

Defence under attack: A review of three important Supreme Court decisions in 1999

Three important Supreme Court of Canada decisions in the 1999 year display a disturbing trend and signal a change in the court's approach to finding a balance between the rights of the accused and the interests of society in criminal trials. The cases of *Mills*,¹ *Stone*,² and *Smith v. Jones*³ introduced some significant changes in the criminal law, which all came at the expense of the accused. In *Mills*, the Supreme Court retreated substantially from its earlier statement of the constitutional parameters of the accused's right to make full answer and defence. In *Stone*, the court put a significant dent in the presumption of innocence, and in *Smith v. Jones*, the accused was left in a vulnerable and uncertain position after the court removed some of the protections afforded by the law of privilege.

The implications of these judgments are disturbing for those who believe that the measure of a just society is its treatment of those who are accused of the worst crimes. At a time when the voice of victim rights advocates is loud and shrill, and political pandering to fears for public safety is widespread, the court must be resolute in protecting the rights of the unpopular accused. Unfortunately, these cases demonstrate a weak response to the public outcry demanding protection against crime. A review of the cases indicates several features of the apparent shift in the court's approach to the rights of the accused. This article attempts a brief analysis of the shifting focus, and its implications.

OVERVIEW OF THE CASES

R. v. Mills

In *Mills*, the court revisited the topic of the constitutional parameters of the ac-

BY LESLIE PRINGLE

Leslie Pringle is an attorney
with Skurka and Pringle

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cused's right to make full answer and defence when seeking access to third-party records. In the 1995 case of *R. v. O'Connor*,⁴ the majority of the court struck a constitutional balance between the accused's need to gain access to records in the hands of a third party in order to defend himself, and the need to respect the privacy rights of the complainant in a sexual assault case. Parliament clearly shifted the *O'Connor* balance in favour of the complainant when it enacted Bill C-46 (ss. 278.1 to 278.91 of the *Criminal Code*) in 1997. The preamble to the Bill devoted several paragraphs to Parliament's concern about

the incidence of sexual violence in Canadian society, the disadvantageous impact of sexual abuse on women and children, and the need to encourage reporting of sexual offences. The rights of the accused to make full answer and defence were barely mentioned. The legislation also gave greater control to the witness over records in the hands of the Crown,⁵ enacted a list of factors that would *not* establish that the records were likely relevant in making full answer and defence,⁶ and placed emphasis on factors relating to privacy and societal interests that were not in accordance with the majority ruling in *O'Connor*.⁷ In light of the obvious differences struck in the balance between accused persons and complainants by the majority in *O'Connor* and Bill C-46, the question was, who was right—the court or Parliament?

The surprising answer from the court in *Mills* was that they were both right. According to the court, Bill C-46 could still strike a balance that was constitutional despite its marked differences from *O'Connor*. This finding required that the court give Parliament some remarkable leeway to disagree with the Supreme Court of the land on a constitutional issue. In an unprecedented display of deference, the court conceded that Parliament was entitled to differ in its opinion as to where privacy concerns entered into the analysis, and even that Parliament was entitled to give the Crown an advantage over the accused in possessing records that the accused did not have. The court allowed that some difference in approach was permissible. Essentially, the court held that there was a range of permissible

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options available to deal with access by an accused to third-party records. The fact that Bill C-46 was at the lowest end of the acceptable range did not render it unconstitutional.⁸ Second best could still be constitutional.

R. v. Stone

Stone was a case involving the complex defence of automatism. The accused claimed that he suffered a psychological blow that left him in a dissociative state after his wife berated him in a cruel and sadistic way about his children, his former wife, and his sexual performance. He then stabbed his wife 47 times. At his trial for murder, the accused relied on the defence of “non-insane automatism,” and called medical evidence that supported the fact that he was in a dissociative state. Accordingly, he sought an acquittal because his actions were not voluntary. In the alternative, he suggested that if the court insisted that his condition was a disease of the mind, the medical evidence entitled him to a finding of not guilty by reason of mental disorder (NCRMD). The judge refused to put non-insane automatism to the jury, but did leave open the defence of insane automatism. The accused was convicted of manslaughter.

