not need to have knowledge that the statement is against his or her interest. It suffices that the opposing side seeks to use it in trial for the statement to qualify as an admission. Admissions are a recognized exception to the general rule against hearsay.  

Admissions may stand out from other hearsay exceptions in the sense that they may actually enjoy a certain immunity from the principled approach that other exceptions do not. In *R v Evans*, the SCC stated:

> The rationale for admitting admissions has a different basis than other exceptions to the hearsay rule. Indeed, it is open to dispute whether the evidence is hearsay at all. The practical effect of this doctrinal distinction is that in lieu of seeking independent circumstantial guarantees of trustworthiness, it is sufficient that the evidence is tendered against a party. Its admissibility rests on the theory of the adversary system that what a party has previously stated can be admitted against the party in whose mouth it does not lie to complain of the unreliability of his or her own statements. As stated by Morgan, "[a] party can hardly object that he had no opportunity to cross-examine himself or that he is unworthy of credence save when speaking under sanction of oath."... The rule is the same for both criminal and civil cases subject to the special rules governing confessions which apply in criminal cases.  

11 [1993] 3 SCR 653 at 664, 108 DLR (4th) 32 [*Evans*].
Evans came out in 1993, and the law since then has become unclear as to whether admissions are exempt from scrutiny under the principled approach. I will return to this issue later on, but it is enough for now to say that there is significant support for the proposition that admissions by a party are exempt from being excluded under the principled approach.

Confessions are a particular kind of admission which have special requirements for inclusion into evidence. If the rules surrounding common law confessions are applicable to the Mr. Big confession, they may potentially be a source of protection to the accused because those rules impose stringent requirements on the admission of confessions that the Crown must establish beyond a reasonable doubt. However, while a Mr. Big statement does involve making a statement that apparently owns up to committing a crime, there are problems with making the confessions rule applicable. Firstly, in order for the rules surrounding confessions to be applicable, the confession must be made to somebody that the accused believes to be a state authority. Note that the emphasis is on whether the accused held a subjective belief that the person pressing for a confession was capable of influencing the course of the prosecution. Once that prerequisite has been met, a court must be satisfied beyond a reasonable doubt that the statement was made voluntarily. “Voluntarily” means the statement was the product of an operating mind (e.g., the accused was not intoxicated, the police did not employ a hypnosis technique during the interrogation, the accused was not in a state of shock following an accident), free of inducement by threats or promises (e.g., a quid pro quo offer for a lighter sentence in exchange for a confession), and not given in an oppressive atmosphere. A confession may also be excluded if the method by which the authorities obtained it would shock the conscience of the community.

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16 Ibid at paras 65–66.
It is apparent that the technique frequently engages the concerns captured by the confessions rule. For example, in *R v Hammerstrom*, a confession was ruled inadmissible because the police continued to grill the accused for over an hour and a half despite repeated assertions of the right to silence, coupled with a misleading representation that the police had an incontrovertible piece of evidence that tied the accused to the scene. Justice Neilson of the British Columbia Supreme Court decided that these factors together created an oppressive atmosphere that had overcome the will of the accused.

In *R v MJS*, Judge Ketchum noted that prolonged and intense questioning can, of itself, undermine the voluntariness of an incriminating statement, as follows:

When stripped to its essentials the Reid Technique is solely designed to convince the suspect that he is caught, that the police have overwhelming evidence that he is the culprit, and that there is no way that the suspect will be able to convince the interrogator or anyone else involved in the Criminal Justice System that he didn't do the crime. It is well to remember that for an unsophisticated accused willingly cooperating with the police, (but without the benefit of counsel) the police at that point represent the whole Criminal Justice System. When three senior police officers repeatedly tell this accused a falsehood namely, that they have investigated and cleared all other suspects, it is with the intent of persuading this accused that he committed the crime and he should confess to it. The danger of such a technique is that any "confession" then becomes a coerced—compliant, but false "confession" ("I must be guilty since you tell me so"). This enables the police to bring closure to their investigation. However, it is a devastating prospect not only for suspects, but also for the traditional Anglo-Canadian concept that every citizen is duty bound to not only report crime, but to assist and cooperate with the police in the detection of those who may have committed a crime. This case is a classic illustration of how slavish adherence to a technique can produce a coerced—compliant false "apology" (confession) even from an

17 2006 BCSC 1700, 43 CR (6th) 346.
accused who has denied 34 times that he did anything wrong when caring for his child.¹⁹

It should be apparent that Mr. Big confessions engage the same concerns that the confessions rule strives to address. The protections that the confessions rule provides, however, are rendered inapplicable simply because the accused perceives the individuals he or she is making a statement to as partners in crime instead of as state authorities. Courts have held that the confessions rule has no application to the Mr. Big technique because there is no awareness or perception on the part of the suspect that he or she is speaking to a person in authority.²⁰ In one Mr. Big case, a court found that the rules regarding confessions were applicable when the accused actually did have knowledge that the undercover officer was a cop.²¹ In R v Bonisteel, the Court held that use of the Mr. Big technique would meet the approval of the community rather than shock its conscience.²²

Mr. Big confessions, not being made to persons that the accused reasonably believes to be authorities capable of influencing the course of the prosecution, are instead routinely admitted as admissions by a party.²³ As matters presently stand, the Mr. Big technique does not fall within the ambit of the confessions rule, which could potentially afford protection to the accused in the form of stringent requirements for admission and a high standard of proof as to voluntariness. This is because the Mr. Big technique dodges the application of the confessions rule by having state authorities pose as gangsters and fellows in crime instead of as self-revealed authorities in an interrogation room. Mr. Big confessions are, however, frequently admitted as standard admissions by a party, which provides little if any protection to the accused because it goes no further than to insist that the tenor of the statement go against the accused’s interests. A fundamental question that this

¹⁹ 2000 ABPC 44 at para 45, 263 AR 38.


²² 2008 BCCA 344, 236 CCC (3d) 170 [Bonisteel].

²³ R v Osmar, 2007 ONCA 50 at paras 52–53, 84 OR (3d) 321 [Osmar].
paper will now address is whether Mr. Big confessions, even if they technically qualify for admission into evidence as admissions by a party, should be excluded under a reasonable necessity and reliability analysis following the principled approach.

III. A CASE FOR EXCLUDING MR. BIG STATEMENTS UNDER COMMON LAW

A. WHETHER SUBJECT TO A NECESSITY AND REASONABLE RELIABILITY ANALYSIS

Whether Mr. Big confessions are categorized as confessions or as admissions by a party, there is uncertainty over whether a statement that qualifies as either an admission or a confession is subject to further scrutiny under the principled approach. Both admissions and confessions may well satisfy the reasonable-necessity requirement under the principled approach, since the accused cannot be obliged to testify as a witness for the prosecution. It is whether admissions and confessions would be subject to a reasonable-reliability analysis where the answer is not so clear. Consider this statement from the Ontario Court of Appeal in *R v Moore-MacFarlane* with reference to confessions:

> It is important to distinguish between reliability as a concept underlying the notion of voluntariness at the admissibility stage and the ultimate questions of reliability and weight that remain, as with all evidence, determinations for the triers of fact. The first has been commonly referred to as the “threshold reliability” in the general context of the principled approach to hearsay exceptions. In the particular context of confessions, Cory J. in Hodgson referred to the “putative reliability” of the evidence. Hence, he noted that the purpose of the confessions rule was to exclude statements that were inherently unreliable because they were obtained by force, threats, or promises (or in an atmosphere of oppression) but that it did not inquire into the truth or falsity of the statement. “Rather it focuses on putative reliability, by analyzing the circumstances surrounding the statement and their effect on the accused, regardless of the statement’s accuracy”. Hence, it is only consonant with the general principled approach to hearsay exceptions that

