R. v. *Mills* in the Age of #MeToo

Developments in the Law of Privacy and Disclosure in Sexual Assault Cases

Presented by Mary Marshall and Teresa Meadows

This analysis is a conversation starter

- The focus of the following analysis of cases, judgments, and media accounts of past and ongoing cases is on how a complainant's rights to privacy and equality may be affirmed/sacrificed in the unique context of sexual assault laws
- The analysis is not offered, nor intended to provide an opinion on the specific outcome of any individual case (either already decided or ongoing)
- These are difficult cases and difficult discussions, and there are no easy solutions
- This discussion is intended to be provocative and get discussions going.

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Session Overview

- **A little background:**
  - The context giving rise to the current rules of third party records disclosure (applicable to sexual assault cases) as upheld in 1999 in the decision *R. v. Mills,* [1999] *3 S.C.R. 668*
  - The #MeToo Movement
- **Key Themes:**
  - Disclosure, privacy, and equality rights in the broader context of sexual assault law
    - How sexist myths and stereotypes manifest/affect disclosure cases and pose a threat to equality rights
  - How is the era of social media affecting this context
  - Envisioning privacy, disclosure, and equality rights in a post-#MeToo society
    - We wonder: Is it time for an update to the protections/analysis upheld in *R.* v. *Mills* to reflect the influence of social media?

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Privacy, equality, and records disclosure remain uniquely central issues in trials associated with sexual offences

- An analysis of third party records disclosure cases in 1997 concluded:

  > In theory, personal records can be sought in any criminal case. In reality, the records have been sought mainly in sexual violence cases; they are rarely of interest to criminal defence lawyers in other cases.
  >
  > Karen Busby, "*Discriminatory Uses of Personal Records in Sexual Violence Cases*" (1997) 9 CJWL 148 at p. 151.

- Analysis of cases applying Bill C-46 after *R. v. Mills* have noted the same trend:

  > Lise Gotell, "*Tracking Decisions on Access to Sexual Assault Complainants' Confidential Records: The Continued Permeability of Subsections 278.1–278.9 of the Criminal Code*" (2008) 20:1 CJWL 111.

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The Context: *R. v. O'Connor* and *R. v. Mills*

[1995] 4 R.C.S. R. c. 668

Hubert Patrick O'Connor *Appellant*

v.

Her Majesty The Queen *Respondent*

and

The Attorney General of Canada, the Attorney General for Ontario, the Aboriginal Women's Council, the Canadian Association of Sexual Assault Centres, the DisAbled Women's Network of Canada, the Women's Legal Education and Action Fund, the Canadian Mental Health Association and the Canadian Foundation for Children, Youth and the Law *Interveners*

INDEXED AS: R. *v.* O'CONNOR

File No.: 24114.

1995: February 1; 1995: December 14.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Criminal law — Evidence — Disclosure — Accused charged with sexual offences — Defence counsel obtaining pre-trial order requiring Crown to disclose complainants' entire medical, counselling and school records — Trial judge ordering stay of proceedings owing to non-disclosure and late disclosure by Crown — Court of Appeal allowing Crown's appeal and ordering new trial — Whether stay of proceedings appropriate remedy for non-disclosure by Crown of information in its possession.

Criminal law — Evidence — Medical and counselling records — Procedure to be followed where accused seeks production of records in hands of third parties.

R. v. MILLS [1999] 3 S.C.R.

L.C. (The Complainant) and the Attorney General for Alberta *Appellants*

v.

Brian Joseph Mills *Respondent*

and

The Attorney General of Canada, the Attorney General for Ontario, the Attorney General of Quebec, the Attorney General of Nova Scotia, the Attorney General of Manitoba, the Attorney General of British Columbia, the Attorney General of Prince Edward Island, the Attorney General for Saskatchewan, the Canadian Mental Health Association, the Canadian Psychiatric Association, the Child and Adolescent Services Association, the Criminal Lawyers' Association (Ontario), the Association québécoise des avocats et avocates de la défense, the Women's Legal Education and Action Fund, the Canadian Civil Liberties Association, the Canadian Council of Criminal Defence Lawyers, the Alberta Association of Sexual Assault Centres and the Sexual Assault Centre of Edmonton *Interveners*

INDEXED AS: R. *v.* MILLS

File No.: 26358.

1999: January 19; 1999: November 25.

Present: Lamer C.J. and L'Heureux-Dubé, Gonthier, Cory,* McLachlin, Iacobucci, Major, Bastarache and Binnie JJ.

ON APPEAL FROM THE ALBERTA COURT OF QUEEN'S BENCH

Constitutional law — Charter of Rights — Fundamental justice — Right to fair trial — Right to make full answer and defence — Right to privacy — Right to

*Cory J. took no part in the judgment.

L.C. (la plaignante) et le procureur général de l'Alberta *Appelants*

c.

