2017 ONSC 889
Ontario Superior Court of Justice

R. v. Armstrong

2017 CarswellOnt 1377, 2017 ONSC 889, 136 W.C.B. (2d) 255, 375 C.R.R. (2d) 197

# R v. Stacy Gordon Armstrong

E.M. Morgan J.

Heard: December 1, 2016
Judgment: February 6, 2017
Docket: CR-15-10000290

Counsel: Carlos Rippell, for Defendant / Applicant
Erin Winocur, for Crown / Respondent
Marshall Swadron, for Intervener, CB

Subject: Constitutional; Criminal; Human Rights
**Related Abridgment Classifications**
Criminal law
IV Charter of Rights and Freedoms
IV.12 Life, liberty and security of person [s. 7]
IV.12.b Right to make full answer and defence
Criminal law
IV Charter of Rights and Freedoms
IV.19 Presumption of innocence [s. 11(d)]
IV.19.a Right to fair trial
Criminal law
XXX Disclosure
XXX.3 Third party disclosure [O'Connor]
**Headnote**
Criminal law --- Charter of Rights and Freedoms — Life, liberty and security of person [s. 7] — Right to make full answer and defence
Male accused was charged with sexual assault against female complainant, and complainant's boyfriend ("boyfriend") was potential Crown witness — Accused contended that boyfriend was complainant's pimp, that he had beaten her in past, and that this reflected on his credibility as witness — Accused sought disclosure of police occurrence reports related to boyfriend to provide evidence of his violent relationship with complainant ("subject records") — Under ss. 278.3(5) and 278.4(2) of Criminal Code ("impugned provisions"), accused was required to notify boyfriend of defence application to obtain subject records — Accused took position that impugned provisions undermined his ability to cross-examine boyfriend and thereby violated his rights under ss. 7 and 11(d) of Canadian Charter of Rights and Freedoms ("Charter") — Accused brought application for declaration that impugned provisions were of no force and effect — Application dismissed — M decision by Supreme Court of Canada in 1999 upheld constitutionality of Criminal Code regime for disclosing third party records ("M regime") — Fact that Q decision by Supreme Court of Canada in 2014 held that police occurrence reports about non-complainant witnesses are included in M regime did not require constitutionality of regime to be reconsidered — To contrary, this was very issue decided in Q decision, and same argument put by accused in application at bar was put by defence in Q decision — Q decision was explicit that subjects of police occurrence reports will often be persons investigated for crimes, including crimes of violence.
Criminal law --- Charter of Rights and Freedoms — Presumption of innocence [s. 11(d)] — Right to fair trial

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Criminal law --- Pre-trial procedure — Disclosure of evidence — Disclosure — Compelling production

Third party records — Male accused was charged with sexual assault against female complainant, and complainant's boyfriend ("boyfriend") was potential Crown witness — Accused contended that boyfriend was complainant's pimp, that he had beaten her in past, and that this reflected on his credibility as witness — Accused sought disclosure of police occurrence reports related to boyfriend to provide evidence of his violent relationship with complainant ("subject records") — Under ss. 278.3(5) and 278.4(2) of Criminal Code ("impugned provisions"), accused was required to notify boyfriend of defence application to obtain subject records — Accused took position that impugned provisions undermined his ability to cross-examine boyfriend and thereby violated his rights under ss. 7 and 11(d) of Canadian Charter of Rights and Freedoms ("Charter") — Accused brought application for declaration that impugned provisions were of no force and effect — Application dismissed — M decision by Supreme Court of Canada in 1999 upheld constitutionality of Criminal Code regime for disclosing third party records ("M regime") — Fact that Q decision by Supreme Court of Canada in 2014 held that police occurrence reports about non-complainant witnesses are included in M regime did not require constitutionality of regime to be reconsidered — To contrary, this was very issue decided in Q decision, and same argument put by accused in application at bar was put by defence in Q decision — Q decision was explicit that subjects of police occurrence reports will often be persons investigated for crimes, including crimes of violence.