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the court, as part of its inquiry into the voluntariness of a confession, should look for circumstantial guarantees of trustworthiness that sufficiently address the danger associated [with] this kind of evidence.\(^{25}\)

This excerpt may be capable of more than one reading. One reading is simply that the rules for confessions reflect the principled approach's demands for reasonable reliability. Once a confession satisfies all the common-law rules for being made to a person in authority and for voluntariness, implicitly it means that it also has reasonable reliability for purposes of the principled approach and thus any further scrutiny is unnecessary. However, two decisions from the Manitoba Court of Queen's Bench, \(R v\) Bridges and \(R v\) Friesen, have adopted another reading of Moore-MacFarlane that finds even if a confession satisfies all the rules for voluntariness, it may still be subject to exclusion under the principled approach if, in the circumstances of a particular case, it does not have reasonable necessity and reliability.\(^{26}\)

Since Evans came out in 1993, there has also been a lingering uncertainty over whether admissions are subject to a threshold-reliability analysis. Three appellate decisions in 2002 and 2003, all of them arising from Mr. Big cases, came up with different conclusions regarding what to do with this uncertainty. The Ontario Court of Appeal in \(R v\) Foreman stated that admissions are admitted "without any necessity/reliability analysis."\(^{27}\) The British Columbia Court of Appeal arrived at the same conclusion in \(R v\) MacMillan.\(^{28}\) The Alberta Court of Appeal in \(R v\) Wytyshyn was of the view that a court could apply the principled approach in rare cases to exclude an admission by a party if it lacked reasonable necessity and reliability.\(^{29}\)

\(R v\) Mapara, a 2005 SCC decision made with regards to co-conspirator admissions, provided this commentary:

\(^{25}\) (2001), 56 OR (3d) 737 at para 60, 47 CR (5th) 203 (CA) [Moore-MacFarlane].

\(^{26}\) \(R v\) Bridges, 2005 MBQB 142, 200 Man R (2d) 313 [Bridges]; \(R v\) Friesen, 2007 MBQB 240, 219 Man R (2d) 156.

\(^{27}\) [2002] 62 OR (3d) 204 at para 37, 169 CCC (3d) 489 (CA).

\(^{28}\) 2003 BCSC 1705 (available on CanLII) [MacMillan].

\(^{29}\) 2002 ABCA 229, 55 WCB (2d) 654 [Wytyshyn].
In *Starr*, our Court held that evidence falling within a traditional exception to the hearsay rule is presumptively admissible and that the exceptions should be interpreted in a manner consistent with the requirements of the principled approach: necessity and reliability. It was also recognized that, in spite of the application of an exception to the hearsay rule, evidence can be excluded in rare circumstances if it does not meet the principled approach's requirements of necessity and reliability. Moreover, *Starr* does not differentiate between the types of hearsay exceptions. It appears therefore that all hearsay exceptions may potentially be subject to the requirements of the principled approach to the hearsay rule. This includes the co-conspirator's exception to hearsay, regardless of whether this exception is justified on the basis of the principles of agency, *res gestae* or admissions.\(^{30}\)

The Court also emphasized that the "concern about the admission of unreliable evidence and the resulting impact on trial fairness must take priority."\(^{31}\) It may not be entirely clear whether the SCC intended these statements as a departure from what it said in *Evans*. It may signal an intention to move the law in that direction. Peter McWilliams writes:

> It would appear that courts have too quickly assumed that admissions are not subject to hearsay analysis.... Similarly, in *R. v. Mapara*, while the Supreme Court cited *Evans* in its discussion of the rationale for the co-conspirators exception and noted the link between admissions and the co-conspirators rule, the court nevertheless considered whether the co-conspirator's exception satisfied the principled approach and also held that the "rare case" analysis applied to that exception. This would suggest that in rare cases, admissions by an accused could be subject to a necessity/reliability analysis.\(^{32}\)

Whatever the SCC's intentions in *Mapara* may have been, it has apparently done little to resolve whether admissions by a party are ever subject to a necessity and reliability analysis. Courts have continued to come up with different answers during Mr. Big cases since *Mapara*. The Ontario Court of

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\(^{30}\) *Mapara*, supra note 9 at para 44.

\(^{31}\) Ibid.

Appeal in Osmar relied on both Evans and Foreman to conclude that Mr. Big statements, as admissions, were not subject to a threshold reliability analysis. The Newfoundland Supreme Court in R v Hart, another Mr. Big case, relied on Mapara and Wytshyn to conclude that an admission was potentially subject to exclusion if it lacked threshold reliability.

It is apparent that Mapara, however its excerpts may be read, has not sufficed to clarify the issue of whether or not admissions are subject to a reasonable necessity and reliability analysis under the principled approach. If anything, what this inquiry into Mr. Big cases reveals is that this particular aspect of the law of hearsay is badly in need of further clarification from the SCC. This preliminary question is an important one that needs to be resolved before we can even begin to discuss excluding Mr. Big confessions under the law of hearsay.

So how should the preliminary question be resolved? Should it be resolved in favour of subjecting admissions to reasonable necessity and reliability analysis? Addressing this question involves not only competing strands of legal authority, but also competing policy considerations. The policy consideration in favour of not applying the principled approach to admissions was described in Evans. It would seem awfully convenient for a party to make concessionary statements out of court, possibly with abandon, and then hide behind hearsay rules to avoid being called to task once inside the courtroom. In a criminal context, if the accused admitted to committing a crime, why should he or she be allowed to backpedal out of it once on trial?

The competing policy concern is that an admission by a party may, in some circumstances at least, still engage concerns about evidentiary reliability. This in turn can engage concerns about trial fairness when unreliable evidence is entered against the accused. In Starr, the SCC stated:

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33 Osmar, supra note 23 at paras 52–53.
34 2007 NLTD 74 at paras 96, 103–104, 265 Nfld & PEIR 266 [Hart]. For similar decisions made in contexts other than Mr. Big, see R v Teerhuis-Moar, 2009 MBQB 22, 65 CR (6th) 335; R v Smith, 2007 NSCA 19, 251 NSR (2d) 255.
35 Supra note 11 at 664.
However, this concern for reliability and necessity should be no less present when the hearsay is sought to be introduced under an established exception. This is particularly true in the criminal context given the "fundamental principle of justice, protected by the Charter, that the innocent must not be convicted". It would compromise trial fairness, and raise the spectre of wrongful convictions, if the Crown is allowed to introduce unreliable hearsay against the accused, regardless of whether it happens to fall within an existing exception.36

As previously noted, the SCC in Mapara emphasized that concerns about admitting unreliable evidence and trial fairness must take priority.37 The Ontario Court of Appeal in Moore-MacFarlane emphasized that it is precisely this rationale that explains why confessions are a category of admissions that require more stringent requirements. Justice Charron wrote:

In turn, the reliability of the evidence is intrinsically connected to trial fairness, the second rationale for the confessions rule. Again here, it is noteworthy that the relationship between reliability and fairness underlies the modern principled approach to hearsay exceptions in general. As noted by the Supreme Court of Canada in R. v. Starr, it would compromise trial fairness and raise the spectre of wrongful convictions, if the Crown were allowed to introduce unreliable hearsay against the accused.38

The routine entrance of admissions into evidence without engaging in a reasonable necessity and reliability analysis, and grounding that practice in the proper functioning of the adversarial system, may be more understandable during civil litigation, assuming that the admissions were freely made without any coercion from either side. I suggest that it is a different matter where Mr. Big is concerned. Mr. Big confessions, although not made to somebody the accused believes to be a state authority, are nonetheless admissions that the State will have frequently had a very active role in inducing, even forcing, from the accused. This reality suggests that the policy concerns about unreliable evidence and trial fairness should be

36 Supra note 7 at para 200 [citations omitted].
37 Supra note 9 at para 44.
38 Moore-MacFarlane, supra note 25 at para 58 [citations omitted].
accorded greater priority relative to the policy concerns identified in *Evans*, at least where Mr. Big statements are concerned. I argue that the outstanding legal question needs to be resolved in favour of allowing admissions to be subjected to the principled approach in appropriate cases, with a Mr. Big statement standing out as just such an appropriate case. However, even in those instances where courts have been open to the possibility of applying the principled approach to Mr. Big confessions, the results leave cause for concern.