Brian Joseph Mills *Intimé*

et

Le procureur général du Canada, le procureur général de l'Ontario, le procureur général du Québec, le procureur général de la Nouvelle-Écosse, le procureur général du Manitoba, le procureur général de la Colombie-Britannique, le procureur général de l'Île-du-Prince-Édouard, le procureur général de la Saskatchewan, l'Association canadienne pour la santé mentale, l'Association des psychiatres du Canada, la Child and Adolescent Services Association, la Criminal Lawyers' Association (Ontario), l'Association québécoise des avocats et avocates de la défense, le Fonds d'action et d'éducation juridiques pour les femmes, l'Association canadienne des libertés civiles, le Conseil canadien des avocats de la défense, l'Alberta Association of Sexual Assault Centres et le Sexual Assault Centre of Edmonton *Intervenants*

RÉPERTORIÉ: R. *c.* MILLS

N° du greffe: 26358.

1999: 19 janvier; 1999: 25 novembre.

Présents: Le juge en chef Lamer et les juges L'Heureux-Dubé, Gonthier, Cory*, McLachlin, Iacobucci, Major, Bastarache et Binnie.

EN APPEL DE LA COUR DU BANC DE LA REINE DE L'ALBERTA

Droit constitutionnel — Charte des droits — Justice fondamentale — Droit à un procès équitable — Droit à une défense pleine et entière — Droit à la vie privée —

*Le juge Cory n'a pas pris part au jugement.

1999 CanLII 637 (SCC)

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Chronology – *R. v. O'Connor*

1991: Bishop O'Connor was charged with rape and indecent assault of four indigenous women at a residential school in Williams Lake, BC during the time that he was a priest. During the pre-trial process, the judge ordered the disclosure of all records of therapists, counselors, psychologists, and psychiatrists who had treated the complainants in relation to sexual assault or sexual abuse.

1992: Proceedings were stayed in part because the trial judge did not have confidence that full disclosure had been made by the Crown. The Crown appealed.

1994: Court of Appeal ruled that the evidence sought by Bishop O'Connor was not relevant either to an issue in the proceeding or to the competency of the complainants to give evidence. The Court of Appeal rejected the pre-trial order that the complainants should provide defence counsel with all records concerning sexual assault kept by counselors, therapists, psychologists, and psychiatrists. The Court of Appeal held that in some instances this information may be admitted, however, the Court set out a strict two-stage procedure for determining when records held by third parties about a complainant can be disclosed and established guidelines for the application process. Bishop O'Connor appealed to the Supreme Court of Canada.

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Chronology – *R. v. O'Connor* and Parliament's Response to Privacy and Disclosure in Bill C-46

1995: The Supreme Court of Canada dismisses Bishop O'Connor's appeal. The SCC affirms the two-step process for determining the admissibility of complainants' therapeutic records, declaring that the trial judge must balance the substantive privacy interests of complainants and third parties with the accused's right to a fair trial.

1996: Bishop O'Connor convicted of committing rape and indecent assault on two young aboriginal women during the 1960s when he was a priest. He was sentenced to 2 1/2 years in prison by Mr. Justice Wally Oppal. After serving six months, he was released on $1,000 bail.

1997: The Federal Government amends the *Criminal Code* under Bill C-46 to set out a more rigorous procedure for disclosure of personal records, including medical and therapeutic records, in all sexual offence cases.

The amendments required the court to take into account a women's right to privacy and equality before the law.

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Bill C-46 addresses some key myths and stereotypes affecting the application of the SCC's test in *R. v. O'Connor*

In particular, s. 278.3(4) of the *Criminal Code* (Bill C-46) was implemented in part to prevent unsubstantiated myths and stereotypes from forming the entire basis of an order for the production of private records.

Section 278.3(4) states that:

Any one or more of the following assertions by the accused are not sufficient on their own to establish that the record is likely relevant to an issue at trial or to the competence of a witness to testify:

(h) that the record relates to the sexual activity of the complainant with any person, including the accused

(j) that the record relates to the complainant's sexual reputation

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Chronology -- *R. v. Mills* at Trial

October 4, 1996

Trial commences on one count of sexual assault and one count of unlawful sexual touching (offences are alleged to have occurred in 1995 when the complainant was 13). Trial is delayed to allow the defence to address second statement in the case.

January 28, 1997

Defence gets an order for production under the *O'Connor* test for therapeutic records and counsellor's notes about the complainant.

May 12, 1997

Bill C-46 was proclaimed into force and amended the *Criminal Code* to include ss. 278.1 to 278.91.

May 14, 1997

Defence seeks additional production of therapeutic records relating to the complainant held by a psychiatrist

May 26, 1997

Defence challenges Bill C-46, arguing that the amendments violate the accused's rights to full answer and defence afforded by ss. 7 and 11(d) of the Charter.

September and October 1997

The Trial Judge agrees that the amendments violated ss. 7 and 11(d) of the Charter and that the amendments cannot be saved by s. 1 of the Charter and strikes down Bill C-46 in its entirety

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Myths and Stereotypes—why disclosure and privacy issues are so central in the context of this category of offences

In November 1999, the SCC releases *R. v Mills*, and the majority, in upholding the law stated that an:

> [90] …appreciation of myths and stereotypes in the context of sexual violence is essential to delineate properly the boundaries of full answer and defence." (And also the complainant's right to privacy and equality)

Noting:

> [90] ….the right to make full answer and defence does not include the right to information that would only distort the truth-seeking goal of the trial process.

