DIALOGUE AND HIERARCHY IN *CHARTER* INTERPRETATION: A COMMENT ON *R.* V. *MILLS*

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I. INTRODUCTION

Following the Supreme Court of Canada's decision in *R.* v. *O'Connor*,[1] Parliament enacted Bill C-46,[2] which added ss. 278.1-278.9 to the *Criminal Code*.[3] Not only does the legislation complicate the labyrinth that governs the disclosure and production of records to the accused in sex offence cases, it directly challenged Supreme Court of Canada authority. Though Parliament did not rely on s. 33 of the *Charter*[4] to protect its law from review, the Court upheld Bill C-46 in *R.* v. *Mills*,[5] despite overt contradiction between *O'Connor* and the government's additions to the *Criminal Code*. If it is unusual for Parliament to legislate so boldly in the face of constitutional precedent, it is equally remarkable that the Court so willingly participated in the emasculation of its authority to interpret the *Charter*.

For years, the contest between the rights of the accused and those of the complainants in sex offence cases has been a source of controversy under the *Charter*.[6] One issue is whether the accused is entitled to a complainant's counselling and therapeutic records, which may be generated by third parties for treatment purposes unrelated to the investigation of a crime. On that question, Bill C-46 made plain the legislature's intent to subordinate the right to make full answer and defence to the privacy and equality rights of victims, not to mention to law enforcement objectives.[7] Moreover, it is not as though the statute diverged on minor points and technicalities; to the contrary, Parliament enacted a scheme that differed in four fundamental respects from the principles and procedures

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1 [1995] 4 S.C.R. 411 [hereinafter *O'Connor*] (*per* Lamer C.J.C. and Sopinka J., for the majority, on disclosure and production, and L'Heureux-Dubé J., for the majority, in denying a stay of proceedings); see also *A.(L.L.)* v. *B.(A.)*, [1995] 4 S.C.R. 536 (applying the procedures adopted in *O'Connor* in a companion case).

2 *An Act to amend the Criminal Code (Production of records in sexual offence proceedings)*, 2d Sess., 35th Parl., 1996 (assented to 25 April 1997, S.C. 1997, c. 30).

3 R.S.C. 1985, c. 46.

4 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

5 [1999] 3 S.C.R. 668 [hereinafter *Mills*] (Lamer [then] C.J.C., dissenting in part).

6 See, *e.g.*, *R.* v. *Seaboyer*, [1991] 2 S.C.R. 577 (striking down the *Criminal Code*'s "rape-shield" provision); *R.* v. *Osolin*, [1993] 4 S.C.R. 595 (holding that the trial judge erred in failing to allow cross-examination of the complainant on her medical records); and *R.* v. *Carosella*, [1997] 1 S.C.R. 80 (holding that a sexual assault centre's destruction of evidence violated the accused's right of full answer and defence).

7 See *infra* note 80 and accompanying text.

established by *O'Connor*.[8] In ignoring the Court's majority opinion, Bill C-46 favoured the interests of complainants on virtually every issue it addressed.

Though a variety of its features were invalidated in the lower courts, the Supreme Court upheld the legislation in *Mills*. Chief Justice Lamer, together with Iacobucci and Major JJ., abandoned their position in *O'Connor*, and though the Chief Justice registered a dissent on Crown disclosure, Mr. Justice Iacobucci co-authored the Court's opinion with McLachlin J. (as she then was), who dissented in the earlier case and had by the time of *Mills* been named Chief Justice-designate. L'Heureux-Dubé and Gonthier JJ., who had also dissented in *O'Connor*, likewise voted to uphold Bill C-46. Meanwhile, the remaining panel members in *Mills*, Justices Bastarache and Binnie, did not participate in *O'Connor*.[9]

In the circumstances, the riddle of *Mills* is that legislation which *looked* unconstitutional was not unconstitutional after all.[10] Considering that its members could not agree on these issues prior to Bill C-46, it is curious that the Court so readily allowed Parliament to legislate contrary to *O'Connor*'s interpretation of the *Charter*. But rather than acknowledge that it had changed its mind or invalidate Bill C-46, which might have provoked yet another outcry about judicial review,[11] *Mills* touted Parliament's response as an exemplar of dialogue between institutions. Put another way, instead of conceding that it had overruled *O'Connor*, the Court claimed it had merely demonstrated institutional respect for Parliament.

This case comment does not join issue on the question of whether Bill C-46 and *Mills* unacceptably compromise the rights of the accused or whether they unduly favour the interests of complainants, but focuses on two issues of methodology: the first concerns constitutional interpretation and the democratic process, or the *dialogue* issue; and the second, the relationship between *Charter* guarantees, or the *hierarchy* issue. To set the stage, an initial section provides an overview of the *Stinchcombe*[12]/*O'Connor*/*Mills* trilogy, and is followed by a more detailed analysis of *Mills* that examines the tension between judicial and legislative decision making, before considering how Parliament and

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8 Not only did Parliament extend Bill C-46's framework for defence access to counselling and therapeutic records held by the Crown, it effectively implemented the dissent's procedural constraints, by adopting a high threshold for likely relevance, a salutary benefits/deleterious consequences test at stage one as well as stage two of the process, and a requirement that society's interests be considered before access is granted. See *infra* notes 37-40 and accompanying text.

9 The panel in *Mills* comprised eight members of the Court, rather than nine, because Cory J. heard argument but, having retired, took no part in the judgment.

10 See D. Paciocco, "Criminal Jurisprudence in the Supreme Court of Canada: IV. Recent Developments in Criminal Procedure; A. Access to Third Party Records" (National Judicial Institute Appellate Courts Seminar, Ottawa, April 2000) [unpublished]; R. Pomerance, "Shifting Ground: New Approaches to *Charter* Analysis in Criminal Context" 8 *Canada Watch* 36; L. Pringle, "Defence Under Attack: A Review of Three Important Supreme Court of Canada Decisions" 8 *Canada Watch* 31; P. Sankoff, "Crown Disclosure After *Mills*: Have the Ground Rules Suddenly Changed?" (2000) 28 C.R. (5th) 285; D. Stuart, "*Mills*: Dialogue with Parliament and Equality by Assertion at What Cost?" (2000) 28 C.R. (5th) 275.

11 *Mills* was decided in the aftermath of *R.* v. *Marshall*, [1999] 3 S.C.R. 456 (upholding aboriginal fishing rights) and *R.* v. *Marshall*, [1999] 3 S.C.R. 533 (clarifying the Court's earlier decision and confirming the federal government's authority to regulate aboriginal fishing).