B. MOTIVE TO LIE

The SCC recognizes that whether the declarant has motive to lie is a criterion that is relevant to the issue of threshold reliability.39 There have been several cases where perceived motive to lie has led to the exclusion of hearsay statements from evidence. In *R v Scott*, the co-accused—who refused to testify at the accused’s trial—was found to have motive to lie, which was deemed fatal to the issue of threshold reliability.40

When the hearsay declarant stands to procure a tangible benefit by making the hearsay statement, this can provide a motive to lie that can be fatal to threshold reliability. In *R v Johnson*, Judge Di Zio of the Ontario Court of Justice excluded a statement because the declarant faced deportation to Jamaica and the prospect of improving her chances to remain in Canada by saying the accused had killed the victim strongly suggested a possible motive to lie that rendered her statement inadmissible.41 In *R v Atwal*, the accused’s daughter had a possible motive to exaggerate the state of her strained relations with the accused, namely that he wanted to kill her, in order to gain access to a home where she enjoyed considerably more freedom.

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40 2004 NSCA 141 at paras 102, 105, 228 NSR (2d) 203. See also *R v Bartkowski*, 2004 BCSC 598 at para 8, 66 WCB (2d) 109.

41 2005 ONCJ 465, 69 WCB (2d) 239.
regarding matters such as curfew.\textsuperscript{42} This was sufficient to exclude the daughter’s statements from evidence as not meeting threshold reliability.\textsuperscript{43}

An especially interesting example of the court erring on the side of caution on the issue of motive to lie is \textit{R v Skeir}.\textsuperscript{44} The accused called 911 within a couple of hours regarding a domestic incident, but the phone call was made while the accused was intoxicated. Justice Williams did not find any direct evidence of motive to lie, but also noted that the Crown could not provide any direct evidence of the absence of motive to lie. She decided to exclude the recorded call from evidence since she could not conclude that motive to lie was absent.\textsuperscript{45}

There is no doubt that the Mr. Big technique, by its very nature, produces a powerful incentive for fabrication. Robert Gordon, Director of the School of Criminology at Simon Fraser University, has said:

\begin{quote}
As an investigative tool it is very effective. If you go the next step and try to use it as evidence it gets wobbly. . . . People get caught up in the activity that they are alleged to be involved in. . . . They want to be members of the group. And so to impress Mr. Big, or Mr. Big’s lieutenants, they will say things that are in effect not true. They may well confess to police officers who are role playing in the simulation that they have done this, that or the other, when in effect, they haven’t. They want to be accepted.\textsuperscript{46}
\end{quote}

This motive to lie due to a Mr. Big sting can show up markedly in individual cases. A news story on the trial of James Kakegamic, who was convicted of first-degree murder, showed that he had been threatened by the Hells Angels of Winnipeg over a past debt and feared for his family’s safety.\textsuperscript{47} The promise

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\item \textsuperscript{42} 2004 BCSC 1517 (available on CanLII).
\item \textsuperscript{43} \textit{Ibid}.
\item \textsuperscript{44} 2005 NSPC 38, 237 NSR (2d) 297.
\item \textsuperscript{45} \textit{Ibid} at para 47.
\item \textsuperscript{46} John Cotter, “Critics wonder if ‘Mr. Big’ stings used by police are really dirty tricks”, \textit{The Canadian Press} (25 January 2009), online: Penticton Herald <http://www.pentictonherald.ca>.
\item \textsuperscript{47} Dan Gauthier, “Final submissions heard in murder trial for Kakegamic”, \textit{Kenora Daily Miner \& News} (17 October 2005) A1.
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of paying off the debt with more riches to come provided definite leverage for the Mr. Big sting that garnered a confession from Kakegamic. In *R v Smith*, the Court found that the accused was a habitual liar who often cooked up stories about himself and his past deeds in order to portray himself grandiosely, and, in the course of the Mr. Big sting, he had frequently altered or revised his answers in response to what he thought the undercover officers posing as gangsters wanted to hear. It was therefore risky to allow the confession to stand as a basis for conviction. Courts, however, have frequently been dismissive of arguments to exclude Mr. Big confessions on the basis that the accused had a motive to fabricate, very often with little to no explanation of why such statements have threshold reliability despite obvious motives to lie. In *R v Ciancio*, the British Columbia Supreme Court stated that any concerns stemming from a motive to lie in response to a Mr. Big sting were a matter of ultimate rather than threshold reliability. The motive to lie, however, is not the only concern with respect to Mr. Big confessions and threshold reliability.

C. POTENTIAL FOR COERCION

In *R v B(KG)*, Chief Justice Lamer stated that a finding of coercion may often be fatal to the threshold reliability of a hearsay statement, as follows:

I would apply this test to prior statements. The trial judge must satisfy him or herself (again, in the majority of cases on the balance of probabilities) on the *voir dire* that the statement was not the product of coercion of any form, whether it involves threats, promises, excessively leading questions by the investigator or other person in a position of authority, or other forms of investigatory misconduct.

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48 2005 BCSC 1624 at paras 98, 109, 113, 68 WCB (2d) 350.
49 *Ibid* at para 114.
50 See e.g. *MacMillan*, supra note 28 at para 36; *Hart*, supra note 34 at para 140; *R v Terrico*, 2005 BCCA 361 at para 26, 199 CCC (3d) 126; *Wisneshyn*, supra note 29 at paras 7-8.
51 2007 BCSC 777 at para 35, 73 WCB (2d) 798. See also *Omar*, supra note 23 at para 50.
One could of course say that it is a whole different matter when the accused is speaking to individuals he or she believes are partners in crime, as opposed to individuals the accused knows to be law-enforcement authorities. Nonetheless, there is recognition in B(KG) that coercion can come from sources other than state authorities, such as to raise concerns about evidentiary reliability:

A new rule that would admit the statements if certain conditions are met should ensure that the prior statement of the witness was made voluntarily. It should still permit the witness to recant and to explain that the earlier statement resulted from police pressure or coercion. Yet it must be remembered that the police are not the only ones who can exert pressure on a witness. The accused, or friends and supporters of the accused can as well influence a witness to change a statement. This may be particularly true in drug cases and cases of spousal assault. Obviously, the incentive of an accused to have a witness change his version of events is substantial if the present rule is maintained since the retraction by itself can effectively end the prosecution’s case. Frequently this will frustrate any possibility of the resolution of the charge on its merits.53

One must keep in mind that this particular excerpt was made in the context of a case involving multiple suspects. Furthermore, the primary significance of B(KG) and subsequent cases is to provide guidelines for when a prior inconsistent statement made by a witness who recants on the stand can be used not just to test the witness’s credibility, but also as proof of the truth of its contents.54 It is not necessarily a given that the Court in B(KG) intended the above excerpt to be potentially applicable to all hearsay statements under the principled approach.