**Table of Authorities**

**Cases considered by *E.M. Morgan J.*:**

*Bedford v. Canada (Attorney General)* (2013), 2013 SCC 72, 2013 CarswellOnt 17681, 2013 CarswellOnt 17682, 303 C.C.C. (3d) 146, 366 D.L.R. (4th) 237, 7 C.R. (7th) 1, 312 O.A.C. 53, 452 N.R. 1, (sub nom. *Canada (Attorney General) v. Bedford)* [2013] 3 S.C.R. 1101, (sub nom. *Canada (Attorney General) v. Bedford)* 297 C.R.R. (2d) 334, 128 O.R. (3d) 385 (note) (S.C.C.) — referred to

*R. v. Armstrong* (2016), 2016 ONSC 1657, 2016 CarswellOnt 3826 (Ont. S.C.J.) — referred to

*R. v. Duncan* (2013), 2013 ONSC 8044, 2013 CarswellOnt 19069 (Ont. S.C.J.) — considered

*R. v. Find* (2001), 2001 SCC 32, 2001 CarswellOnt 1702, 2001 CarswellOnt 1703, 42 C.R. (5th) 1, 154 C.C.C. (3d) 97, 199 D.L.R. (4th) 193, 269 N.R. 149, 146 O.A.C. 236, [2001] 1 S.C.R. 863, 82 C.R.R. (2d) 247 (S.C.C.) — considered

*R. v. Mills* (1999), 1999 CarswellAlta 1055, 1999 CarswellAlta 1056, 139 C.C.C. (3d) 321, 248 N.R. 101, 28 C.R. (5th) 207, 180 D.L.R. (4th) 1, [2000] 2 W.W.R. 180, 244 A.R. 201, 209 W.A.C. 201, 75 Alta. L.R. (3d) 1, 69 C.R.R. (2d) 1, [1999] 3 S.C.R. 668 (S.C.C.) — followed

*R. v. O'Connor* (1995), [1996] 2 W.W.R. 153, [1995] 4 S.C.R. 411, 44 C.R. (4th) 1, 103 C.C.C. (3d) 1, 130 D.L.R. (4th) 235, 191 N.R. 1, 68 B.C.A.C. 1, 112 W.A.C. 1, 33 C.R.R. (2d) 1, 1995 CarswellBC 1098, 1995 CarswellBC 1151 (S.C.C.) — considered

*R. v. Quesnelle* (2014), 2014 SCC 46, 2014 CSC 46, 2014 CarswellOnt 9195, 2014 CarswellOnt 9196, 11 C.R. (7th) 221, 460 N.R. 27, 320 O.A.C. 38, 375 D.L.R. (4th) 71, 312 C.C.C. (3d) 187, [2014] 2 S.C.R. 390, 314 C.R.R. (2d) 283, 129 O.R. (3d) 640 (note) (S.C.C.) — considered

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*R. v. Thompson* (2009), 2009 ONCA 243, 2009 CarswellOnt 1379, 247 O.A.C. 196, 243 C.C.C. (3d) 331, 95 O.R. (3d) 469 (Ont. C.A.) — referred to

**Statutes considered:**

*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

Generally — referred to

s. 1 — considered

s. 7 — considered

s. 11(d) — considered

*Criminal Code*, R.S.C. 1985, c. C-46

Generally — referred to

ss. 278.1-278.91 [en. 1997, c. 30, s. 1] — referred to

s. 278.2 [en. 1997, c. 30, s. 1] — considered

s. 278.3 [en. 1997, c. 30, s. 1] — considered

s. 278.3(3)(a) [en. 1997, c. 30, s. 1] — considered

s. 278.3(3)(b) [en. 1997, c. 30, s. 1] — considered

s. 278.3(5) [en. 1997, c. 30, s. 1] — considered

s. 278.4(2) [en. 1997, c. 30, s. 1] — considered

APPLICATION by accused for declaration that third party record requirements in ss. 278.3(5) and 278.4(2) of *Criminal Code* were unconstitutional.