In *Stone*, the court⁹ reviewed its own jurisprudence on non-insane and insane automatism, and changed the law in three important ways. In the first instance, the majority imposed a legal burden on the defence to establish automatism on the balance of probabilities, in the absence of which the defence would not be left with the jury at all. Although recognizing that this shift in the burden to the accused violated section 11(d) of the Charter, the majority found that such a limitation was justified under s. 1.¹⁰ In the second instance, the majority formulated a rule that judges must “start from the proposition” that automatism stems from a disease of the mind. The direction is akin to a presumption that automatism is linked to

insanity. The effect is of course important: the court must start from a proposition that leads to a verdict of NCRMD, and not from one that may lead to an acquittal. Finally, if the defence of non-insane automatism is left with the jury, the jury must be told about the “serious policy factors which surround automatism, including concerns about feignability and the repute of the administration of justice.” The jury will be instructed that the accused will be found guilty unless he proves that he was acting involuntarily on the balance of probabilities.

Although the court upheld an acquittal based on non-insane, involuntary conduct in a sleep-walking case in 1992,¹¹ it seems that the chances of a similar success after *Stone* are exceedingly slim. The defence of non-insane automatism appears to be dead.¹²

Smith v. Jones

In *Smith*, the court was faced with achieving a balance between the need for public protection, and the rights of the individual accused. The facts were unusual and gave the court justifiable cause for alarm. The accused was charged with aggravated sexual assault of a prostitute, and was referred to a psychiatrist by his lawyer, under the umbrella of solicitor-client privilege. The accused provided the psychiatrist with detailed information about his plans to kidnap, rape, and murder prostitutes in the future. The psychiatrist concluded that the accused was dangerous and would likely commit further offences, and advised the lawyer of his concerns. The accused subsequently pled guilty to the charge. When the psychiatrist was advised that the sentencing judge would not be informed of his concerns with regard to the danger posed by the accused, he brought an application for a declaration that he was entitled to disclose the information he had received in the interests of public safety.

The court was unanimous in finding that the risk to public safety in this case

was sufficiently clear, serious, and imminent to justify setting aside the solicitor-client privilege. However, the court split on the level of disclosure that was required.¹³ The majority held that the portion of the psychiatrist’s report that indicated there was a serious risk to public safety should be disclosed to the sentencing court and made public.¹⁴ In future cases, they noted that it might be appropriate to warn the potential victim directly, or the police or a Crown prosecutor. The minority took more care to circumscribe the scope of the disclosure and its proposed use. They held that, although the psychiatrist’s opinion could be disclosed to the Crown and the sentencing judge, the details forming the basis of the opinion, including the accused’s own statements, should not be disclosed. Such a limitation was necessary in order to protect the accused’s right against self-incrimination, and to ensure that the chilling effect of disclosure would not make lawyers reticent to refer their mentally disturbed clients for assessment or treatment. The minority was also careful to indicate that disclosure of the opinion did not necessarily mean that it was admissible. Justice Major noted that sanctioning a breach of privilege too hastily erodes the workings of the system of law in exchange for an illusory gain in public safety.

THE COURT’S INCREASED EMPHASIS ON SOCIETAL INTERESTS

In the early years of the *Constitution Act, 1982*, this “living tree” was said to be capable of growth and expansion. The Supreme Court described the Charter as a means of providing “unremitting protection [for] individual rights and liberties,” and held that it was to be given a “broad and purposive analysis.”¹⁵ In one commentator’s description of the years that followed, the court enthusiastically embraced an expansive approach to review, and moved boldly into the Charter era.¹⁶

In these three cases, the court has retreated from previous statements of the scope of the rights of the accused. It has done so in the name of victims' rights and protection of the public, giving these broad societal interests increased emphasis in achieving a balance against individual rights. How did this come about?