Be that as it may, there are cases where the principled approach has been applied to statements made by children during child protection matters. A prime consideration in some of these cases was whether or not the child provided the statement under coercion, whether given to a police officer, a

social worker, a biological parent, or a foster parent. One could of course suggest that this reflects a particular circumstance—the ability of an adult to coerce a young child—and thus the applicability to Mr. Big may be questionable. I suggest that this reflects a matter that should be much more fundamental and germane to the principled approach. That matter is whether there is a power imbalance, whether it is between an adult and a child, a uniformed police officer and a suspect, or an officer posing as a dangerous gangster and a suspect. If that power imbalance is exploited to coerce or intimidate the hearsay statement from the declarant, it should, by its very nature, raise serious concerns about threshold reliability. There should not be any logical reason to conclude that other witnesses besides those the accused knows to be state authorities cannot exercise coercion on the accused such as to engage threshold reliability concerns.

Coercion is in fact the “stock in trade” of the Mr. Big technique. A documentary on the Mr. Big technique by the Canadian news program *The Fifth Estate* shows a revealing example of how the technique is plied. In one excerpt, the accused, Andrew Rose, is subjected to prolonged and intense questioning by a Mr. Big and his associates. Mr. Big spends a great deal of time and energy trying to convince Rose that the police have enough evidence to convict Rose of murder, and that Mr. Big can make the legal troubles go away. The condition, of course, is that Rose has to admit to having committed two murders in northern British Columbia years beforehand. Rose denies having committed the murders multiple times. Mr. Big frequently responds to the denials with accusations that Rose is not coming clean and demands that Rose quit lying. He says he cannot trust Rose and will cut him loose from the criminal organization, and that Rose will go to prison if he keeps denying involvement. Mr. Big often presses his

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55 See *Children's Aid Society of Ottawa-Carleton v LL*, [2001] 22 RFL (5th) 24 at paras 29, 41, 47, 110 ACWS (3d) 92 (Ont Sup Ct); *Children's Aid Society of Ottawa v SE*, 139 ACWS (3d) 687 at paras 32, 39, 44, 2005 CanLII 25949 (available on CanLII) (Ont Sup Ct).

56 “Someone Got Away with Murder”, *The Fifth Estate* (21 January 2009), online: Canadian Broadcasting Corporation <http://www.cbc.ca/fifth> [“Murder” documentary].
accusations and demands in an angry and raised voice with plenty of expletives to intimidate Rose into giving the confession.\footnote{Ibid.}

In \textit{Hart}, the court described the accused's evidence as follows:

In his testimony on the \textit{voir dire}, Mr. Hart claims that he lied to the crime "boss" and did a re-enactment so as to keep his place in the organization. He maintains he was intimidated, scared and felt trapped in his ability to get out. His evidence was that he did not feel he had an option of leaving without being possibly done away with because once you were into the organization, you would not get out. He was told about prostitutes being beaten while attending at a meeting with someone referred to as the "ice man", i.e., an enforcer for a bike gang. He also witnessed physical hitting of an undercover operator at a hotel room.\footnote{Hart, supra note 34 at para 33.}

Justice Dymond of the Newfoundland Supreme Court gave short shrift to the accused's arguments, on the basis that the intimidation was directed at others besides the accused and that the accused made no efforts to get out of the Mr. Big organization.\footnote{Ibid at para 63.} It is also prudent to ask, for purposes of evidentiary reliability, whether it makes any real difference what particular form the intimidation tactics take. Kyle Unger, Jason Dix, and Clayton Mentuck all describe during a film documentary how they were on the receiving end of tactics such as staged beatings, implicit threats of physical harm to themselves personally, and hints that the fictional crime rings knew where their family members lived, thus implying physical harm to them as well.\footnote{"Murder" documentary, supra note 56.} Surely, if anyone were to be seriously pressed on the issue, it would be hard to explain how an intimidating atmosphere in an interrogation room with people the accused knows to be police officers can affect evidentiary reliability, but threats by people whom the accused perceives to be bona fide members of a criminal underworld would not affect evidentiary reliability. Contrary to Justice Dymond's reasoning, getting out of the organization is far from simple for the suspect. If anything, one can anticipate that threats
from Mr. Big would be distinctly more palpable and coercive than obvious police authorities, providing a strong incentive to lie in order to preserve not just one's own physical safety, but the safety of family members as well.61

In Terrico, the British Columbia Court of Appeal acknowledged that the intimidation tactics latent in the Mr. Big technique had the potential to yield a false confession, yet stressed that such a confession also had the potential to be truthful.62 Concerns about the reliability of statements produced by Mr. Big investigations were thus appropriate for an assessment by the trier of fact as to ultimate reliability, and the statements were not inherently unreliable under the circumstances such as to warrant exclusion under the threshold reliability test.63

D. WHETHER THRESHOLD OR ULTIMATE RELIABILITY

It is apparent that Canadian courts have largely not subjected the Mr. Big technique to rigorous scrutiny under the principled approach. When courts have been pressed by defence counsel on the issue, the frequent response has been to categorize concerns such as motive to lie and coercion as appropriate for determination by the trier of fact as to ultimate reliability rather than as a basis for exclusion under threshold reliability. This has, of course, drawn criticism. Daniel Brodsky, a defence lawyer who has defended clients caught by the Mr. Big technique, not only feels that juries should hear expert evidence on Mr. Big confessions, but also raises this question:

It's a troublesome technique because it allows juries to hear confessions that may not be confessions without giving them the tools to figure out what's the truth and what's not the truth. ... Are the statements reliable enough that

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61 See also Timothy E. Moore, Peter Copeland & Regina A. Schuller, “Deceit, Betrayal and the Search for Truth: Legal and Psychological Perspectives on the 'Mr. Big' Strategy” (2009) 55:3 Crim LQ 348.
62 Terrico, supra note 50 at paras 28, 42.
63 Ibid at para 42.
the jury should have to hear them, or are they so tainted that they should never go before the jury?\(^{64}\)

To a certain degree, treating the issue as one of ultimate reliability is understandable. Glen Crisp argues that the distinction between threshold and ultimate reliability can be a blurry one.\(^{65}\) This blurriness can easily lead to confusion over whether a certain factor should be used to assess exclusion under threshold reliability or to allow for its consideration by the trier of fact as to ultimate reliability. One of the examples that he focuses on is the issue of credibility.\(^{66}\) There has indeed been considerable confusion over whether extrinsic evidence pertinent to the credibility of the hearsay declarant should be assessed for threshold reliability, or for ultimate reliability. The SCC itself has contributed to the confusion. It initially suggested that comparator statements could be used to assess threshold reliability in *R v U(F)*,\(^{67}\) then went on to say that a declarant's credibility and corroborating evidence were not to be used to assess threshold reliability in *Starr*.\(^{68}\) The Court then changed position again in *Khelawon*.\(^{69}\) The principled approach does not warrant compartmentalizing or pigeonholing factors as relating either to threshold or to ultimate reliability. The principled approach requires functional analysis of the dangers involved with the admission of a hearsay statement.\(^{70}\) The credibility of the hearsay declarant and the availability of corroborative evidence may thus be considered in an assessment of threshold reliability in appropriate cases. It is easy to make a case that motive to lie, for example, is part of the circumstances surrounding the making of the statement itself, just as it is also easy to classify motive to lie as extrinsic evidence relevant to declarant credibility for purposes of ultimate reliability.


\(^{66}\) Ibid.


\(^{68}\) Supra note 7 at para 217.

\(^{69}\) Supra note 54 at para 4.