12 *R.* v. *Stinchcombe*, [1991] 3 S.C.R. 326.

the Court altered *O'Connor*'s model for balancing the rights of the accused and complainants. On the latter issue, though the article does not comment in detail on the mechanics of defence access to these records, some attention to particulars is necessary to show how the Court both eschewed and embraced a hierarchy among *Charter* entitlements.[13] A final section returns to overriding questions of hierarchy. Beyond the *substantive* issue of ranking rights and interpreting s. 7 is the question of relations between *institutions*. There, Parliament's decision to negate *O'Connor* by ordinary legislation calls into question any concept of dialogue as a demonstration of mutual respect between courts and legislatures. In that regard, it is doubtful that dialogue's objective of keeping the institutional peace augurs well for constitutional rights. As the conclusion suggests, the concept is more likely to compromise entitlements and destabilize *Charter* jurisprudence.

II. DISCLOSURE AND PRODUCTION: THE *STINCHCOMBE/O'CONNOR/MILLS* TRILOGY

In combination, *Stinchcombe* and *O'Connor* imposed significant burdens of disclosure and production, respectively, on the Crown and on third parties.[14] In *Stinchcombe*, for instance, Sopinka J. described the arguments in favour of imposing a constitutional duty of disclosure on the Crown as "overwhelming."[15] Quoting *Boucher* v. *The Queen*, and Rand J.'s statement that "none [is] charged with greater personal responsibility" than Crown prosecutors,[16] Sopinka J. held that the Crown must disclose all relevant information as a matter of constitutional duty, unless non-disclosure is justified by the law of privilege.[17] Subject to that exception, *Stinchcombe* established the rule that "information ought not to be withheld if there is a reasonable possibility [of impairing] the right of the accused to make full answer and defence."[18]

Before long, the logic of *Stinchcombe* was challenged on two key points: whether certain *kinds of information* are exempt from disclosure or production, and whether an accused's right of full answer and defence can be enforced, not only against the Crown, but against *third parties* as well. Requests for counselling and therapeutic records were met by the response that treatment records potentially relating to the commission of sexual assault offences should not be dealt with the same way as other documents; rather they

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13 On the question of mechanics, see Paciocco, *supra* note 10 (explaining how *Mills* in effect read the "constitutional mischief" out of Bill C-46 to achieve an acceptable balance between the interests at stake).

14 "Disclosure" refers to the Crown's duty to share information with the accused and "production" to any obligation that might be imposed on a third party, in fulfillment of an accused's right of full answer and defence.

15 *Stinchcombe*, *supra* note 12 at 333.

16 [1955] S.C.R. 16 at 24.

17 Stinchcombe, *supra* note 12 at 333 (adding that "the fruits of the investigation which are [in the Crown's possession] are not the property of the Crown for use in securing a conviction but the property of the public to be used to ensure that justice is done," and, at 340, that the absolute withholding of relevant information can only be justified on the basis of a *legal privilege* [*i.e.*, narrowly defined] which excludes the information from disclosure.)

18 *Ibid.* at 340 (recognizing, however, that disclosure is subject to notions of relevance, as well as to considerations relating to the timing and manner of disclosure).

should be set apart and treated differently.[19] Moreover, though the accused can enforce *Stinchcombe* against the Crown, it was less clear that full answer and defence could be claimed against those who are neither Crown prosecutors, nor agents of the state. Under the *Charter*'s logic of government action, the basis on which the accused could wrest private records from third parties was far from apparent.[20]

From the accused's perspective, it is the existence of records that triggers an entitlement under s. 7 of the *Charter*, whether the information is held by the Crown or by third parties.[21] Meantime, a complainant's stake in the privacy of those records is just as strong, and it matters little whether the documents are held by the Crown or by third parties. The challenge for the Court in *O'Connor* was either to decide whose interest should prevail, or to craft a compromise between the demands of absolute access and absolute privilege.

Although the status of Crown-held records was not at issue in *O'Connor*, the Court addressed the question anyway, and in doing so concluded that a balancing of interests was "unnecessary in the context of disclosure."[22] As to the content of such records, Chief Justice Lamer and Sopinka J. held that full answer and defence is "unaffected by the confidential nature of therapeutic records,"[23] because "there is simply *no compelling reason* to depart from the reasoning in *Stinchcombe*."[24] Under *O'Connor*, then, documents which fall into the Crown's hands are subject to disclosure; in this regard far from being equivocal, the joint opinion emphasized that "information in the possession of the Crown which is clearly relevant and important to the ability of the accused to raise a defence must be disclosed ... *regardless of any potential claim of privilege that might arise*."[25] With concurring votes from Cory, Iacobucci and Major JJ., this aspect of *O'Connor* constituted majority opinion.[26] Meanwhile, L'Heureux-Dubé J. complained

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19 See, *e.g.*, K. Kelly, "'You must be crazy if you think you were raped': Reflections on the Use of Complainants' Personal and Therapy Records in Sexual Assault Trials" (1997) 9 C.J.W.L. 178 (arguing that such records are used to discredit witnesses and reflect a range of gender-biased social myths under the guise of scientific fact or medical evidence); cited by *Mills*, *supra* note 3.

20 See, *e.g.*, *R.* v. *Carosella*, *supra* note 6 at 117, *per* L'Heureux-Dubé J. in dissent, maintaining that disclosure is a concept that is binding *solely* on the Crown, and not upon the public at large.

21 See L'Heureux-Dubé J. in *O'Connor*, *supra* note 1 at 479 (acknowledging that "when an accused is unable to make full answer and defence ... as a result of his inability to obtain information that is material to his defence, it is of little concern whether that information is in the hands of the state or in the hands of a third party.")

22 *Ibid.* at 429.

23 *Ibid.*

24 *Ibid.* at 432 [emphasis added].

25 *Ibid.* at 431 [underlining in original and italics my emphasis]. The Court emphasized its conclusion several times, indicating, at 429, that concerns relating to privacy or privilege disappear when documents *have fallen* into the possession of the Crown; adding, at 430, that fairness requires that if the complainant has released the information to advance the prosecution, then the accused should be entitled to use it for defence purposes; and summarizing, at 431, that "any form of privilege may be forced to yield where such a privilege would preclude the accused's right to make full answer and defence."

