S.C.C. File No.: 35049

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR NEWFOUNDLAND AND LABRADOR)

BETWEEN:

HER MAJESTY THE QUEEN

APPELLANT
(Respondent)

- and -

NELSON LLOYD HART

RESPONDENT
(Appellant)

- and -

MARIE HENEIN

AMICUS CURIAE

- and –

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(Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW OF ARGUMENT

1. This appeal is about how the law of evidence and criminal procedure should be applied to constrain the admissibility of evidence obtained as a result of a Mr. Big operation ("Mr. Big evidence" or "Mr. Big statements"). It is common ground that evidence generated through Mr. Big operations presents unique challenges and difficulties. Both courts and legal theorists have observed that there are obvious concerns about the reliability of Mr. Big statements.[1] Further, no matter how they are generated, confessions constitute "powerful evidence" before juries.[2] Yet, no settled and principled legal framework has been developed to address the dangers inherent in this type of evidence. The question for this Court is determining what principles from our jurisprudence can and should be applied to address the concerns associated with evidence elicited in these unique circumstances.

2. The British Columbia Civil Liberties Association (BCCLA) submits that this Court should look to the principles developed in the context of the hearsay analysis in crafting an appropriate framework to deal with evidence, and specifically statements, obtained through Mr. Big operations.[3]

3. The rules surrounding the admissibility of hearsay evidence are designed to ensure that only evidence that has a certain measure of reliability reaches the trier of fact. The BCCLA takes the position that the hearsay principles provide a helpful framework in which to assess Mr. Big evidence.

4. The BCCLA has a longstanding interest in the relationship between the criminal justice system and civil liberties. The Association recognizes that the protection of civil and human rights depends upon the existence of a legal system that ensures trial fairness and prevents miscarriages of justice. A fair trial necessarily includes the right to be tried and convicted on

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[1] See Timothy E. Moore, Peter Copeland and Regina A. Schuller, "Deceit, Betrayal and the Search for Truth: Legal and Psychological Perspectives on the Mr. Big Strategy" (2009), 55 Crim. L.Q. 348, at p. 359. [Amicus' BOA Tab 51] See also *R. v. N.R.R.*, 2013 ABQB 288 at paras. 415-424. [Appellant's BOA Tab 21]

[2] *R. v. Hart*, 2012 NLCA 61 at para. 260. [British Columbia Civil Liberties Association (BCCLA)'s BOA Tab 6]

[3] See David Milward, "Opposing Mr. Big in Principle" (2013), 46 UBC L. Rev. 81,which argues for the exclusion of Mr. Big confessions under the principled approach. [BCCLA's BOA Tab 16]

reliable evidence. The BCCLA says that to give effect to the principle of trial fairness, courts must be given the tools to address the frailties inherent in Mr. Big evidence.

PART II – POINTS IN ISSUE

5. The BCCLA's submission is focused on the first broad issue described by the Appellant: "the admissibility of statements made by a suspect in the context of the undercover operation".[4] The BCCLA will advance three points in respect of this issue:

A. Admissions of a party stand on a different footing than other exceptions to the hearsay rule.

B. The theory of the adversary system does not justify automatically introducing admissions of a party elicited through Mr. Big operations. Placing reliance on the proposition that the accused is available to testify shifts the balance of the evidentiary burden and given the overwhelming and unreliable nature of the evidence, risks an unfair trial.

C. For reasons of trial fairness, Mr. Big evidence must be subject to a threshold test of admissibility.

PART III – ARGUMENT

A. Admissions of a party stand on a different footing

6. The rule against hearsay has been a fundamental part of our law for over 300 years.[5] Wigmore described it as "...that most characteristic rule of the Anglo-American law of evidence

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[4] Appellant's factum at para. 1.

[5] Alan W. Bryant, Sidney N. Lederman and Michelle K. Fuerst. *The Law of Evidence in Canada*, 3rd ed. Markham, Ont.: LexisNexis, 2009 at para. 6.6 [BCCLA's BOA Tab 15]. See also John H. Wigmore, "The History of the Hearsay Rule" (1904) 17 Harv. L. Rev. 437 at p. 458. [BCCLA's BOA Tab 17]

– a rule which may be esteemed, next to jury-trial, the greatest contribution of that eminently practical legal system to the world's jurisprudence of procedure."[6]

7. Hearsay is defined as an out-of-court statement by a person not called as a witness to testify in the proceedings when it is tendered to make proof of the truth of its contents.[7] The concern with hearsay evidence has, and continues to be, the inability to test the reliability of the declarant's assertion through cross-examination.[8]

8. Out-of-court statements made by a party to the proceedings and tendered by the opposite party for their truth have traditionally been considered admissible as an exception to the hearsay rule.[9] The justification for this exception to the hearsay rule is not, like the other exceptions, grounded in a concern over an inability to assess the evidence's reliability. Sopinka J. explained the purpose for the rule in *R. v. Evans* (emphasis added)[10]:

> 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" (Morgan, "Basic Problems of Evidence" (1963), pp. 265-66, quoted in McCormick on Evidence, supra, at p. 140). The rule is the same for both criminal and civil cases subject to the special rules governing confessions which apply in criminal cases.