\(^{70}\) Ibid at paras 55, 93.
Confusion is indeed understandable as motive to lie and dishonesty are prime considerations in the evaluation of otherwise admissible evidence in areas of evidence law besides hearsay. Examples of such areas include confronting a witness with a prior inconsistent statement during cross-examination, allowing a party to confront its own witness with a prior inconsistent statement under section 9 of the Canada Evidence Act,\(^{71}\) and allowing a party to contradict the answers provided by a witness on cross-examination through other evidence on issues such as bias,\(^{72}\) personal interest in the proceedings,\(^{73}\) and corruption\(^ {74}\) as exceptions to the collateral-facts rule. Be that as it may, precedent from our highest court has made it clear that factors such as motive to lie and coercion are to be considered during an analysis of threshold reliability of hearsay. It seems rather curious that courts are willing to give full regard to such factors in cases from other contexts, and yet that vigilance seems to fall apart in the face of the law-enforcement expediency that the Mr. Big sting promises.

It is, nonetheless, an open question of whether there is enough legal authority for defence lawyers to mount a serious legal challenge against the Mr. Big technique. The authorities are divided on the important and preliminary question of whether admissions should be subject to scrutiny under the principled approach. Some would suggest that the conclusion reached in Evans and Foreman remains the prevailing one. A more worrisome prospect is that even when courts are willing to entertain subjecting Mr. Big confessions to the principled approach, they are producing questionable authorities that conclude concerns such as coercion and motive to lie will not be significant barriers to admission. Those legal authorities that may be called upon to challenge the Mr. Big technique may not be enough on their

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\(^{71}\) RSC, 1985, c C-5.


\(^{73}\) See e.g. *R v Teneycke* (1996), 108 CCC (3d) 53, 31 WCB (2d) 241 (BCCA); *R v Bencardino and De Carlo* (1973), 2 OR (2d) 351, 24 CRNS 173 (CA); *R v Stevenson*, [1972] 1 OR 741, 5 CCC (2d) 415 (CA).

\(^{74}\) See e.g. *R v P(PN)* (1993), 107 Nfld & PEIR 141, 81 CCC (3d) 525 (NLCA); *R v Demeter* (1975), 10 OR (2d) 321, 25 CCC (2d) 417 (CA).
own to mount a serious challenge. Or, at the very least, they may need to gain more traction. If the available legal authorities may not be enough on their own to mount a serious legal challenge, then perhaps the available empirical evidence on confessions may be what is needed to enhance such a challenge. Perhaps the empirical studies could be introduced during a *voir dire* in a lower-court trial, or failing that, they could be brought in as social-science evidence at the appellate level. As it turns out, the available empirical evidence has a lot to say about whether investigatory tactics should merit complete exclusion under threshold reliability instead of allowing the resultant admissions to go to the trier of fact under ultimate reliability.

It has been argued repeatedly that any confession, by whatever method it was obtained, tends to be viewed uncritically by judges and juries alike as compelling evidence of guilt, even when contradictory evidence is presented during trials. Mock-jury studies have shown that confessions significantly increase the chances of conviction, even when it was obvious to the mock juries that the confession was coerced. A recent mock-jury study also shows that confessions significantly increase the probability of conviction, even when those confessions are presented second-hand by informants who had motives to lie that were apparent to jurors.

A study by Iris Blandón-Gitlin, Katheryn Sperry, and Richard Leo, based on a survey of jurors who had served in Santa Ana, California, conveys a

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similar picture. The participants were asked to rate the coerciveness of various police interrogation tactics on a scale of 1 (not coercive at all) to 5 (extremely coercive). Tactics based on threatening the suspect with violence, even if implied, received an average coercive score of 4.16 to 4.48. Tactics based on presenting the suspect with false evidence averaged 4.05 to 4.39. Tactics based on promises of leniency averaged 3.19 to 3.47. Tactics based on repeatedly accusing a suspect of the crime, or cutting off the suspect's denials of the crime, or repeatedly telling the suspect that the alibi was false, averaged 3.13 to 3.17. The participants were then asked whether they believed the confession was nonetheless likely true on a scale of 1 (not at all likely) to 5 (extremely likely). Tactics based on threats of violence averaged 3.03 to 3.36. Tactics based on presenting false evidence averaged 3.23 to 3.64. Tactics based on promises of leniency averaged 3.60 to 3.74. Tactics based on repeatedly confronting the suspect with allegations of guilt averaged 2.95 to 3.15. The disturbing implication of this study is that jurors will very often feel confident in relying on a confession to render a guilty verdict, even when they perceived the interrogation tactics leading to that confession as being highly coercive.

A survey study by Linda Henkel, Kimberly Coffman, and Elizabeth Dailey found that survey participants were generally aware that confessions were not necessarily an absolute indicator of guilt and that confessions could potentially be false. There is more to the picture, though. Respondents were asked to respond to the statement, "Although some coercive interrogation tactics may induce false confessions, those techniques are justifiable because they elicit truthful confessions in far more people (the benefits outweigh the risk)" on a scale of 1 (strongly disagree) to 5 (strongly agree). Approximately 45% answered 1 or 2, approximately 22% answered 3, while approximately

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79 Ibid at 244.
33% answered 4 or 5. When respondents were asked to respond to the statement, "It is sometimes necessary for police officers to use ethically questionable techniques (like lying or coercion) to elicit truthful confessions" on a scale of 1 (strongly disagree) to 7 (strongly agree), approximately 34.5% answered 1 to 3, approximately 22.5% answered 4, and approximately 43% answered 5 to 7.

An even more alarming picture emerges from another survey study by Richard Leo and Brittany Liu. Survey respondents were generally aware that many police interrogative tactics could be psychologically coercive. Many of the respondents, however, indicated that they did not believe such tactics were likely to result in false confessions. The percentage of respondents who found that tactics based on repeatedly accusing the suspect, telling the suspect that the alibi is false, or cutting off the suspect’s denials of guilt were likely to elicit false confessions ranged from 15.6% to 19.1%. The percentage for tactics based on presenting false evidence to the suspect ranged from 24.7% to 33.6%. The percentage for tactics based on promises of leniency ranged from 17.3% to 18.4%. The percentage for tactics based on implied or express threats of bodily harm ranged from 33.6% to 42.9%.

There are also substantial indications that reliance on confessions as strong indicators of guilt can lead to wrongful convictions where the accused turned out to be innocent, even when there is awareness of coerciveness or contradictory evidence. Some American aggregated case studies have established that false confessions have contributed to 14% to 60% of documented cases of wrongful convictions. The Innocence Project, based in

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81 Ibid at 567.
82 Ibid at 568.
84 Ibid at 386.
New York City, states that approximately 25% of DNA exonerations in the United States were made against wrongful convictions based on false confessions.\textsuperscript{86} A study by Brandon Garrett points out that of the more than 250 exonerations in the United States that have followed DNA testing, more than 40 of them stemmed from wrongful convictions due to false confessions. Many of these false confessions were due to psychological pressure exerted by police interrogation tactics.\textsuperscript{87} Steven Drizin and Richard Leo performed a study on 125 American cases where the police obtained a confession by using a psychologically coercive tactic (i.e., threats or promises of leniency) and that confession was proven beyond any doubt to have been false.\textsuperscript{88} A particularly disturbing finding in this study is that 81% of the cases in this sample went ahead to trial and resulted in wrongful conviction despite the insistence on proof beyond a reasonable doubt. Another 11% pleaded guilty, with the avoidance of the death penalty having been the typical motive.\textsuperscript{89} A study by Melissa Russano et al on the tie between various police tactics and false confessions is particularly revealing. The police tactic of minimizing the potential consequences of giving a confession was found to almost double the rate of true confessions, but also to triple the rate of false confessions. Offers of leniency were also found to increase both true and false confessions.\textsuperscript{90}

Certain tactics used during standard police interrogations are not just psychologically coercive, but also often have a causal connection to false confessions. Implied threats of violence (e.g., staged beatings of another gang member), repeated confrontations of the suspect with allegations of guilt, promises of making the problem go away, and false presentations of evidence, while taking on a somewhat different spin during a Mr. Big sting, are

\textsuperscript{86} "False Confessions", online: The Innocence Project <http://www.innocenceproject.org>.
\textsuperscript{89} Ibid at 996.
\textsuperscript{90} Melissa B Russano et al, "Investigating True and False Confessions within a Novel Experimental Paradigm" (2005) 16:6 Psychological Science 481 at 484.
nonetheless all salient features of the technique. The natural question then is whether the same kind of tactics, albeit with a different spin and in a different setting, present the danger of false confessions. Indications are that this danger exists and it is not trivial.