26 Justices Cory and Iacobucci concurred with the joint opinion on the issues relating to disclosure and production, and then joined L'Heureux-Dubé J. in supporting a majority result denying a stay of proceedings.

that because the issue did not arise on the facts and was not argued by the parties, the joint opinion's remarks about records in the Crown's possession were "strictly *obiter*."[27]

On the production of records, the majority in *O'Connor* effectively acknowledged that records held by third parties are different and accordingly not subject to the rigours of *Stinchcombe*. Specifically, the Chief Justice and Sopinka J. found that the interests of the accused and of the complainant should be balanced in the following way. To gain access to third party records, the accused has the initial burden of demonstrating likely relevance. That threshold enables a judge to decide whether records should be produced to the court, and there the joint opinion made it clear that the standard is not onerous.[28] Once that burden is met, a second step requires that the judge decide whether the accused should have access to the records. On that question, Lamer C.J.C. and Sopinka J. agreed generally with L'Heureux-Dubé J. that the salutary benefits and deleterious effects of a production order must be balanced.[29] Even so, the joint opinion made it clear that the question in every case is whether a "non-production order would constitute a reasonable limit on the ability of the defence to make full answer and defence."[30]

Both in form and in substance, the joint opinion modified the more elaborate procedure proposed by L'Heureux-Dubé J. Though the majority and minority share in common the elements of a likely relevance threshold, and a balancing of interests to determine the accused's access to records, the dissent rested on a different perception of the issues at stake. For example, though L'Heureux-Dubé J. accepted the "fundamental" nature of full answer and defence, she candidly declared that "[p]rivacy and equality must not be sacrificed *willy-nilly* on the altar of trial fairness."[31] She also complained about routine insistence on exposure of the complainant's personal background, the potential for a "built-in bias" against victims, and the prospect that stereotype would triumph over logic in the absence of a presumption against production.[32] In her view, "arguments urging production must rest upon permissible chains of reasoning, rather than upon discriminatory assumptions and stereotypes."[33] Essentially, she maintained that fairness had been put on a pedestal and that the evidentiary concept of relevance had been corrupted by myths and stereotypes. Her proposal would correct those flaws by making it that much more difficult for the defence to gain access to such records.

As a result, L'Heureux-Dubé J.'s test diverged from the majority's in three central ways. First, after endorsing "likely relevance" she found that such evidence would rarely

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27 *Supra* note 1 at 476; but see *infra* note 64 and accompanying text.

28 *Ibid.* at 436 (stating that the inquiry should be confined to the question of whether the right of full answer and defence is "implicated" by information contained in the records) and at 437 adding that "while this is a significant burden, it should not be interpreted as an onerous burden ... and [the onus] should be a low one."

29 *Ibid.* at 441-42; note that L'Heureux-Dubé J. adapted that analysis from the majority opinion of Lamer C.J.C. in *Dagenais* v. *C.B.C.*, [1994] 3 S.C.R. 835 [hereinafter *Dagenais*] (elaborating on the kind of balancing that should be undertaken under the third part of s. 1's proportionality test).

30 *O'Connor*, *ibid.* at 442.

31 *Ibid.* at 492 [emphasis added].

32 *Ibid.* at 487-90.

33 *Ibid.* at 492.

be relevant and that the standard for production should therefore be strict.[34] Second, she required a salutary benefits/deleterious consequences analysis at stage one to determine whether the records should be produced to the court. In other words, the judge cannot view any documents without first concluding that full answer and defence outweighs privacy and equality.[35] From there L'Heureux-Dubé J. carried her determination to push fairness from its altar into the second stage of the process and the ultimate question of production to the accused. On that issue, she would require a fresh salutary benefits-deleterious consequences analysis comprising seven factors, including two which address law enforcement interests favourable to complainants.[36]

In enacting Bill C-46 seventeen months later, Parliament more or less adopted the *O'Connor* dissent. First, though, against the majority's clear direction, Bill C-46 extended its procedures for defence access to records held by *third parties* to documents in the *Crown*'s possession.[37] Then, in place of the majority's onus for likely relevance, the legislation substituted an eleven-part definition of what is *not* considered *prima facie* relevant to the stage one question of whether records should be produced to the court.[38] Next, Bill C-46 requires a judge to weigh the competing interests before ordering that records be produced to the court,[39] and added criteria the *O'Connor* majority did not consider imperative in the salutary benefits/deleterious consequences balancing of interests.[40]

When *Mills* arrived at the Supreme Court of Canada, Justices McLachlin and Iacobucci admitted that "there are several *important* respects in which Bill C-46 differs from the regime set out in *O'Connor*."[41] The joint opinion nonetheless maintained that "these differences are not fatal because Bill C-46 provides sufficient protection for all relevant *Charter* rights."[42] Before examining the institutional and substantive impact of the *Mills* decision in detail, the extent of the Court's about-face should be noted. First, *Mills* upheld s. 278.3(4)'s eleven grounds deemed insufficient on their own to establish likely relevance, because "speculative myths, stereotypes, and generalized assumptions about sexual assault victims and classes of records have too often in the past hindered the search

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34 *Ibid.* at 497. Compare the joint opinion at 440 (stating that "[t]he sheer number of decisions in which such evidence has been produced supports the potential relevance of therapeutic records") and at 441 (disagreeing that records will only be relevant in rare cases).

35 *Ibid.* at 501. Compare the joint opinion at 436 (stating that this balancing should be confined to the second stage because a judge will only be in an informed position to analyze the competing interests when the records are available for review).

36 *Ibid.* at 504 (society's interest in encouraging the reporting of sexual offences and treatment for victims, and the effect of production on the integrity of the trial process). Compare the joint opinion at 442 (expressing reservations as to those criteria).

37 See s. 278.2(2) (stating that the provisions apply to a record in the possession or control of any person, including the prosecutor).

38 See s. 278.3(4)(a)-(k).

39 Section 278.5(2)(a)-(h).

40 Section 278.5(2)(f) (requiring consideration of society's interest in encouraging the reporting of sexual offences), and (g) (also requiring consideration of society's interest in encouraging the obtaining of treatment by complainants of sexual offences).

41 *Mills*, *supra* note 5 at 690 [emphasis added].

42 *Ibid.*

for truth."[43] As for the Bill's checklist of eight factors to govern on production to the court, the joint opinion explained that "[t]he fact that the approach set out in s. 278.5 does not accord with *O'Connor*'s pronouncement ... does not render it unconstitutional," because "this process is a "notable example of the dialogue between the judicial and legislative branches."[44] Though the rule in *O'Connor* was "of course informed by the *Charter*" the judges said it should not be read as a "rigid constitutional template."[45] Thus they held that, "[w]hile this Court *may have considered it preferable* not to consider [a complainant's] privacy rights at the production stage, that does not preclude Parliament from coming to *a different conclusion, so long as its conclusion is consistent with the Charter in its own right.*"[46] As to the second stage of the process, the joint opinion responded to the argument that Bill C-46 created a statutory bias by codifying two factors that are societal rather than case-specific, with the remark that those items do not have controlling or conclusive weight, but are simply "to be taken into account."[47]

The text of the *Charter* does not direct how conflicts between complainants and the accused should be resolved. In the absence of guidance, methodology provides an important guarantee against *ad hoc* decision making. With that in mind, the next two sections address the institutional and substantive principles the Court relied on to uphold Bill C-46.