***E.M. Morgan J.*:**

1 The Defendant is charged with sexual assault. He would like production of certain records pertaining to a Crown witness in the upcoming trial, but has not brought the required application under section 278.2 of the *Criminal Code*. He submits that subsections 278.3(5) and 278.4(2) of the *Criminal Code*, which require that he notify the witness of the application and which permit the witness to appear, make submissions, and otherwise participate in the hearing of the application, are unconstitutional.

2 Defense counsel's concern is that section 278.3(3)(a) and (b) of the *Criminal Code* compel an accused person to give notice of the particulars of those records and the grounds on which he relies to establish that they are likely relevant to an issue at trial. Counsel submits that providing such notice to the witness could, in effect, undermine the eventual cross-examination of the witness by alerting him in advance to contentious areas to be covered in the cross-examination.

3 Defense counsel goes on to contend that undermining cross-examination in this way deprives the Defendant of the ability to make full answer and defense and creates an unfair trial. He argues that this procedural requirement is therefore contrary to the Defendant's rights under sections 7 and 11(d) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"), and that it cannot be justified under section 1. The defense seeks an order declaring the impugned provisions to be of no force and effect to the extent that they compel the Defendant to furnish the witness with the application record and permit the witness to participate in the hearing of the application for production of third party records.

4 The witness in question is not the Complainant. Rather, it is the Complainant's boyfriend at the time of the incident who may be called to give evidence of what occurred in the immediate aftermath of the alleged sexual assault. The

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Complainant was at the time a sex trade worker, living out of a downtown hotel. Her boyfriend was a desk clerk at the same hotel, and may be called to testify that he gave chase after the Defendant immediately following the Complainant identifying the Defendant to him.

5 It is defense counsel's contention that the Complainant's boyfriend was, effectively, her "pimp", and that he has beaten her in the past and forced her to prostitute herself. The Defendant seeks disclosure of one or more police occurrence reports that he surmises will provide evidence of the violent relationship between the Complainant and her boyfriend and that will reflect on the boyfriend's credibility as a witness.

6 This is the Defendant's second application for third party records, the first having been brought with respect to the Complainant's medical records and materials from a prior sexual assault case involving the same Complainant. That application was dismissed almost in its entirety by Goldstein J., who ordered only that the Crown disclose the date and location of the previous trial. The facts alleged against the Defendant are more thoroughly set out by Goldstein J. in his reasons for decision: see *R. v. Armstrong*, 2016 ONSC 1657, at paras 1-5.

7 The Crown's response to the present constitutional challenge is rather straightforward. Crown counsel submits that this question has already been asked, and answered, by the Supreme Court of Canada.

8 The constitutionality of the entire *Criminal Code* regime with respect to third party records was considered by the Supreme Court in *R. v. Mills*, [1999] 3 S.C.R. 668 (S.C.C.). McLaughlin and Iacobucci JJ., on behalf of the majority, reasoned that although sections 278.1 through 278.91 do impact on the right to make full answer and defence, this impact must be weighed against the constitutionally protected right of privacy in personal information records, and that neither of these rights is "absolute or capable of trumping the other; all must be defined in light of competing claims": *Mills*, at para 61. They viewed the balance struck by the third party records disclosure provisions of the *Criminal Code* as constitutionally permissible.

9 Accordingly, at para 146 of *Mills*, the Supreme Court disposed of the constitutional questions addressed therein as follows:

> 1. Do ss. 278.1 to 278.91 of the *Criminal Code*, R.S.C., 1985, c. C-46, infringe s. 7 of the *Canadian Charter of Rights and Freedoms*?
>
> Answer: No.
>
> 2. If so, is the infringement demonstrably justified in a free and democratic society?
>
> Answer: Given the answer to question 1, it is not necessary to answer this question.
>
> 3. Do ss. 278.1 to 278.91 of the *Criminal Code*, R.S.C., 1985, c. C-46, infringe s. 11 (*d*) of the *Canadian Charter of Rights and Freedoms*?
>
> Answer: No.
>
> 4. If so, is the infringement demonstrably justified in a free and democratic society?
>
> Answer: Given the answer to question 3, it is not necessary to answer this question

10 Counsel for the Crown submits that this series of questions and answers by the Supreme Court of Canada provides a complete answer to the present application. It is difficult to come to any other conclusion. The Supreme Court was explicit in delineating precisely which sections of the *Criminal Code* it was considering, and pronounced unambiguously that those sections pass constitutional muster.