R. v. Mills

In *Mills*, the most obvious way in which the court bowed to broad societal concerns was by deferring to Parliament in an area where the court had already spoken on the constitutional content of the rights in question. The preamble to Bill C-46 made it abundantly clear that Parliament was speaking for societal concerns that had little to do with the individual rights of the accused. While the legislation was also directed to the individual rights of the complainant, those rights were addressed in a way that clearly skewed the balance struck in *O'Connor*. The legislation could be seen as a direct response to society's dislike of the court's ruling in *O'Connor*, and has been aptly described as "in your face" legislation.¹⁷ Yet, in reviewing the legislation, the court bent over backward to attribute good intentions to Parliament, and to presume that Parliament intended to enact constitutional legislation. This position is perilously close to a presumption of constitutional validity, which the court had rejected in earlier Charter jurisprudence.¹⁸ The case is discouraging in its excessive deference to Parliament—it may also signal that the days of expansive and bold review of legislation are receding into the past.

A more subtle but equally disturbing way in which the court shifted the balance in favour of societal interests in *Mills* was in its analysis of the relationship between s. 7 and s. 1 of the Charter. In balancing the rights of the accused, the complainant, and the interests of society at large, both s. 7 and s. 1 have an important role to play in the "contextual analysis" of rights.

This is where the delicate language of balancing begins to break down. It is

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all very well to say that there is no hierarchy of rights, and that one right should not trump another. Yet at some point, the "definition" of one right will necessarily "limit" another. In *Mills*, the court "defined" and balanced the rights under s. 7, and found no violation of the accused's right to make full answer and defence, or to a fair trial. Implicitly, the court found that the accused did not discharge the onus upon him to show a violation. Even though this was a case where it was acknowledged that Parliament had changed the *O'Connor* rules, the state did not have to justify the shift in the balance. By balancing the rights under s. 7 and finding no violation, the court let the state off the hook from having to justify the limits that the legislation imposed under s. 1.

Finally, in *Mills*, the court permitted Parliament to factor societal concerns about sexual abuse into the actual decision-making process of the trial judge. According to ss. 278.5(f) and (g), before disclosing the records to the accused, the judge must consider "society's interest in encouraging the reporting of sexual offences" and "society's interest in encouraging the obtaining of treatment by complainants of sexual offences." Such considerations are not novel; indeed, they were accepted as appropriate in *O'Connor*. However, the difficulty inherent in this exercise should not be ignored—in a trial where sexual abuse is itself disputed, the trial judge must consider the need to report

and seek treatment for sexual abuse. By requiring the judge to consider societal factors relevant to sexual abuse before sexual abuse has been proven, Parliament undermines the presumption of innocence in a subtle but insidious way. It is as if the legitimacy of the complaint is conceded.

R. v. Stone

The court in *Stone* also instructed trial judges to inform the jury of broad societal concerns in relation to non-insane automatism. Indeed, after *Stone*, the trial judge must *begin* the charge to the jury by thoroughly reviewing the serious policy factors that surround automatism, including concerns about feignability and the repute of the administration of justice. The precise format of the caution that is envisioned by the court is not clear; however, it is likely that the court was referring to the comments of Justice Dickson in *Rabey* when he stated that automatism as a defence is easily feigned.¹⁹

In *Rabey*, Dickson J.'s comments were made in the context of the judge's consideration of the categorization of automatism as a matter of law. An instruction of this kind to the trier of fact is highly unusual.²⁰ Again, the difficulty for the jury in these circumstances is very real—in a trial where they must determine if the claim of automatism is genuine, they are reminded that such claims are easily feigned, and acquit-

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tals based on bogus claims bring the system into disrepute. In effect, at the very time they must consider acquittal, the jury members are warned against acquittal. There is simply no precedent for this kind of bold warning that will have such a chilling effect on the deliberations of the jury.

Smith v. Jones

The incursion into solicitor–client privilege in *Smith* was a necessary one in light of the clear, serious, and imminent danger posed by the accused. However, in resolving the tension between the interests of the accused and society in that case, it can be argued that the majority gave insufficient care to crafting a response that would adequately protect the rights of the accused. In the rush to protect the public, the very real concern about the effect of the decision on the rights of the accused was overlooked.