9. A number of courts have applied the party exception to automatically admit statements generated through Mr. Big operations on the basis of the adversary system. In *R. v. Osmar,*

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[6] Wigmore, *supra*, at p. 458. [BCCLA's BOA Tab 17]
[7] *R. v. Baldree*, 2013 SCC 35 at para. 1. [BCCLA's BOA Tab 2]
[8] See Alan W. Bryant et al., *supra,* at para. 6.4 [BCCLA's BOA Tab 15] and *R. v. Baldree, supra,* at para. 31. [BCCLA's BOA Tab 2]
[9] Alan W. Bryant et al., *supra*, at para. 6.396. [BCCLA's BOA Tab 15]
[10] *R. v. Evans*, [1993] 3 S.C.R. 653 at p. 664. [Respondent's BOA Tab 9] See also *R. v. Khelawon*, 2006 SCC 57 at para. 65. [BCCLA's BOA Tab 7] See also Bruce P. Archibald, "The Canadian Hearsay Revolution: Is Half a Loaf Better Than No Loaf at All?" (1999), 25 Queen's L.J. 1 at para. 15. [BCCLA's BOA Tab 14]

Rosenberg J.A. relied on the theory of the adversary system in rejecting the appellant's argument that Mr. Osmar's statements to undercover police officers should be subject to a necessity-reliability analysis.[11] In *R. v. McMillan,* McEwan J. refused to apply the analysis set out in *R. v. Starr*[12] to an accused's statements to undercover officers because of the different rationale for treating admissions by a party.[13] In *R. v. Terrico,* Huddart J. (for the majority) held that nothing had changed the Supreme Court of Canada's comments in *R. v. Evans, supra,* that a statement made by an accused who was not a person in authority was admissible as an admission against interest.[14]

10. Admissions of a party are generally admitted because, at least since the 19th century and the abolition of the bar on defendants testifying on their own behalf, the adversary system operates such that it is open to the party to testify. Given that the party has the option of stepping into the witness box, the argument runs along the lines that a party cannot complain that the statement is unreliable. This is an over-simplified rationale when applied to Mr. Big statements.

B. The adversary system does not justify automatically admitting admissions of a party

11. The BCCLA submits that the theory of the adversary system as justification for the automatic admission of Mr. Big statements cannot withstand scrutiny. Where the state has devoted all of its resources to obtaining a confession, it is artificial to say that concerns about the reliability of the evidence are neutralized because the accused can attempt to meet the circumstances in the witness stand.

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[11] *R. v. Osmar*, 2007 ONCA at paras. 52-53. [Appellant's BOA Tab 7]
[12] *R. v. Starr*, [2000] 2 S.C.R. 144. [BCCLA's BOA Tab 9]
[13] *R. v. MacMillan*, [2003] B.C.J. No. 3156 (S.C.) at para. 32. [BCCLA's BOA Tab 8]
[14] *R. v. Terrico*, 2005 BCCA 361 at para. 45. [BCCLA's BOA Tab 10] See also *R. v. Foreman*, [2002] 62 O.R. (3d) 204 at para. 37 [Respondent's BOA Tab 10]; *R. v. Vuozzo,* [2010] A.J. No. 1405 (ABQB) at paras. 49-53 [BCCLA's BOA Tab 11]; and *R. v. Bonisteel,* [2008] B.C.J. No. 1705 (B.C.C.A.) at paras. 81-85. [Appellant's BOA Tab 17]

12. Relying on the accused to refute Mr. Big evidence through testimony in chief or cross-examination raises an important constitutional issue. As Madam Justice Newbury said in *R. v. Terrico, supra,* a case where the admissibility of Mr. Big evidence was challenged, " [...] in this context: can it truly be said he or she [the accused] is 'available for cross-examination'?"[15]

13. The effect of grounding the admissibility of Mr. Big evidence on the ability of the accused to testify is to force the accused to choose between entering the witness box or risking a conviction based on an unreliable statement. This ultimately shifts the balance of the evidentiary burden and risks an unfair trial.

14. Even if the accused 'chose' to take the witness stand, the inherently overpowering nature of Mr. Big evidence presents a unique challenge to the accused person that is unlike any other circumstance that arises in criminal proceedings.

15. The case law and commentary demonstrate that little expense is spared in the planning and preparation of Mr. Big scenarios.[16] The scenarios usually include several phases, such as: introduction, credibility-building, and evidence-gathering.[17] This process can take months to complete because every detail is thought out methodically.