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11 The present Application asks the court to consider the constitutionality of subsections 278.3(5) and 278.4(2) of the *Criminal Code* — that is, the provisions which require notice to, and allow the participation of, the person whose personal information is sought. The *Mills* judgment considered the constitutionality of subsections 278.1 to 278.91 of the *Criminal Code* — that is, the provisions that cover the entire Third Party record disclosure process. The former subsections are obviously a subset of the latter.

12 Counsel for the Defendant submits that the fundamental unfairness, and therefore the unconstitutional aspect of the *Mills* regime, has arisen in the wake of the Supreme Court of Canada's more recent judgment in *R. v. Quesnelle*, [2014] 2 S.C.R. 390 (S.C.C.). There, Karakatsanis J., on behalf of a unanimous Court, stated, at para 2: "I conclude that the *Mills* regime [defined as ss. 278.1 to 278.91 of the *Criminal Code*] applies to police occurrence reports that are not directly related to the charges against the accused."

13 It is defense counsel's view that this overly broad definition of personal records — i.e. one that includes police occurrence reports other than those which form part of the investigation before the court — aggravates the encroachment on the right to make full answer and defense that was already acknowledged as being present in *Mills*. The defense submits that this increased infringement on the Defendant's *Charter* rights changes the balance struck in *Mills*, making the impugned provisions unconstitutional when applied to extrinsic misconduct such as the police occurrence reports sought here. Defense counsel characterizes this as a case where the legislative provisions, which are necessary in some contexts, suffer from a "failure of instrumental rationality" in that they are "inadequately connected to [their] objective or in some sense goes too far in seeking to attain it": *Bedford v. Canada (Attorney General)*, [2013] 3 S.C.R. 1101 (S.C.C.), at para 107.

14 It may well be that extrinsic police occurrence reports about a witness other than the Complainant raise considerations that are distinct from those raised by a complainant's personal information, which is what was at issue in *Mills*. And it is true that not until the Supreme Court of Canada's ruling in *Quesnelle* was it definitively resolved that extrinsic police occurrence reports regarding a witness fall within the *Mills* regime. But that does not mean that the balance struck by sections 278.1 to 278.91 of the *Criminal Code* must be reconsidered in light of the *Quesnelle* extension of the definition of "records" to include those police occurrence reports.

15 To the contrary, that is the very issue decided in *Quesnelle*. The same argument put by the Defendant here was put by the defense, supported by the Criminal Lawyers' Association, in *Quesnelle*. Karakatsanis J., at paras 62-62, 67, considered the question of extrinsic police occurrence reports to be covered by *Mills* and to fit squarely within the process set out in sections 278.1 to 278.91 (which, again, includes subsections 278.3(5) and 278.4(2) at issue here):

> The respondent and the intervener the Criminal Lawyers' Association of Ontario raise concerns about the effect of an expansive interpretation of 'records' in s. 278.1 on trial fairness. A broad interpretation of 'records' means that the *Mills* regime applies to a larger number of documents. While this furthers Parliament's objective of protecting the privacy of complainants and witnesses, it may also impose procedural burdens on defendants and create the risk that some helpful documents would not be available to the defence. However, largely for the reasons set out in *Mills*, I do not think these concerns require a narrower reading of s. 278.1.
>
> Documents protected by the *Mills* regime are not inaccessible to the defence. Defendants can access records when the privacy infringement is proportionate, given the relevance of the record to the defence...
>
> The trial judge was right to require a *Mills* application before disclosing them to the defence...