III. *MILLS* AND INSTITUTIONAL DIALOGUE BETWEEN PARLIAMENT AND THE COURT

Though it seemed that the Court's choices were either to strike parts of Bill C-46 or to overrule parts of *O'Connor*, the joint opinion avoided both extremes. By discounting the "common law" status of *Charter* interpretation and praising the democratic process, *Mills* downplayed the reality that the Court had overruled *O'Connor*, and in so doing promoted the impression that the institutions are engaged in a co-operative enterprise. This spirit of co-operation is referred to as dialogue, and is attractive to courts and legislatures alike because it casts each in a favourable light.[48] Thus, when Parliament overturns precedent by ordinary legislation, characterizing the response as dialogue legitimizes a form of institutional confrontation that should be channeled through s. 33's mechanism for overriding the *Charter*. From the other side, dialogue takes the threat out of judicial review by suggesting that courts can strike down legislation, as long as the legislatures are

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43 *Ibid.* at 741. But see Paciocco, *supra* note 10 (explaining how *Mills* interpreted the "constitutional mischief" out of this provision, thereby rendering its list of factors meaningless). See also *infra* note 113 and accompanying text.

44 *Mills*, *supra* note 5 at 748-49 and 745.

45 *Ibid.*

46 *Ibid.* at 749 [emphasis added].

47 *Ibid.* at 751. See *supra* note 40.

48 Dialogue as an answer to the claim that judicial review is illegitimate is primarily associated with P. Hogg & A. Bushell, "The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn't Such A Bad Thing After All)" (1997) 35 Osgoode Hall L.J. 75.

not pre-empted from re-drafting their laws. On that view, the essence of dialogue is that *Charter* interpretation leaves room for a legislative response.[49]

Though it is beyond the scope of this article to comment in detail on the concept, there can be little doubt that *O'Connor* made it awkward for the Court to accept Bill C-46 as a true instance of dialogue. As noted above, Parliament defied the Court's majority opinion in at least four principal respects. Even so, *Mills* avoided a result antithetical to the co-operative spirit of dialogue by a theory of institutional relations which rested, in part, on the "common law" status of *Charter* interpretation. Focusing on the judge-made quality of the *O'Connor* doctrine enabled Justices McLachlin and Iacobucci to declare that the question in *Mills* was not whether Parliament could amend the common law, as "it clearly can."[50] Hence they concluded, "[w]e cannot presume that the legislation is unconstitutional *simply because* it is different from the common law position."[51] Having conceded the point, the joint opinion pronounced that the key in *Mills* was whether Parliament had chosen a "constitutionally acceptable procedure."[52] On that, the Justices stated that the range of permissible regimes is "not confined to the specific rule adopted by the Court pursuant to its competence in the common law,"[53] because "[s]uch a situation could *only* undermine rather than enhance democracy."[54] In their view, it followed that "[i]f the common law were to be taken as establishing the *only* possible constitutional regime, then we could not speak of a dialogue with the legislature."[55] Accordingly, it was "perfectly reasonable" that Parliament's concerns led to a procedure that is "different from the common law position but that nonetheless meets the required constitutional standards."[56]

In stating that "[t]he law develops through dialogue between courts and legislatures" and adding that "*O'Connor* is not necessarily the last word" on defence access to third party records,[57] *Mills* took deference to new heights. That much is undeniable in the pronouncement that the fact a law passed by Parliament "differs from a regime envisaged by the Court" does not mean that the statute is unconstitutional.[58] Circular reasoning produced a number of statements along similar lines, including the suggestion that the government can "build on the Court's decision, and develop a *different* scheme as long as it remains constitutional."[59] By that logic, "Parliament was free to craft its own solution to the problem *consistent with the Charter*."[60] The assumption in *Mills*, that Parliament is free to dispense with precedent, may have reached its pinnacle in the statement that "[t]o insist on *slavish conformity* [to the Court's rulings] would belie the

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49 See, *e.g.*, Hogg & Bushell, *ibid.*, arguing that the effect of the *Charter* is rarely to block a legislative objective, but mainly to influence the design of implementing legislation.

50 *Supra* note 5 at 713.

51 *Ibid.* [emphasis added].

52 *Ibid.*

53 *Ibid.* at 712.

54 *Ibid.* at 711 [emphasis added].

55 *Ibid.* [emphasis added].

56 *Ibid.* at 713.

57 *Ibid.* at 689.

58 *Ibid.* at 710.

59 *Ibid.* [emphasis added].

60 *Ibid.* at 689 [emphasis added].

mutual respect that underpins the relationship between the courts and legislature."[61] With the Supreme Court of Canada granting the government a license to ignore its interpretations of the *Charter*, it is difficult to see how this symmetry of respect actually works.

In specific terms, though *O'Connor* bifurcated the Crown and third parties and attached different obligations to each, Bill C-46 treated the two in the same way. To sustain this aspect of the Bill, *Mills* essentially abandoned *Stinchcombe*'s principle that the Crown has a general duty to disclose. At the same time, *O'Connor* was dispensed with by judicial sleight of hand, which rejected the argument that s. 278.2 contradicts *Stinchcombe* and *O'Connor* as "an overstatement of the Crown obligation to disclose that was affirmed in those cases."[62] After repeating that "[t]he *mere* fact that this procedure differs from that set out in *Stinchcombe* does not, without more establish a constitutional violation," *Mills* accepted that Bill C-46 "puts the Crown at an advantage," but found no violation of ss. 7 or 11(d) of the *Charter*.[63]

It is true that the remarks in *O'Connor* about Crown-held records were *obiter* and that the majority can be criticized for deciding questions of law that were not raised by the record or argued by the parties.[64] Instead, the joint opinion in *Mills* maintained that there is no inconsistency between *Stinchcombe*'s and *O'Connor*'s duties of disclosure and the fetters Bill C-46 places on defence access to records held by the Crown.[65] Prior to *Mills*, though, it was widely accepted that the obligation did not change with the content of the records,[66] and that *O'Connor* was not in any way predicated upon the fact that a waiver by the complainant had been made.[67] Respectfully, then, if it is an overstatement that *Stinchcombe* and *O'Connor* resolved all issues relating to third party records, it is equally

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61 *Ibid.* at 710 [emphasis added].

62 *Ibid.* at 733. Justices McLachlin and Iacobucci maintained that *Stinchcombe* should be distinguished because privacy was not at stake, and rejected the suggestion in *O'Connor* that a reasonable expectation of privacy is lost once the Crown comes into possession of records, indicating that privacy cannot be forfeited in the absence of an express waiver.

63 *Ibid.* at 735 and 736 [emphasis added].

64 See *supra* note 26. Even so, the Court has addressed issues that are not properly before it, before and after *O'Connor*, with little suggestion that the precedent is lacking in authority as a result. For a sampling, see *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 (expanding and then deciding issues that were not before the Court, over La Forest J.'s dissent); *Libman* v. *Quebec*, [1997] 3 S.C.R. 569 (overruling the Alberta Court of Appeal in *Somerville* v. *Canada* (1996), 136 D.L.R. (4th) 205, though the decision was not appealed and the record was not before the Supreme Court); *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 (basing the Court's decision on a duty to negotiate that was not raised or briefed by any of the parties); and *R.* v. *Stone*, [1999] 2 S.C.R. 290 (altering the law relating to automatism on issues that were neither raised nor briefed by the parties).