The majority in *Smith* did not seek to limit the disclosure of the psychiatrist's report to the opinion of dangerousness. As a result, the confidential and intensely private discussions of the accused with his psychiatrist became public, and became available for use against him at his sentencing. The minority was no doubt correct in its prediction that faced with this prospect in the future, defence counsel will be very reluctant to refer their clients for assessment or treatment. In addition, it will be extremely unlikely that accused persons will choose to air their innermost thoughts honestly with psychiatrists during the course of a criminal proceeding, even if they are genuinely motivated to seek treatment.

The decision is also disturbingly silent on the use that can be made of this intimate and self-incriminating disclosure. While the minority was clear that disclosure did not equate to admissibility, the majority in *Smith* appeared to sanction the use of the material at the accused's sentence hearing. However, the court did not discuss the manner in which the evidence could be used to

protect public safety. Could the Crown rely on the statements of the accused to increase his sentence or to commence a dangerous offender application? If the accused took the stand, could the Crown cross-examine the accused on his statements to the psychiatrist? If further offences were disclosed, could the Crown rely on the statements of the accused to prosecute him in other proceedings? Once concerns about privilege and about self-incrimination are put aside, these uses of the disclosed material are not farfetched. Without knowing the answer to those questions, the accused is left in a vulnerable and uncertain position.

The case has a further negative impact on the role of counsel in the solicitor–client relationship. Although the fact situation in *Smith* related to a doctor seeking to set aside privilege, the guidelines set out by the court apply to lawyers in a solicitor–client relationship as well. Despite the fact that the ability to warn the public of danger is permissive and not mandatory, defence counsel will now be placed in a position of divided loyalty whenever they are defending a client who presents a clear, serious and imminent danger to an identifiable person or persons. As a result of *Smith*, a lawyer may choose to warn the authorities about a dangerous client. In even considering whether there might be a moral imperative to warn the authorities, counsel will be in a position of conflict with the interests of the client and will be faced with a difficult ethical and professional dilemma that is bound to weaken the solicitor–client relationship. Frank discussions will be inhibited; the foundation of trust will be undermined. The rights of the accused to counsel, to make full answer and defence, and to a fair trial are thereby affected. It would have been preferable if the court had affirmed that in the normal course, it would not be expected that lawyers would warn the authorities against their own client. A moral duty to warn that is contrary to the best inter-

ests of the client should not be encouraged. This is of particular concern because *Smith* did not rule out the possibility of a legal duty to warn. In emphasizing that the court was not seeking to establish a tort duty on doctors to disclose confidential information when a public safety concern arises, Justice Cory did not dismiss this possibility. He merely stated, "That issue is not before the court and must not be decided without a factual background and the benefit of argument." Legal liability for a failure to warn is an appalling prospect for criminal lawyers, and an equally devastating one for their clients.

THE COURT'S RESORT TO WEAK LEGAL ANALYSIS AND ITS FUTURE IMPLICATIONS

A shift in emphasis from the rights of the accused—even a retreat from a previous position—might be justified if it was based on sound legal reasoning and a clear application of fundamental principles. Unfortunately, the willingness of the court to retreat from its previous positions in both *Mills* and *Stone* is accompanied by a weak legal analysis in support of some of the changes. These weaknesses have been exposed in several important articles, and a detailed legal analysis will not be repeated here.²¹ However, a brief review of the issues may help in understanding the somewhat obvious conclusion that is put forward here—that change based on a foundation of weak legal reasoning diminishes not only the rights of the individual accused, but also the integrity of the judicial system as a whole.

In *Mills*, the court relied on equality concerns as a necessary component of the "contextual analysis" of the rights in question. However, the court was vague in describing the nature of the equality right, referring variously to equality between men and women; equality between victims of sexual assault and victims of other crimes; and equality between women whose lives have been documented more extensively through

aboriginal status, disability, imprisonment, or involvement with child welfare and those who have not. The analysis was infused with the touchstones of political correctness, making reference to rape myths and to the prohibition on “whacking the complainant.” However, there was little guidance on the scope or effect of a s. 15 right. In his article, “*Mills*: Dialogue with Parliament and Equality by Assertion at What Cost?” Professor Stuart pointed to the lack of authority for the creation of an enforceable s. 15 claim for the complainant, and rightly criticized the analysis, calling it “equality by assertion.” He predicted that equality rhetoric would have important implications for future cases.