Kyle Unger was the prime suspect for the rape, beating, mutilation, and murder of 16-year-old Bridgette Grenier in Manitoba.\textsuperscript{91} Unger had been on the police radar for the killing since the early 1990s. Earlier efforts at prosecuting Unger initially resulted in a Crown stay after the preliminary inquiry. According to Unger’s own explanations, he was especially vulnerable to the inducements offered by a Mr. Big sting. He had trouble finding employment following his initial arrest for the murder of Grenier.\textsuperscript{92} The conviction was also based on a purported similarity between Unger’s hair and hair found on the victim’s sweatshirt; however, subsequent DNA testing proved that the hair samples were unreliable. This was enough to convince Federal Minister of Justice Rob Nicholson that there was a strong possibility that a miscarriage of justice occurred and to order that Unger be retried.\textsuperscript{93} Deputy Attorney General of Manitoba Dan Slough subsequently decided to withdraw the charges, partly because of the DNA mismatch, and partly because a previous jailhouse informant was deemed to not be credible.\textsuperscript{94} Unger was then acquitted by the Manitoba Court of Queen’s Bench.\textsuperscript{95}

In 1996, 14-year-old Amanda Cook disappeared from a country fair and was found dead days later. The apparent cause of death was having been bludgeoned over the head with a large rock. The indictment against the prime suspect, Clayton Mentuck, was stayed by the Crown, partly because he appeared in a clean state hours after Cook’s disappearance, which would suggest no involvement, as well as earlier jailhouse admissions by Cook not

\textsuperscript{91} \textit{R v Unger}, 2005 MBQB 238, 196 Man R (2d) 280.
\textsuperscript{92} \textit{Ibid} at para 17.
\textsuperscript{94} \textit{Ibid}; “Kyle Unger acquitted in murder for which he spent 14 years in prison”, \textit{Waterloo Chronicle} (23 October 2009).
\textsuperscript{95} “Kyle Unger acquitted of 1990 killing”, \textit{The National} (23 October 2009).
matching up with the forensic evidence. Police then initiated a Mr. Big sting against Mentuck after the stay. Their initial efforts at garnering a confession did not go anywhere, and they had reached the point where Mentuck had maintained his innocence and threatened to leave the fake organization altogether. Police efforts at inducing a confession through the promise of lucrative criminal work continued. It finally succeeded when they indicated to Mentuck that somebody else who had a terminal case of AIDS was prepared to admit to killing Cook, but if Mentuck confessed instead, the organization would help him launch a wrongful-conviction suit against the government. Mentuck, who is Aboriginal, noted during a documentary on the sting, “How do you get sucked in? Well, out here [on a reserve] it’s close to poverty. There’s no jobs. All you have to do is pick something up here and take it there for $500 to $1000. Who’s going to turn that down? Obviously, I didn’t.” Justice MacInnes of the Manitoba Court of Queen’s Bench ultimately acquitted Mentuck, noting that parts of his story were inconsistent with other independent evidence, and that the inducement for Mentuck to confess was “positively overwhelming” since “there was nothing but upside for him to admit and nothing but downside for him to deny the offence.”

Andrew Rose’s case, like those of Unger and Mentuck, represents a glaring example of financial inducement and intimidation in the same circumstances, and Rose, like Unger, was subsequently cleared by DNA evidence. The case of Sebastian Burns and Atif Rafay, convicted in Washington State for the triple murder of Rafay’s parents and sister, is

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97 Mentuck, supra note 96.

98 Tiffany Burns, Mr. Big: A Documentary, DVD: (Canada: Atlas Grove Entertainment, 2007) [Mr. Big].

99 Mentuck, supra note 96 at paras 94–95.

100 Ibid at para 99.

101 “Murder” documentary, supra note 56.
another case where the issue of guilt is questionable. Repeated demands of confession and the promise of monetary rewards were part of the sting directed against them by the RCMP while both Burns and Rafay were residing in Vancouver. What is particularly troubling is the possibility of an alternative theory for the murders that could at the very least suggest reasonable doubt as to Burns’s and Rafay’s guilt. Michael Levine, a former undercover agent for the United States Drug Enforcement Administration, explains during a video documentary that there was not any significant blood splatter in the Rafay home because the victims were forced to wear scarves before being bludgeoned to death with aluminum baseball bats. The scarves absorbed the blood spatter. Atif Rafay’s father had, prior to the murders, developed a software program that showed that not all Muslims necessarily faced east while praying. The fact that all three victims were found lying headfirst and straight east suggests a motive that can be attributed to Muslim extremists. In the very least, this suggests an alternative scenario that should have been followed up on by investigative authorities but was not, and that could have potentially raised a reasonable doubt. Burns and Rafay recently lost their appeal against conviction before the Washington State Court of Appeals. Their lawyer, David Koch, has stated he intends to appeal this decision.

It is easy to say that these were isolated instances. Indications are, however, that wrongful convictions as a result of Mr. Big confessions may be becoming much more frequent. The Mr. Big technique originated in and is also extensively used in British Columbia. As of 2009, the Innocence Project, housed at the Faculty of Law at the University of British Columbia, had at least 23 cases on its roster involving potential wrongful convictions

102 Mr. Big, supra note 98.
103 Ibid.
105 Keenan & Brockman, supra note 2 at 51 (Of 81 Mr. Big stings considered by Keenan and Brockman, 56 took place in British Columbia).
stemming from Mr. Big confessions. One could say that it has not been proven that the confessions in those cases are false. Be that as it may, the Eligibility Guidelines for the Innocence Project include the following statement: "Consideration for review of a case may be dependent on whether there is any important new evidence or new testing available which would assist a claim of wrongful conviction." The fact that the Innocence Project has found potential merit on review of at least 23 cases involving Mr. Big confessions should itself be cause for considerable concern. If law-enforcement authorities continue to make extensive use of Mr. Big stings, the stories of Unger, Mentuck, and Rose may end up becoming the proverbial tip of the iceberg.

The available empirical evidence strongly suggests that offers of benefits and threats of harm lead to false confessions and that juries will rely on confessions to render guilty verdicts even when made aware of the concerns stemming from threats and offers. This is as true of confessions generated by Mr. Big stings as it is of confessions obtained in a police interrogation room. The courts' faith in the ability of juries to properly weigh the evidentiary value of Mr. Big confessions is unjustified. It is open to question whether there is sufficient legal authority to challenge the routine admission of Mr. Big confessions, especially considering the division of authorities over the fundamental question of whether admissions are subject to scrutiny under the principled approach and the building line of authorities that dismiss motive to lie and coercion as significant barriers to admission. It may be that the large amount of empirical evidence that links the coercive features of the technique with the very substantial risk for false confessions is what is needed, along with supportive legal authorities, to pose a serious question to Canadian courts as to whether they should distance themselves from the Mr. Big technique.