16 The Defendant does not agree that under the circumstances the *Criminal Code* provisions strike an appropriate balance between the right to a fair trial and the right to privacy. As defense counsel puts it in his factum, "It is hard to fathom how any legitimate societal goal or enhancement of the court's truth-seeking function is advanced by legislation that allows someone who may reasonably be called a pimp to be forewarned about the evidence that will be used to attack his credibility."

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17 But, of course, disreputable people called as witnesses have the same procedural rights as reputable people called as witnesses, in the sense that both get to have their privacy rights determined by a court in accordance with the *Mills* regime. *Quesnelle* was explicit that police occurrence reports about witnesses other than a complainant — who will often be persons themselves investigated for crimes, including crimes of violence, extrinsic to the one at issue in the trial — must follow the procedure set out in sections 278.1 to 278.91 of the *Criminal Code*. That is the constitutionally valid process.

18 It would seem that this resolution of the conflict of rights is not ideal from the defense point of view. That is because a balancing of rights, by definition, is not ideal from the point of view of one side of the scale. As McLaughlin CJC put it in *R. v. Find*, [2001] 1 S.C.R. 863 (S.C.C.), at para 28:

> A fair trial, however, should not be confused with a perfect trial, or the most advantageous trial possible from the accused's perspective. As I stated in *R v O'Connor* [1995] 4 SCR 411, at para 193, '[w]hat constitutes a fair trial takes into account not only the perspective of the accused, but the practical limits of the system of justice and the lawful interests of others involved in the process...'

19 The Supreme Court held in *R. v. O'Connor* [1995 CarswellBC 1098 (S.C.C.)], at para 134, that in order to obtain access to a person's personal information records — which *Quesnelle* defined as including police occurrence reports such as those sought by the Defendant here — an accused person must bring a court application supported by affidavit evidence showing that the records are likely to be relevant, and that this must be done on notice to the Crown as well as to the subject of the records and to any other person with an interest in the confidentiality of the records. The Court followed up the notice requirement in *O'Connor*, at para 134, by setting out the consequences of not following this procedure: "Failure to give notice to all interested parties will be fatal to the application."

20 Section 278.3 of the *Criminal Code* requires that the notice set out: (a) particulars identifying the record and the name of the person in possession or control of it; and (b) the grounds for establishing that the record is likely relevant to an issue at trial or to the competence of a witness. No descriptions of evidence need be provided, thereby permitting an applicant to explain the relevance of the records without having to quote directly from, or to reference specific passages from, the preliminary inquiry, police statements, etc.

21 It is even possible, in certain cases where there is a concern that a particular piece of information could compromise the witness' evidence to the point of undermining a fair trial, for defense counsel to rely on submissions alone and to outline the grounds of relevance without any reference to the piece of evidence: *R. v. Thompson*, [2009] O.J. No. 1109 (Ont. C.A.), at paras 12-16. That said, it is unclear that this is necessary here. Defense counsel's primary concern seems to be that putting the Complainant's boyfriend (or any other witness) on notice of the application for personal records may reveal anticipated areas of cross-examination such as the nature of their relationship with the Complainant.

22 As counsel for the Crown points out, that is information that the witness is likely to know in any event, and which the Crown is entitled to review with the witness. Ducharme J. explained in *R. v. Duncan*, 2013 ONSC 8044 (Ont. S.C.J.), at para 53, that, "Any competent counsel will prepare their witness and preparation includes reviewing potential areas of cross-examination."

23 The process by which the Defendant can get access to the police occurrence reports that he seeks has been addressed by the Supreme Court in *Quesnelle*. Police records which do not form part of the charge before the court fall within the rubric of third party records subject to the *Mills* regime, as specifically enumerated in sections 278.1 to 278.91 (which, once again, include subsections 278.3(5) and 278.4(2) of the *Criminal Code*).

24 As held in *Mills*, these sections strike an appropriate balance between the right to a fair trial and the right to privacy, and do not violate sections 7 or 11(d) of the *Charter*. Having found that the challenged sections are not contrary to the Defendant's *Charter* rights, it is not necessary to consider whether any infringement is justifiable under section 1.

25 The Application is dismissed.

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*Application dismissed.*

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