65 The Chief Justice agreed that Parliament could legislate in this area but dissented because the statutory scheme tipped the scales too far in favour of privacy: *Mills*, *supra* note 5 at 685.

66 See Sankoff, *supra* note 10 at 287 (stating that "[u]ntil the release of *Mills*, it had been almost unanimously accepted by lower courts and legal observers alike that the *O'Connor* majority meant exactly what it said: otherwise private records which are in the hands of the Crown must be disclosed." [footnote omitted]).

67 *Ibid.* at 289. Sankoff states that "the swift rejection of *O'Connor* on this point is unsettling ... [but] the treatment of *Stinchcombe* was even more remarkable."

an overstatement to declare that Parliament had merely filled a void.[68] Far from filling a gap, Bill C-46 displaced a careful framework for balancing rights that had been deliberated upon and adopted by a majority of the Court in *O'Connor*.

As for third parties, *Mills* permitted Parliament to reverse *O'Connor*'s "common law" interpretations of the *Charter* on likely relevance, on balancing at stage one of the process, and on the factors that influence the balancing of interests, because the legislative result met the "required constitutional standards." The problem is that when Parliament's legislation is incompatible with, or is in conflict with constitutional precedent, it cannot meet those standards until the Court abandons existing precedent or changes *its* interpretation of the Constitution. In weak defence of its authority, the joint opinion stated that "[w]hile this dialogue is obviously of a *somewhat different nature* when the common law rule involves interpretation of the *Charter*, as in *O'Connor*, it remains a dialogue nonetheless."[69] Along the same lines, Justices McLachlin and Iacobucci added ambiguously that, "[w]hile it is the role of the courts to specify [constitutional] standards, there may be a range of permissible regimes that can meet these standards."[70] In making that remark, the joint opinion simultaneously acknowledged the status of constitutional interpretation and surrendered the Court's authority to Parliament's will. On the basis of *Mills*, it is difficult to see how *Charter* interpretation can be principled when the power to decide important questions ricochets between institutions engaged in some *ad hoc* form of dialogue.

Moreover, without stating exactly why it should carry so much weight, the Court attached significant value to the consultation process that culminated in Bill C-46. Effectively, *Mills* claimed that a process which listens to the voices of the vulnerable and enacts well-intentioned legislation to protect their interests can supplant precedent. For instance, Justices McLachlin and Iacobucci declared that "[c]ourts do not hold a monopoly on the protection and promotion of rights and freedoms," and added that "[t]his is especially important to recognize in the context of sexual violence."[71] In making that statement, *Mills* came close to conceding that Parliament does a better job of protecting the vulnerable, and thereby calling into question the Court's mandate to enforce constitutional rights.

Explaining the statute's alterations to *O'Connor*, the joint opinion declared that "Parliament must be taken to have determined, as a result of *lengthy consultations*, and years of Parliamentary study and debate, that trial judges have sufficient evidence [to balance the rights of the two parties at stage one]."[72] Then, after conceding that "little statistical data existed at the time of drafting Bill C-46 on the application of *O'Connor*," the Justices declared that "*it was open to Parliament to give what weight it saw fit to the evidence presented at the consultations*."[73] Once again McLachlin and Iacobucci JJ. re-

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68 *Mills*, *supra* note 5 at 735.

69 *Ibid.* at 711 [emphasis added].

70 *Ibid.* at 712.

71 *Ibid.*

72 *Ibid.* at 744 [emphasis added].

73 *Ibid.* at 745 [emphasis added].

iterated that "the *mere* fact that Bill C-46 does not mirror *O'Connor* does not render it unconstitutional."[74] They found, instead, that "[f]rom the information available to Parliament and the submissions it received during the consultation process, Parliament concluded that the effect of production on the integrity of the trial" should be taken into account at both stages of the application for production.[75]

The Court's reliance on consultation is problematic for two reasons. First, as to Bill C-46, the joint opinion lauded the process but nowhere described it in detail, and nowhere expressed concern or interest whether the interests of the accused had been heard. Instead, as this excerpt from *Mills* reveals, the process was aimed in one direction:

> Parliament ... is often able to act as a significant ally for vulnerable groups. This is especially important to recognize in the context of sexual violence.... If constitutional democracy is meant to ensure that due regard is given to the voices of those vulnerable to being overlooked by the majority, then this court has an obligation to consider respectfully Parliament's attempt to respond to such voices.
>
> ... [In Bill C-46] Parliament also sought to recognize the prevalence of sexual violence against women and children and its disadvantageous impact on their rights, to encourage the reporting of incidents of sexual violence, to recognize the impact of the production of personal information on the efficacy of treatment, and to reconcile fairness to complainants with the rights of the accused....
>
> Parliament may also be understood to be recognizing 'horizontal' equality concerns, where women's inequality results from the acts of other individuals and groups rather than the state, but which nonetheless may have many consequences for the criminal justice system.[76]

Though the Court maintained that the victims of sexual offences are vulnerable to being overlooked by the majority, in the circumstances of a consultation process that was slanted one way, it is those accused of sexual offences who appear more at risk of being overlooked.[77]

Second, the logic of consultation is suspect, as the constitutionality of legislation should neither be defined nor determined by process criteria. Consultation *per se* should not be considered particularly strong evidence either that a breach of the *Charter* never occurred or that if it did, that the violation is justified. The fact of "consultation" provides no guarantee that the process was balanced or representative; and to assume otherwise is naïve. If a flawed process can sometimes invalidate a law that is constitutional in

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74 *Ibid.* [emphasis added].

75 *Ibid.* at 754.

76 *Ibid.* at 712-13 [emphasis added].

77 Of the fourteen witnesses who appeared before the Standing Committee on Justice and Legal Affairs between March 14 and April 9, 1997, nine were advocates for the victims of sexual violence, two represented the interests of the accused, and the rest were government witnesses, who presumably supported the legislation; see online: Parliamentary Internet <http://www.parl.gc.ca/english/ebus.html> (last modified: 25 September 1997).

substance, it does not follow that consultation should save a law that is invalid on its face.[78] To rhapsodize democracy in the name of dialogue is to forget some of history's sorriest moments, and though an absence of consultation may exacerbate a breach of the *Charter*, its presence cannot save a violation that is, in substantive terms, unconstitutional.[79]