The prediction was alarmingly accurate. In *R. v. Shearing*,²² the B.C. Court of Appeal seized upon the equality language in *Mills*, and translated it into a privacy right of the complainant to suppress cross-examination by the accused in relation to her diary on a charge of sexual assault. In this case, the complainant had kept a diary, and left it behind when she left a centre run by the accused. The accused came into possession of the diary, and sought to cross-examine the complainant on the fact that there were no entries relating to her allegations of sexual abuse during the relevant time period. The trial judge refused the cross-examination after balancing the probative value of the proposed cross-examination against the privacy interest of the complainant. In upholding this approach, the B.C. Court of Appeal referred to the “new direction in *Mills*,” and said that *Mills* has shifted the balance away from the primary emphasis on the rights of the accused.

The result means that in British Columbia, at least, the rules governing the limits of cross-examination and the admissibility of defence evidence will be governed by balancing probative value against prejudice to the complainant. This is a radical restatement of the law set out in *Seaboyer*, which focused on a balancing of probative value versus prejudice to the trial process not simply to the complainant. The previous need

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for extreme caution in restricting the accused’s ability to defend himself appears to have been forgotten.

The case of *Stone* has also changed the law of automatism without due regard for established legal principles and procedure. The most important and far reaching of the changes is undoubtedly the reversal of the onus of proof for this defence. Disturbingly, this issue was not directly raised by any of the parties on the appeal. Instead, Justice Bastarache concluded that, in reviewing the proper evidentiary foundation for automatism, the court should reassess the burden of proof for automatism as well. This circumvented the appropriate procedure of giving constitutional notice of the issue to all interested parties, who may have intervened based on the important implications for defences generally.²³ It may also have deprived the court of valuable legal submissions that directly addressed the constitutional significance of the issue.²⁴ Moreover, it appears to have contributed to the lack of evidence before the court to discharge the state burden to justify the reversal of the onus of proof. In a sloppy approach to s. 1 of the Charter in this case, the majority seemed undeterred by a lack of evidence and relied on previous case law in the context of mental disorder and drunkenness to discharge the burden on the court’s own initiative. In his case comment, “*Stone*: Judicial Activism Gone Awry to Presume Guilt,” Professor Delisle noted the weakness of the majority’s reasoning that because automatism is easily feigned and all knowledge of its occurrence rests with the accused, putting the legal burden on the defence is justi-

fied. Professor Delisle went on to point out that based on such a rationale, the onus with respect to the defences of lack of intent, duress, provocation, and necessity could all be reversed as well.

The suggestion is not farfetched. Indeed, in an upcoming case in the Supreme Court, the Crown has raised a similar rationale for a proposed reversal of the onus of proof in relation to the defence of duress.²⁵ Based on *Stone*, the Crown asserts that it is time to revisit the burden of proof for duress, in part because claims of duress are easily raised by those who seek to evade criminal sanction, and in part because full knowledge of the duress always rests with the accused. If the court accepts this argument, it would appear that a full-scale erosion of the presumption of innocence may be underway.

CONCLUSIONS

In the cases of *Mills*, *Stone*, and *Smith v. Jones*, the individual rights of the accused fared badly in a balancing of rights involving broad societal interests. The court appears to be placing increasing emphasis on the rights of victims of sexual assaults and public safety at the expense of the accused. Although there is no presumption that the rights of the accused are paramount in a criminal trial, it is obvious that the trial process will have the most direct impact on the accused. At the end of the day, it is the accused who will face the prospect of jail if he or she is found guilty.