The SCC also recognized that disclosure should not be permitted based on unsubstantiated

> "…speculative myths, stereotypes and generalized assumptions about sexual assault victims and classes of records"

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The #MeToo Movement: A Quick Timeline

Timeline	Action	Parties Involved
2006	The term MeToo is first used as a phrase that could be used to show solidarity amongst women that had been sexually assaulted.	Tarana Burke (sexual assault survivor)
October 2017	Sexual harassment /assault allegations leveled against Harvey Weinstein	Rose McGowan and Ashley Judd
October 2017	Tweets: "If you've been sexually harassed or assaulted write 'me too' as a reply to this tweet."	Alyssa Milano
October 2017 to date	Allegations of sexual harassment and assault are posted on social media platforms under #MeToo against a number of high-profile men	Kevin Spacey, Louis CK, Charlie Rose, Matt Lauer, Senator Al Franken, James Franco, and the list goes on…
December 2017	Time Magazine names the #MeToo Movement as the "Person" of the Year for 2017	Ashley Judd, Susan Fowler, Adama Iwu, Taylor Swift, and Isabel Pascual (a pseudonym) on the cover

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In the era of social media consent and credibility myths and stereotypes persist

Jian Ghomeshi acquitted on basis of 'inconsistencies' and 'deception'
Judge says verdict doesn't mean "these events never happened," only that court doesn't have sufficient faith "in the reliability or sincerity of these complainants."

NEWS & CULTURE

Harvey Weinstein Is Using an Email From Ben Affleck to Dispute Rose McGowan's Accusations

≡ GLAMOUR

NEWS & CULTURE

Harvey Weinstein May Have Tried to Use Rose McGowan's Sexual History Against Her

BY ABBY GARDNER
OCTOBER 26, 2017 2:20 PM

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R. v. Barton, 2017 ABCA 216 – If Equality and Privacy Rights are not asserted, are they waived?

[111] The defence contended that the Crown's failure to object to Gladue's sexual history evidence or request a hearing indicates that the Crown and trial judge regarded the evidence as admissible. We reject this argument. The procedures and considerations under s. 276 are mandatory and place obligations on the Crown, the defence and the trial judge. The vital interests served by s. 276 in protecting the equality and privacy rights of complainants are not within the gift of counsel or the Court. They are not to be sacrificed or waived by any of the participants in the trial.

[underlining added for emphasis]

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Myths and Stereotypes in the Era of Social Media

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Another Aspect of Credibility: Social Media and Disclosure in *R.* v. *Ghomeshi*, 2016 ONCJ 155

[43] The expectation of how a victim of abuse will, or should, be expected to behave must not be assessed on the basis of stereotypical models. Having said that, I have no hesitation in saying that the behaviour of this complainant is, at the very least, odd. The factual inconsistencies in her evidence cause me to approach her evidence with great skepticism.

[44] L.R.'s evidence in-chief seemed rational and balanced. Under cross-examination, the value of her evidence suffered irreparable damage. Defence counsel's questioning revealed inconsistencies, and incongruous and deceptive conduct. L.R. has been exposed as a witness willing to withhold relevant information from the police, from the Crown and from the Court. It is clear that she deliberately breached her oath to tell the truth. Her value as a reliable witness is diminished accordingly.

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Does posting to #MeToo or otherwise engaging in advocacy damage credibility/waive privacy?

It very well might…see the discussion in *R.* v. *Ghomeshi,* 2016 ONCJ 155:

[88] In trying to reconcile the apparent disconnect between Ms. DeCoutere's evidence and some of the established facts, another perhaps more subtle but related concern needs to be identified. It may be entirely natural for a victim of abuse to become involved in an advocacy group. However, the manner in which Ms. DeCoutere embraced and cultivated her role as an advocate for the cause of victims of sexual violence may explain some of her questionable conduct as a witness in these proceedings.

[90] Ms. DeCoutere engaged the services of a publicist for her involvement in this case. She gave 19 media interviews and received massive attention for her role in this case. Hashtag "ibelievelucy" became very popular on Twitter and she was very excited when the actor Mia Farrow tweeted support and joined what Ms. DeCoutere referred to as the "team". In an interview with CTV news, Ms. DeCoutere even analogized her role in this whole matter to David Beckham's role as a spokesperson with Armani.

[91] I have to consider whether as a member of this "team", Ms. DeCoutere felt that she had invested so much in being a "heroine" for the cause that this may have been additional motivation to suppress any information that, in her mind, might be interpreted negatively. I do not have sufficient evidence to conclude that this was in fact a reason for suppressing evidence, but in light of the amount of compromising information that she wilfully attempted to suppress, it cannot be ignored as a live question.

[underlining added]

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And so? Is an update required to the Criminal Code provisions upheld in *R.* v. *Mills* to better reflect a post-#MeToo context?

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Questions????

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