The second aspect of democratic process that the joint opinion in *Mills* referred to with approval was Bill C-46's preamble. Here, too, concerns can be voiced about the Court's reliance on this aspect of the legislation.[80] First, as noted, the preamble demonstrates beyond peradventure that Bill C-46 was concerned with the rights of complainants and with law enforcement objectives, and though it includes passing reference to the rights of the accused, there is no mistaking the thrust of this legislation.[81] More generally, though a preamble can offer guidance as to a statute's objectives, its purpose is self-serving and, as a result, its imprecatory words should not be taken at face value. Doing so is unprincipled because it treats rhetoric as a substitute for the *Charter*'s requirement that limits on rights be justified. Bill C-46's preamble may bespeak Parliament's "good intentions,"[82] but whether legislation is well-intentioned is not the test of its constitutionality. In the circumstances, the joint opinion's statement that "courts must presume that Parliament intended to enact constitutional legislation and strive, where possible, to give effect to this intention," signalled that Justices McLachlin and Iacobucci agreed with Bill C-46 and did not propose to engage in a critical review of its merits.[83]

Far from creating stability, *Mills* has thrown the status of *Charter* interpretation into doubt, because it is now unclear which of the Court's decisions can be amended by ordinary legislation, and which are "supreme." As for dialogue, either the Constitution is supreme or it is not.[84] If it is supreme, Parliament could only overrule *O'Connor*,

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78 Without citing the article, *Mills* reflects the argument made by Martha Jackman in "Protecting Rights and Promoting Democracy: Judicial Review Under Section 1 of the *Charter*" (1996) 34 Osgoode Hall L.J. 661, that the democratic quality of government decisions, including the presence or absence of consultation, should be a factor in *Charter* analysis.

79 A distinction should be drawn between a process that generates evidence to meet s. 1's requirement of being demonstrably justified, and a process that limits the rights of those who lack political power, either to implement majoritarian concerns, such as law enforcement, or to satisfy those who have special access to the system, like advocacy groups. For a brief account of a flawed process, see B. Blugerman, "The New Child Pornography Law: Difficulties of Bill C-128" (1993-95), 4 M.C.L.R. 17 at 25 (discussing the genesis of Canada's child pornography law).

80 *Mills*, *supra* note 5 at 708 and 712-13 (summarizing, extensively, from the preamble).

81 *Ibid.* at 708 (stating that "[t]he preamble expressly declares that Parliament seeks to provide a framework of laws that are fair to and protect the rights of both accused persons and complainants.")

82 *Ibid.* at 730.

83 *Ibid.* at 711. Throughout, the joint opinion cited *Slaight Communications* v. *Davidson*, [1989] 1 S.C.R. 1038 [hereinafter *Slaight*], for the proposition that the court must strive to interpret legislation consistently with the *Charter*. Yet *Slaight* dealt with the constitutionality of a discretion exercised under statutory authority and does not provide strong support for that proposition. See Stuart, *supra* note 10 at 276.

84 See *Marbury* v. *Madison*, 1 Cranch (5 U.S.) 137 (*per* U.S. Chief Justice John Marshall); see also *Dickerson* v. *United States*, 2000 WL 807223 (holding that the United States Congress may not legislatively supersede U.S. Supreme Court decisions interpreting and applying the Constitution, and concluding that a legislative provision inconsistent with the judge-made *Miranda* rule is

legislatively, by invoking s. 33. On that view, the Court's choices in *Mills* were to overrule *O'Connor* or to strike down parts of the legislation.[85] Alternatively, if constitutional interpretation is not supreme, then s. 33 serves little purpose because the Court's interpretations of the *Charter* are collapsed into the political process. In plain terms, then, dialogue is flawed by its inherent and unavoidable malleability: that the Court has invoked the concept both in deference to Parliament, as *per Mills*, and to defend decisions striking down legislation, as *per Vriend*, corroborates the point.[86] When dialogue is invoked to support activism in one case and its opposite in another, it is difficult to conclude that principles matter to the Court. Decisions appear instead to follow a political barometer which tells the judges either that the legislature has been progressive and that its law should be upheld, or that the legislature has acted regressively, in which case the *Charter* can be enforced. Though the institutions may be placated, the concept of *constitutional* rights is certain to be compromised.

IV. HIERARCHY IN *CHARTER* INTERPRETATION

While narrowing *O'Connor* to the point of abandoning it as precedent, Justices McLachlin and Iacobucci cited *Dagenais* for the proposition that "[n]o single principle is absolute and capable of trumping the others."[87] The problem with *Dagenais* is the disparity between what in theory may appear sound and what is the reality of *Charter* adjudication.[88] Yet its spirit of egalitarianism was conveniently revived in the context of defence access to records because it provided a rationale for enhancing the rights of complainants *vis-à-vis* the accused. Although dissenting in *Dagenais*, L'Heureux-Dubé J. adopted its central proposition that a hierarchical approach to rights must be avoided. Thus in *O'Connor* she declared that "[a]s important as the right to full answer and defence may be, it must co-exist with other constitutional rights, rather than *trample them.*"[89] To remedy a status quo which, in her perception, had sacrificed privacy and equality "*willy-nilly on the altar of trial fairness*," she proposed the two step test that became the model for Bill C-46.[90]

On first impression, an analogy between the fair trial issues in *Dagenais* and *O'Connor* and *Mills* might appear sound. In *Dagenais*, after commenting that "[a] hierarchical

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unconstitutional).

85 As Hogg and Bushell note, *supra* note 48, it is not an either/or choice in those cases where a statute fails the proportionality test, because a legislature can re-enact its statute in compliance with the Court's interpretation of the *Charter*.

86 See *Vriend* v. *Alberta*, [1998] 1 S.C.R. 493 (invoking dialogue to explain why provincial legislation should be invalidated under the *Charter*), and *M.* v. *H.*, [1999] 2 S.C.R. 3 (invalidating provincial legislation despite a free vote among elected lawmakers to decide the status of same-sex rights).

87 *Mills*, *supra* note 5 at 713.

88 Not long after *Dagenais* stated that the *Charter*'s guarantees are co-equal, expressive freedom was seconded to the protection of reputation in *Hill* v. *Church of Scientology*, [1995] 2 S.C.R. 1130 (refusing to modify the common law of libel in light of s. 2(b)), and again in *R.* v. *Lucas*, [1998] 1 S.C.R. 439 (upholding the *Criminal Code*'s defamatory libel provision). Reputation prevailed in both instances, despite the fact that expressive freedom is explicitly protected by the *Charter* and reputation is nowhere mentioned in the text.

89 *O'Connor*, *supra* note 1 at 491 [emphasis added].

90 *Ibid.* at 492 [emphasis added].

approach to rights ... must be avoided," the Court stated the obvious, that ss. 2(b) and 11(d) have equal status under the text of the *Charter*.[91] As a result, it became necessary to re-formulate the common law rule, which "automatically favoured" fair trial over freedom of the press, and bring it into compliance with the *Charter*. Likewise, it can be argued that Bill C-46 simply adjusts the balance between the accused and complainants. Moreover, in both instances the Court held that the right to a fair trial must prevail when the competing interests cannot be accommodated.[92] Even so, though *Dagenais* required both guarantees to be protected to the point when expressive freedom would compromise fair trial, Bill C-46 chose one set of interests over another.[93] As well, the "non-hierarchical" balancing of rights in *Dagenais* took place under s. 1 but in *Mills* was conducted under s. 7, with attendant implications for the scope of fundamental justice.