As guardian of the individual rights and liberties enshrined in the Charter, the court must not be unduly swayed by

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political correctness, or by the hue and cry of the public for protection from violent crime. Weak legal reasoning will diminish the rights not only of the unpopular accused but also those of all accused, including the innocent. ❁

- 1 (1999), 139 C.C.C. (3d) 321 (S.C.C.).
- 2 (1999), 134 C.C.C. (3d) 353 (S.C.C.).
- 3 (1999), 132 C.C.C. (3d) 225 (S.C.C.).
- 4 (1995), 103 C.C.C. (3d) 1 (S.C.C.).
- 5 Sections 278.2(2) and (3)
- 6 Section 278.4(3). The “insufficient grounds” section was upheld by the court based on an interpretation that permitted the trial judge to make a finding of likely relevance where *any one* of the listed assertions was made and supported by the required evidentiary or informational foundation. However, see the disappointing decision of the Ontario Court of Appeal, *R. v. P.E.*, [2000] O.J. no. 574 (C.A.), where the court held that statements to a therapist touching on the issues in the case, close in time to the decision to press charges, did not meet the threshold of likely relevance without more.
- 7 Section 278.5(2).
- 8 Chief Justice Lamer (as he then was), was the sole dissenter in *Mills*. However, even he found only one as-

pect of the legislation to fall below a constitutionally acceptable level. This was in relation to third-party records in the possession of the Crown.

- 9 Justice Bastarache wrote for the majority, including Justices L’Heureux-Dubé, Gonthier, Cory, and McLachlin. A spirited dissent was written by Justice Binnie on behalf of himself, Lamer, Iacobucci, and Major.
- 10 *Stone*, paras. 173-81.
- 11 *R. v. Parks* (1992), 75 C.C.C. (3d) 287 (S.C.C.).
- 12 See David Paciocco’s excellent article, “Death by *Stone*-ing: The Demise of Simple Automatism,” 26 C.R. (5th) 273. See also *R. v. Balenko*, [2000] Q.J. 717.
- 13 Justice Cory wrote for the majority, joined by Justices L’Heureux-Dubé, Gonthier, McLachlin, Iacobucci, and Bastarache. Justice Major expressed the minority view, shared by Chief Justice Lamer (as he then was) and Justice Binnie.
- 14 *Smith*, para. 100.
- 15 *Hunter v. Southam* (1984), 14 C.C.C. (3d) 97 (S.C.C.), at 105-6.
- 16 Debra McAllister, *Taking the Charter to Court* (Toronto: Carswell, 1999), at 2-7.
- 17 Don Stuart, “*Mills*: Dialogue with Parliament and Equality by Asser-

tion at What Cost?” 28 C.R. (5th) 275, at 277-78.

- 18 *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110.
- 19 Cited at para. 176 of *Stone*.
- 20 The only analogy that comes to mind is in relation to identification, where the trier of fact is sometimes warned of the “inherent frailties” of identification evidence, or that identification evidence has on a number of occasions proven to be erroneous. However, the preferable view is to instruct the jury of the need for caution about identification evidence *in the circumstances of the particular case*. *R. v. Olbey*, [1971] 4 C.C.C. (2d) 103 (Ont. C.A.).
- 21 See notes 12 and 17 above, as well as R.J. Delisle, “*Stone*: Judicial Activism Gone Awry To Presume Guilt,” 24 C.R. (5th) 91.
- 22 [2000] B.C.J. no. 235 (C.A.).
- 23 See Editorial Note, “Rewriting Automatism” (1999), 4 *Can. Crim. L.R.* 119.
- 24 It is not clear from the judgment whether the court had the benefit of argument on the constitutionality of reversing the burden of proof.
- 25 *R. v. Ruzic*, [1998] S.C.C.A. no. 504. (The author is co-counsel on this appeal.)

FROM THE EDITORS

The papers in this volume were originally presented at the 3rd Annual Canada Watch Constitutional Cases Conference, held at Osgoode Hall Law School of York University on April 7, 2000. The Conference was attended by 125 registrants from six provinces, along with a number of international participants, including six judges from the Russian Constitutional Court.

Planning is underway for the 4th Annual Canada Watch Constitutional Cases Conference, which will examine the Supreme Court of Canada’s constitutional decisions released in the 2000 calendar year. The conference will be held at Osgoode Hall Law School of York University on April 6, 2001. The keynote speaker will be Chief Justice Beverley McLachlin of the Supreme Court of Canada.

For further information, contact

JOANNE RAPPAPORT
Centre for Public Law
and Public Policy

PHONE
(416) 736-5515

FAX
(416) 650-4321

E-MAIL
<joanner@yorku.ca>