16. In addition to the fact that the accused person in a Mr. Big operation is confronted with the state's significant resources, the nature of the evidence that is generated through these scenarios presents a unique challenge. The accused is faced with a confession from his or her own mouth that is cluttered with bad character and propensity evidence. By necessity, the accused must promote that he or she is a person of bad character who is inclined to do bad things. This situation simply does not arise in other circumstances.

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[15] *R. v. Terrico, supra,* at para. 21. [BCCLA's BOA Tab 10]
[16] Moore et al. (2009), *supra,* at p. 360 footnote 45. The authors note that the cost of the four-month Mr. Big operation in Mr. Hart's case was reported to be $413,000. [Amicus' BOA Tab 51]
[17] *Ibid.* at pp. 351-353. [Amicus' BOA Tab 51]

17. For example, the situation does not arise where an accused person is faced with a strong Crown case. While the evidence in a Crown's case may be significant, and the accused will be required to testify in an effort to raise a reasonable doubt, the difference is that the accused does not have to respond to a potentially unreliable and very damaging confession that is intertwined with other prejudicial evidence. The fact that our system generally precludes the admission of evidence in relation to "bad character", and has developed strict requirements for jury instructions as to the use of such evidence, is instructive.[18]

18. The distinction between these circumstances relates to how the evidence is generated. Evidence that is state-created, through a Mr. Big operation, rather than state-gathered, through usual police investigative techniques, presents a far different and more challenging case for the accused to meet as a witness. Faced with incriminating video and audio taped statements that are necessarily accompanied by bad character and propensity evidence, there will be very little that an accused can do to convincingly explain away all of the damaging evidence.

19. When the state has orchestrated the construction of the evidence from beginning to end, and there is a real risk to the reliability of the evidence, it would be unfair to simply rely on the accused's ability to explain the circumstances in the witness box as an answer. As Iacobucci J. said in *Starr,* "[i]t 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."[19]

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[18] *R. v. B. (F.F.),* [1993] 1 S.C.R. 697 [BCCLA's BOA Tab 1] per Iacobucci, J., on the requirements for a special charge in similar fact evidence cases: "... the trial judge's instruction to the jury is necessary to counteract three possible effects of the evidence on the jury: that the jury might convict based on propensity, that the jury might convict to punish for past acts, and that the jury might become confused and substitute a verdict with respect to the past acts for a verdict on the charges in issue

[19] *R. v. Starr*, *supra*, at para. 200. [BCCLA's BOA Tab 9] This passage was quoted in *R. v. Khelawon*, *supra*, at para. 47. [BCCLA's BOA Tab 7]

C. Mr. Big statements must be subject to a threshold admissibility standard

20. Determining how to treat incriminating statements generated by the state in a coercive environment requires careful consideration. The fact that statements made to persons in authority must be shown to be voluntary, beyond a reasonable doubt, is a testament to the fact that incriminating statements elicited by the state are viewed with skepticism. The same can be said about statements made by persons who are detained. Indeed, a suspect's right to silence will be violated where undercover agents are used to *actively elicit* information after the suspect has indicated that he does not wish to speak to police.[20]

21. While the whole point of a Mr. Big operation is that the suspect remains unaware that he or she is speaking to a person in authority and the suspect is not detained in the classical sense, the determinative factor is that the suspect *is* in the hands of the state that *can* carry out its calculations to actively elicit a confession. Mr. Big evidence demands different treatment because the state has played an active, and often coercive, role in extracting the incriminating evidence.

22. It is also significant that Mr. Big operations are only initiated when the state deems the existing evidence insufficient to ground a conviction. In some cases, like Mr. Hart's, the existing evidence may even be insufficient to prove that any criminal activity occurred. If Mr. Big evidence is obtained, it will undoubtedly assume an important character if admitted in criminal proceedings simply because of the absence of other evidence.

23. The BCCLA submits that it would be unsafe to admit Mr. Big statements without first establishing that the statements are necessary and have a certain level of threshold reliability. In most cases the necessity requirement will be made out because the accused is not a compellable witness and the statements given to the undercover police officers are likely to be the only other source of the evidence.

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[20] *R. v. Hebert*, [1990] 2 S.C.R. 151 at para. 76. [Appellant's BOA Tab 1]

24. Establishing threshold reliability is especially important in this context, however, because of the uniquely oppressive environment in which Mr. Big evidence is elicited. All Mr. Big operations are built upon a foundation of falsehood. The whole object of the exercise is to deceive. The technique is overlaid with both explicit and implicit threats and promises. These circumstances, that are entirely state-created, do not engender reliable statements. Just the opposite: Mr. Big operations are breeding grounds for false confessions or for the *risk* of false confessions.