Still, the consequences for full answer and defence may not be cataclysmic. If the *Criminal Code*'s procedures entangle and obfuscate basic questions of relevance and credibility, the trial process can be trusted not to compromise the rights of complainants or of the accused.[94] Of more immediate concern in this paper, therefore, are the Court's comments on the relationship between s. 7 and other *Charter* guarantees, including s. 1. For example, the joint opinion's conclusion that privacy and equality act as qualifiers on s. 7 places the guarantee at risk of being *read down* in order not to conflict with other parts of the *Charter*; in effect, it is as though *Mills* read the rest of the *Charter* into s. 7 to narrow its scope.[95] In addressing the question of relationships between guarantees, Justices McLachlin and Iacobucci relied on "context," emphasizing that s. 7 "embraces more than the rights of the accused,"[96] with the result that the right to make full answer and defence is [not] "automatically breached" when relevant information is withheld.[97] Having established that the accused's rights must be "defined in a context that includes other principles of fundamental justice and *Charter* provisions," the Court cautioned that the importance of privacy concerns should not be understated.[98] After praising the "eloquent submissions of many interveners" speaking on behalf of complainants,[99] Justices McLachlin and Iacobucci concluded that "the accused will have *no right* to the records in question insofar as they contain information that is either irrelevant *or would serve to distort the search for truth*, as access to such information is not included within the ambit of the accused's right."[100]

The relationship between ss. 7 and 15 is defined by similar principles, with the exception that equality emerges in *Mills* as the *Charter*'s supreme aspiration. At the

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91 *Supra* note 29 at 877.

92 *Dagenais*, *ibid.* at 878-81 and *Mills*, *supra* note 5 at 751.

93 Access to records cannot be granted under the legislation until a high threshold for full answer and defence has been crossed: *Mills*, *ibid.* at 729.

94 See Paciocco, *supra* note 10 at 115 (concluding that Bill C-46 achieved an acceptable balance between interests in which information needed for full answer and defence will be furnished if the test is applied properly, as interpreted by the Court in *Mills*).

95 But see *infra* note 109 and accompanying text.

96 *Mills*, *supra* note 5 at 718.

97 *Ibid.* at 719-20.

98 *Ibid.* at 720.

99 *Ibid.* at 723; for further approving references to interveners see *ibid.* at 726.

100 *Ibid.* at 726 [emphasis added].

outset, the joint opinion declared that neither full answer and defence nor privacy may be defined in a way that negates the other and that "*both sets of rights are informed by the equality rights at play in this context.*"[101] In light of this, Justices McLachlin and Iacobucci stated that "an appreciation of myths and stereotypes in the context of sexual violence is essential to delineate properly the boundaries of full answer and defence," and concluded that the accused is not entitled to information "that would *only* distort the truth-seeking goal of the trial process."[102] These remarks led the Justices to declare that concerns for the circumstances of complainants "highlight the need for an *acute sensitivity* to context when determining the content of the accused's right to make full answer and defence."[103] Accordingly, the joint opinion concluded that this right is not engaged "where the accused seeks information that will *only* serve to distort the truth-seeking purpose of a trial, and in such a situation, privacy and equality rights are *paramount.*"[104] Such an assertion of hierarchy among *Charter* rights could hardly be more explicit. A further observation is that, although privacy might be considered a principle of fundamental justice, due to the relationship between s. 7 and the other fundamental rights, the same cannot be said of s. 15, which is essentially an intruder into s. 7.

The Supreme Court's insistence that it had simply defined s. 7 to avoid conflicts between competing entitlements understates the shift in substantive entitlements that occurred in *Mills*. As for s. 7, the decision created a double constitutional onus, or a reverse constitutional onus: not only does the accused have to establish the entitlement under s. 7, he or she has in addition to establish that it is justifiable for that entitlement to prevail over any other *Charter* guarantees with which it may be in competition. Here it is interesting to compare ss. 7 and 2(b). In *R.* v. *Keegstra*, the Court held that s. 15 could not be read into s. 2(b) to narrow the scope of expressive freedom, because conflicts between rights should be resolved under s. 1.[105] *Dagenais*, a key precedent in *Mills*, came to the same conclusion. To the contrary, however, the joint opinion held in *Mills* that the interests at stake should be resolved within s. 7.

Unfortunately, that interpretation renders s. 1 a virtual irrelevance. To explain the functions of ss. 7 and 1, the joint opinion in *Mills* relied on the *Motor Vehicle Reference* and its distinction between the basic tenets of the legal system, which are s. 7's terrain, and democratic values, which fall under s. 1's mandate.[106] When balancing the

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101 *Ibid.* at 688 [emphasis added].

102 *Ibid.* at 727 [emphasis added]. To understand the Court's concern in this regard, see *ibid.* at 720, 726, 728, 729, 741 and 754; see also the Court's warning that "[t]he accused is not permitted to 'whack the complainant' through the use of stereotypes regarding the victims of sexual assault": *ibid.* at 727.

103 *Ibid.* at 728 [emphasis added].

104 *Ibid.* at 729 [emphasis added]. The Court operated on an assumption that defence access is a distortion, whether records are relevant or irrelevant. Accepting the subjectivity of relevance, to place privacy and equality above relevance in the search for truth seems, at the very least, to depart from prior conceptions of the concept's importance.

105 [1990] 3 S.C.R. 697 (*per* Dickson C.J. for the majority and McLachlin J, in dissent). See also *C.B.C.* v. *Lessard*, [1991] 3 S.C.R. 421 at 448 (*per* McLachlin J., in dissent, concluding that a search warrant that violates s. 2(b) must be justified under s. 1 and not blended into the s. 8 analysis as to whether a search is reasonable).

106 *Supra* note 5 at 716; see *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 [hereinafter *Motor Vehicle Reference*].

competing rights under s. 7, the Court upheld Bill C-46 in deference to democratic policy making. Yet if respect for Parliament is the basis of *Mills*, by the joint opinion's own reasoning, that conclusion should have been reached under s. 1. Conflicts between the accused's s. 7 rights and the complainant's rights under ss. 8 and 15 should be resolved under s. 1, because that is where democratic values are weighed against rights. In *Mills* the Court tried to have it both ways: to rely on the *Motor Vehicle Reference* to resolve conflicts between rights by reading down s. 7, and then uphold Bill C-46 without a s. 1 analysis.

Far from providing clarification, *Mills* has deepened the confusion which reigns at present regarding basic questions about the relationship between *Charter* guarantees. For example, though societal interests are sometimes balanced within s. 7, at other times that function is performed by s. 1.[107] To take another example, after concluding that economic entitlements are not recognized by s. 7 in one case, and rejecting parental autonomy in another, Chief Justice Lamer imposed an affirmative obligation on the government to provide legal aid in child custody proceedings.[108] In that same case, L'Heureux-Dubé J. held, in a concurring opinion, that equality considerations can *expand* s. 7, a statement that is the diametric opposite of *Mills*, which also relied on s. 15 but to *contract* the scope of fundamental justice.[109] As a result, the proposition that s. 7's definition of fundamental justice is conditioned by s. 15 is now entrenched in majority opinion, for better or for worse.