To routinely conclude that the mere fact that a Mr. Big confession goes against the accused's interests as an admission is sufficient and conclusive on

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107 UBC Innocence Project, "Eligibility Guidelines"; online: <http://www.innocenceproject.law.ubc.ca> [emphasis in original].
the issue of threshold reliability without going any further, or to conclude that there is no need to engage in a voluntariness analysis under the confessions rule simply because the accused is unaware that he is speaking to undercover officers, seems reminiscent of the rigid and technical approach to hearsay evidence that the principled approach was meant to depart from. Statements that technically fall within a recognized exception, perhaps including admissions depending on how one reads Mapara, may be subject to exclusion on a case-by-case basis if there are concerns with respect to threshold reliability. There are compelling reasons why courts must, at the very least, begin to subject Mr. Big stings to a rigorous reliability analysis on a case-by-case basis. This idea can be taken further. Another element of the principled approach is that the legal principles on existing exceptions may be subject to modification to bring them into compliance with the requirements of necessity and reliability.\textsuperscript{108} The Mr. Big technique has certain salient features that categorically raise concerns about the evidentiary reliability of Mr. Big confessions. Steven Smith, Veronica Stinson, and Marc Patry add:

The Mr. Big technique not only is missing the protections of an in-custody interrogation, but officers are much more free to apply the confrontational tactics, such as staging a beating for another recalcitrant member of the organization (i.e., the Bonisteel case) and minimization tactics such as offering to have someone else confess (i.e., the Mentuck and Franz cases).

Thus, the pressure on suspects to confess in a Mr. Big-type scenario is substantial, and the enticements are both explicit and significant. . . . It is clear that even in-custody interrogation procedures are prone to eliciting false confessions from suspects. With the pressure on suspects greater, and the perceived costs of confessing eliminated (indeed the cost of not confessing can be substantial), the Mr. Big technique seems likely to provide fertile ground for false confessions.\textsuperscript{109}

This reality seems to take matters well beyond the "rare case" that merits a case-by-case reliability analysis, and it begs the question of whether courts

\textsuperscript{108} \textit{Mapara, supra} note 9 at para 15.

\textsuperscript{109} Steven M Smith, Veronica Stinson & Marc W Patry, "Using the 'Mr. Big' Technique to Elicit Confessions: Successful Innovation or Dangerous Development in the Canadian Legal System?" (2009) 15:3 Psychol Pub Pol'y, & L 168 at 183.
should begin to develop a general exclusionary rule against Mr. Big confessions. I suggest two alternative conceptions of a general exclusionary rule here. One is Keenan and Brockman’s suggestion that the confessions rule can engage in a voluntariness analysis of the statement without always insisting on the person-in-authority requirement. An awareness on the part of the accused that the person he is making a statement to is a person in authority capable of influencing the course of the prosecution is no doubt a relevant consideration for assessing voluntariness and reliability. At the same time, there should also be little doubt that inducing a confession by promises or threats, or in an oppressive atmosphere, can on a very real level be conclusive of voluntariness and reliability, quite apart from whether the confession is made to officers dressed in uniform or whether it is made to undercover officers posing as dangerous criminals. The fact that the accused is making a confession to individuals he perceives as dangerous gangsters capable of inflicting severe reprisals for failing to show loyalty and obedience should in its own right be just as germane to a voluntariness and reliability assessment as when the accused is speaking to individuals he knows are police officers in an interrogation room.

Between the two alternatives proposed here, a modified confessions rule could conceivably provide more robust protection to the accused due to its stringent requirements on voluntariness that must be proven beyond a reasonable doubt. The alternative, if courts wish to insist on the state-authority requirement of the confessions rule, is that most admissions can remain presumptively admissible, but Mr. Big confessions can be recognized as a particular type of admission that should normally be subject to exclusion. I have made a number of arguments in favour of excluding Mr. Big confessions under the common law on hearsay evidence. There is a contrary argument in support of Mr. Big stings that is based on law-enforcement expediency.

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110 Keenan & Brockman, supra note 2 at 110.

111 Moore, Copeland & Schuller, supra note 61 at 359.
IV. THE ARGUMENT FOR LAW ENFORCEMENT

The policy argument for allowing the Mr. Big technique is of course one of law-enforcement expediency in cases that have gone cold. There is no doubt that the cold cases that are the subject of Mr. Big stings are often horrific. It is easy to feel revulsion at letting somebody who perpetrated a cruel murder go free, to allow an unresolved case go into "permanent freeze". University of Alberta law professor Steven Penney says, "It's hard to understand why the tricking of somebody who was involved in something like that is such an awful thing as compared to the need to obtain evidence of serious criminal wrongdoing." One can of course point to celebrated instances where the Mr. Big technique has led to a confession from someone who is very likely factually guilty and a conviction could not have been obtained any other way. Liana MacDonald's Mr. Big confession to murdering her husband for insurance money, for example, was given rather freely because the fake crime associate she spent the most time with played the part of a woman who also claimed to have had a past abusive husband.

In response to this, I would argue that the Mr. Big technique also presents grave repercussions for the presumption of innocence, which is now a Charter right under section 11(d). William Blackstone's famous adage—"I would rather see ten guilty men go free than one innocent man go to jail"—is an admonition that the justice system should err on the side of avoiding convicting the possibly innocent. This caution also extends to how the legal system should formulate the rules of evidence. Bruce MacFarlane notes that both the presumption of innocence and the rules of evidence serve

112 Mindelle Jacobs, "Rusing the day: Police tricks, including 'Mr. Big' routine, help solve murder cases", Calgary Sun (26 February 2008) 15.

113 Brian Caldwell, "Forest of lies: Two years after his death, a simple pylon marks where David Johnston fell, but the roots of his murder were tangled and vicious. It took an elaborate con game to bring his wife to justice", The Record (Kitchener-Waterloo) (16 December 2006) A1.


a common purpose as follows: "Additionally, the presumption of innocence, and the rules on hearsay and character evidence, the right to disclosure of the prosecution's case, and the entitlement to be tried by one's peers are all intended to safeguard the accused against wrongful convictions." With increased use of the Mr. Big technique over time, we acquire greater awareness and knowledge of its risks, of past instances where it has led to wrongful convictions, and of its ongoing potential to lead to more wrongful convictions. If the justice system stubbornly refuses to exclude evidence that is known to have reliability problems, or to adjust the rules of evidence to address such difficulties, it may very well be making a decision to compromise the presumption of innocence for the sake of law-enforcement expediency. The Mr. Big technique is becoming just such an instance. To condone the practice is to accept a very real risk of wrongful convictions of the innocent in the hopes of catching those who are guilty of past crimes. The justice system is thus willing to turn Blackstone's adage on its head, and the system would rather live with the very substantial risk of convicting the innocent than let the guilty go free in cases gone cold. On the other hand, we must ask whether there is a way to make some allowance for the Mr. Big technique to pursue cold cases while minimizing the dangers.