25. The coercive environment in which Mr. Big statements are produced combined with the empirical evidence that shows that juries will rely on confessions to render guilty verdicts even when they are made aware of concerns about the making of the statement, make it necessary for courts to act as gatekeepers.[21] Trial judges must ensure that Mr. Big evidence has a certain degree of reliability before it is introduced.

26. The principles developed in the hearsay context, that are concerned with ensuring that admissible evidence has some measure of reliability, provide guidance in dealing with this unique kind of evidence. Indeed, some courts have applied the principled approach before they have allowed Mr. Big evidence to be introduced at trial.[22]

27. In determining whether a Mr. Big statement meets the requisite level of reliability to justify admission, trial judges must have the ability to consider a broad range of factors. In *Khelawon,* this Court said:

> Relevant factors should not be categorized in terms of threshold and ultimate reliability. Rather, the court should adopt a more functional approach as discussed above and focus on the particular dangers raised by the hearsay evidence sought to be introduced and on

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[21] See Milward, *supra*, at paras. 27-32. [BCCLA's BOA Tab 16] See also Moore et al. (2009), *supra*, at p. 385. [Amicus' BOA Tab 51]

[22] In *R. v. Wytyshyn,* [2002] A.J. No. 1389 (C.A.) [BCCLA's BOA Tab 13] and *R. v. Bridges,* [2005] M.J. No. 232 [BCCLA's BOA Tab 4] the Courts applied the principled approach and admitted the statements. See also *R. v. Bridges,* 2005 MBQB 118 [BCCLA's BOA Tab 3], where the Court held that the accused could challenge the admissibility of a Mr. Big statement pursuant to the principled approach. In *R. v. Ferber,* [2000] A.J. No. 1405 (ABPC) [BCCLA's BOA Tab 5], the Court applied the principled approach and excluded the Mr. Big evidence.

those attributes or circumstances relied upon by the proponent to overcome those dangers.[23]

28. While ultimate reliability remains for the trier of fact, courts assessing the threshold reliability of Mr. Big statements could consider factors such as:

a) The absence of a reason and/or motive to lie or fabricate the statement;
b) The demeanour of the declarant (accused) at the time of the making of the statement;
c) The spontaneity of the statement;
d) The detail given in the statement;
e) The presence/absence of threats, promises, inducements, and coercion;
f) The presence/absence of corroborating evidence or conflicting evidence;
g) The degree to which the confession matches the known facts of the case; and
h) The presence/absence of holdback evidence.[24]

29. Where the state has played an active role in eliciting a confession and any confession obtained will form a significant part of the evidence at trial, it is incumbent on the state to take some steps to ensure that the evidence has a measure of threshold reliability. The state can do so by 'holding back' some evidence from public consumption to ensure that there is sufficient corroborating evidence. If the suspect reveals the holdback evidence during the Mr. Big operation, this will be a strong indicator of threshold reliability.

30. Imposing a requirement that police hold back some evidence in the context of Mr. Big operations is justified. Such an obligation is not onerous and is often implemented in these types of scenarios.[25] Fairness requires that the police conduct their investigations in a manner that does not run the later risk of a vacuum of reliable corroborative evidence. If the state is to be permitted to engage in these oppressive investigations, at the very least, they must be required to make some efforts to safeguard threshold reliability.

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[23] *R .v. Khelawon, supra,* at para. 93. [BCCLA's BOA Tab 7]
[24] Holdback evidence is defined as evidence concerning a crime that has not been published, and which could only be known to the perpetrator.
[25] See, for example, *R. v. West,* 2013 BCSC 132 at para. 41. [BCCLA's BOA Tab 12]

31. The Mr. Big technique necessitates the development of a principled approach for dealing with evidence generated through these scenarios. The fact that Mr. Big evidence is state-created

32. distinguishes it from other types of evidence and helps to explain why it presents unique challenges for accused persons. The BCCLA submits that this Court should look to the principles applied in the context of hearsay evidence to develop an appropriate framework for treating Mr. Big evidence. Trial fairness requires police to make some efforts to ensure threshold reliability. In the unique circumstances of a Mr. Big operation, the absence of holdback evidence should be fatal to the admissibility of the evidence. Regardless of what approach is adopted, the BCCLA submits that Mr. Big evidence must be subject to an appropriate form of judicial control given the concerns surrounding its reliability.

PART IV – SUBMISSIONS REGARDING COSTS

33. The BCCLA does not seek costs, and asks that no award of costs be made against it.

PART V – ORDER SOUGHT

34. The BCCLA respectfully submits that the appeal should be determined in accordance with the submissions made in this factum.

35. The BCCLA seeks leave to make oral argument for up to 10 minutes at the hearing of the appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 7th day of October, 2013.

E. David Crossin, Q.C. **Elizabeth France**

PART VI – TABLE OF AUTHORITIES

Case Law	
	PARAS. CITED
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