The Court's conception of equality is equally muddled. After years of irresolution, it finally agreed on a test for breach under s. 15; however, the paradox there is that a standard that is aimed at maximizing the *Charter*'s protection of equality is so complex and intractable as to defeat most claims.[110] Strangely, though, while claims raised under s. 15 must run a gamut of doctrinal criteria simply to establish a *prima facie* infringement requiring justification under s. 1, a more relaxed notion of equality can qualify s. 7 and dilute s. 2(b)'s protection under s. 1, without having to meet s. 15's definitional standard.[111] The anomaly is that outside s. 15, an *ad hoc* concept of equality is at work that is not based on doctrine but rooted, instead, in instinct and perception. Finally, as previously mentioned, there remains the contradiction in the way that equality affects other *Charter* guarantees: when it is in conflict with s. 2(b) the issue is resolved under s. 1, but in the case of s. 7, it conditions the definition of fundamental justice.

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107 See Pomerance, *supra* note 10 (briefly discussing the relationship between ss. 7 and 1) at 36-38.

108 Compare *New Brunswick (Minister of Health)* v. *G.(J.)*, [1999] 3 S.C.R. 46, and *Reference re ss. 193 and 195.1 of the Criminal Code*, [1990] 1 S.C.R. 1123 at 1163-66 (concurring opinion excluding economic interests from s. 7; and *B.(R.)* v. *Children's Aid Society*, [1995] 1 S.C.R. 315 (proposing a narrow interpretation of s. 7).

109 *Ibid.* at 100-101 (stating that s. 7 must be interpreted to take the principles and purposes of the equality guarantee into account).

110 *Law* v. *Canada*, [1999] 1 S.C.R. 497 [hereinafter *Law*]. Not only is it less certain how an elaborate test like that in *Law* will be applied, it is more difficult to establish a breach under its multi-layered definition of equality. See C. Bredt & I. Nishisato, "The Supreme Court's New Quality Test: A Critique" 8 *Canada Watch* 16.

111 For a critique of this aspect of *Mills*, see Stuart, *supra* note 10 at 279-82.

These confusions, contradictions, and ambiguities are exasperating for those who struggle with the inconsistencies of *Charter* jurisprudence. As well, a final comment on *Mills* is that the Court should be cautious not to overstate the prevalence of myths, stereotypes, and discrimination in the criminal justice system, as though their existence is unarguable. The joint opinion's documentation of this pattern is thin in *Mills*, with little attention being dedicated to the nature of these myths, where they are found, or how they might be remedied at minimal cost to a fair trial and to the rights of the accused. Yet whatever was once true of trials for sexual offences, the problems have been identified and remedied, if imperfectly, in recent years.[112] For the future, the Court must be wary of uncritically accepting the orthodoxy or dogma that these biases persist systemically throughout the system. It cannot be forgotten that assumptions that are not well-founded are an injustice, no matter whom they benefit or disadvantage. If the system treated complainants poorly in the past, that is no reason to place a history of discrimination and bias on an altar that risks creating new forms of injustice.[113]

V. CONCLUSION

R. v. *Mills* is a troubling decision, not simply because the rights of complainants were enhanced at the expense of those of the accused, but more importantly, because of the way the Supreme Court of Canada addressed issues of principle and methodology. The joint opinion's attempt to explain why it was permissible for Parliament to overturn an authoritative interpretation of the *Charter* is not persuasive on any of the grounds suggested: that *O'Connor* is a "common law" decision that can be repealed by ordinary legislation; that Bill C-46 can essentially overturn *O'Connor* because the courts and legislatures are engaged in a dialogue; that *O'Connor* could be sufficiently read down to minimize the contradiction between Supreme Court of Canada precedent and Parliament's response. As for dialogue, the concept is dangerous, in the first instance, because it invites Parliament to override Supreme Court of Canada authority by ordinary legislation and thereby avoid paying the institutional price of relying on s. 33.[114] It is dangerous for a second reason, because dialogue not only deflects criticism of the judiciary but simultaneously serves the purposes of activism *and* restraint; as such, it is inherently

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[112] But see *R.* v. *Ewanchuk*, [1999] 1 S.C.R. 330 at 372-75 (*per* L'Heureux-Dubé J., concurring, chastizing McClung J.A. of the Alberta Court of Appeal for inappropriately characterizing the complainant's appearance and behaviour).

[113] See D. Paciocco, "Techniques for Eviscerating the Concept of Relevance: A Reply and Rejoinder to 'Sex with the Accused on Other Occasions': The Evisceration of Rape Shield Protection" (1995), 33 C.R. (4th) 365 at 379 (cautioning against the declaration of myth as a justification for excluding evidence).

[114] For other examples see s. 33.1 of the *Criminal Code*, enacted by Bill C-72, *An Act to amend the Criminal Code (Self-induced intoxication)*, 1st Sess., 35th Parl., 1995 (assented to 13 July 1995, S.C. 1995, c. 32), following *R.* v. *Daviault*, [1994] 3 S.C.R. 63; ss. 326-28 of the *Canada Elections Act*, enacted by Bill C-2, *An Act respecting the election of members to the House of Commons*, 2d Sess., 36th Parl., 1999 (assented to 31 May 2000, S.C. 2000, c. 9), introducing a modification of the opinion poll blackout invalidated in *Thomson Newspapers* v. *Canada*, [1998] 1 S.C.R. 877. But see Bill 5, *An Act to amend certain statutes because of the Supreme Court of Canada decision in M. v. H.*, 1st Sess., 37th Parl., Ontario, 1999 (assented to 28 October 1999, S.O. 1999, c. 6) (reluctantly amending a host of statutes to comply with the Supreme Court of Canada's decision in *M.* v. *H.*, [1999] 2 S.C.R. 3).

malleable. By upsetting the *Charter*'s principle of hierarchy — that constitutional rights are supreme, unless and until s. 33 is invoked — *Mills* will have a de-stabilizing effect on precedent and the protection of rights.

On the substantive side, the Court's interpretation of s. 7 is problematic for two reasons, in the main. First, by reading privacy and equality into s. 7 to cut down the scope of fundamental justice, the Court in *Mills* compromised s. 7's status as an equal of the *Charter*'s other rights. As a result, s. 7 is not equal, but less than equal. Second, the lack of constancy in the jurisprudence has made it all but impossible to identify the principles and rationales underlying s. 7. Far from providing clarification, *Mills* demonstrates that the Court's concept of fundamental justice is as shifting and as unpredictable as ever.