V. TOWARDS A CORROBORATION REQUIREMENT

As previously noted, there has been confusion over whether the absence or presence of evidence that corroborated the hearsay statement could be considered in determining threshold reliability, rather than solely in evaluating ultimate reliability. The SCC in Khelawon appears to have resolved this controversy, stating that corroborative evidence may in appropriate cases be pertinent to threshold reliability. I suggest that Mr. Big confessions should generally not be admissible in evidence unless and until they are corroborated by real evidence that makes an admission more likely to be true. Bonisteel may represent a positive example in the sense that

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117 Khelawon, supra note 54 at paras 93–100.
the police were already onto their suspect because of human blood found in his car, and because they were able to use DNA evidence found in the suspect's home in addition to the confession.\textsuperscript{118} In \textit{R v Raza}, it was recognized that the details of the confession matching up with details of the crime the police knew beforehand enhanced its probative value.\textsuperscript{119} In \textit{R v Redd}, it was noted that there was ample circumstantial evidence aside from the confession (e.g., boots that matched the footprints at the scene and gunshot residue) in order to enhance the reliability of the confession.\textsuperscript{120} Another example is Alan Steele, who maintained that he confessed to murdering Cindy Kaplan only to get in the good graces of the purported criminal organization and afterwards insisted that it was a Downtown Eastside crack dealer who had killed Ms. Kaplan.\textsuperscript{121} His confession was admitted at least partly because there was already physical evidence, in the form of blood on the accused's shirt that was confirmed as consistent with having struck the victim with the murder weapon (a candlestick), that tied the accused to the crime.\textsuperscript{122} Brian Townsend was convicted in 2008 of beating a Quebec teenager, Vivien Morzuch, in British Columbia.\textsuperscript{123} Police lifted Townsend's fingerprint and a DNA sample from tape found near Morzuch's body, which led to the subsequent Mr. Big operation that garnered Townsend's confession.\textsuperscript{124} Richard Mack was convicted in part because his Mr. Big confession was corroborated by numerous bone fragments and teeth identifying the victim that were recovered from his father's property.\textsuperscript{125}

\textsuperscript{118} \textit{Bonisteel}, supra note 22.
\textsuperscript{120} [1999] BCJ no 1471, 1999 CarswellBC 1412 (WL Can) (BCSC).
\textsuperscript{121} Kari Shannon, “Man confessed slaying during ‘job interview’ Vancouver court told”, \textit{The Globe and Mail} (10 May 2006) S3.
\textsuperscript{122} \textit{R v Steele}, 2010 BCCA 125, [2010] BCWLD 3346 (CA).
\textsuperscript{123} Jane Seyd, “Former NV man loses murder appeal”, \textit{North Shore News} (22 September 2010) A5.
\textsuperscript{124} \textit{Ibid}.
\textsuperscript{125} \textit{R v Mack}, 2012 ABCA 42 at para 2, 522 AR 262.
The idea of a corroboration requirement would, assuming that courts are willing to move in the direction of a modified confessions rule, be entirely consistent with a recognized windfall that can benefit the Crown even where involuntary confessions are concerned. There are authorities, including Supreme Court cases, that state that derivative evidence obtained subsequent to an involuntary confession, as well as so much of that confession that strictly relates to the derivative evidence, is admissible. In *R v Sweeney*, the Ontario Court of Appeal hinted that this rule may need to be re-examined, as the authorities in its favour have aged and predate the *Charter*, and because concerns besides reliability, such as trial fairness and constitutional rights, are gaining a stronger role in the shaping of exclusionary rules. Nonetheless, the Court declined to challenge precedent directly and affirmed that, until the SCC says otherwise, the rule remains that so much of an involuntary confession as becomes confirmed by derivative evidence may be admissible.

One could argue that insisting on corroboration as a prerequisite for admission may make matters too strict in the other direction. The Mr. Big technique is often used for those cases that have gone cold after other investigative practices have failed to turn up leads. A Mr. Big confession is often garnered years after the crime itself, and this raises the possibility that there may not be any opportunity for corroborative evidence to be found, especially when forensically valuable evidence may be subject to destruction by the suspect or degradation over time (e.g., a cell sample that could yield a DNA match). I have two responses to this. Firstly, the cases mentioned above prove that corroborative evidence often already leads to the authorities' prime suspect (in which case the confession is simply icing on the cake). Secondly, corroborative evidence can sometimes be found afterwards as evidence derivative of the confession.


127 (2000), 50 OR (3d) 321, 36 CR (5th) 198 (CA).

128 Ibid.
Also, assume that a new rule develops that categorically excludes Mr. Big confessions from evidence. The principled approach contemplates that hearsay statements that would normally be excluded can be admitted into evidence if, on a case-by-case basis, they have sufficient threshold reliability. There may be circumstances where an individual Mr. Big confession has the requisite threshold reliability, even when corroboration is absent. Justice Menzies describes the conduct of a particular Mr. Big sting as follows:

To become a member the accused was told he had to have a meeting with the boss who would ask him questions about his past. However, the undercover operator emphasized that if the accused had something to tell the boss, there was a clear expectation that the accused tell the truth or he could not become a member of the organization. The accused was told he did not have to join the organization. The accused was always given the option of backing out of the organization without repercussions.129

There may indeed be Mr. Big stings where an uncorroborated confession is elicited with a minimum of effort, free of coercion or intimidation, and thus may be admitted under the principled approach on a case-by-case basis.

Another response is an invitation for the police and the legal system to engage in a little critical self-reflection and a cost-benefit analysis. The Mr. Big technique is undoubtedly a very expensive operation to undertake. The sting on Liana MacDonald cost $330,000 in staff time.130 Jason Dix spent two years incarcerated not ever having confessed, despite an ongoing Mr. Big sting.131 His case was finally thrown out when it was revealed that former Crown Prosecutor Arnold Piragoff had used a letter purported to be written by Dix’s friend that was actually forged by the RCMP in order to have bail denied. The final tally included not just what must surely have been considerable expenses for the operation itself, but also the $765,000 awarded to Dix when he successfully sued the RCMP and the Crown for malicious prosecution.132 The subject of my invitation for self-reflection and cost-

129 Bridges, supra note 26 at para 7.
130 Caldwell, supra note 113.
132 Ibid.
benefit analysis is whether the Mr. Big sting really represents a worthwhile demand on staff hours and public resources. The returns do not seem to justify it. Mr. Big confessions may sometimes be corroborated, yet given that the technique is often invoked after cases have gone cold, one wonders whether it is not time to either allocate public resources elsewhere or search for more fruitful avenues of pursuing cold cases (e.g., improvements in forensic science). A Mr. Big confession absent corroborative evidence is, for reasons that I have previously explained in detail, really a poor foundation, standing on its own, on which to base a criminal conviction. If Mr. Big stings continue to be used so often, this promises an enormous tally not just in terms of operational costs but also in compensation to those who will be wrongfully convicted.

VI. CONCLUSION

The goal of this article has been to explain why confessions produced by the Mr. Big investigatory technique should be subject to routine exclusion under the principled approach to hearsay evidence. This certainly demands a resolution of the outstanding question of whether admissions are subject to a reasonable necessity and reliability analysis. If that question is resolved in the affirmative, then motive to lie on the part of the accused and coercion are salient features of the technique and are thus relevant considerations to whether Mr. Big confessions lack threshold reliability and should be excluded from evidence. Unfortunately, even when courts are willing to entertain the possibility of subjecting Mr. Big statements as admissions to the principled approach, they relegate motive to lie and coercion to ultimate reliability with little to no explanation as to why they do not merit exclusion from evidence. To be fair, the applicable law is equivocal, especially on the outstanding question. If those authorities that may support exclusion are not quite enough, then the empirical evidence on false confessions and Mr. Big may be what is also needed to present a serious case for exclusion to the courts. Offers of leniency, offers of benefits, threats of harm, and quid pro quo offers have all been established to have causal links to false confessions and, in turn, to wrongful convictions. Given that the risks are germane to the technique itself, it is worth asking whether courts need to go beyond a “case-by-case” analysis of Mr. Big confessions and begin to develop general exclusionary rules against the practice. For the courts to continue to condone
the practice is to turn the presumption of innocence on its head, to accept a preference for a substantial risk of sending the innocent to jail for the sake of law-enforcement expediency. Lastly, if the police are convinced that they must use the practice, then my remaining suggestion is that it be modulated by an insistence on the availability of corroborative evidence as a prerequisite to admission.