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New *Criminal Code* Procedure for

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It can be somewhat disconcerting when a teacher, principal or school board administrator is served with a subpoena to appear as a witness at a legal proceeding and to produce student records. Often the intent is not to obtain the testimony of the witness, but to obtain access to the student records. The discussion below addresses the step-by-step procedure applicable when a subpoena is served by an accused defending criminal charges for sexual assault.

Before *Mills*

Accused persons defending charges of sexual assault and related offences sometimes seek to review confidential records, including student records, pertaining to the complainant or witnesses. The production of confidential records is controversial as it pits the right of the accused to make a full defence against the rights of privacy of complainants and witnesses.

In a 1995 decision, *R. v. O'Connor,* [1995] 4 S.C.R. 411 (SCC), the Supreme Court of Canada ("SCC") set out a procedure that became known as an "O'Connor application", establishing a process by which trial courts in Canada were to determine whether a confidential record should be produced in the circumstances of a particular case.

In 1997, Parliament amended *the Criminal Code*, replacing the O'Connor application with a new procedure (ss. 278.1 to 278.91). The new procedure makes it more difficult for defendants to obtain confidential records, giving much less weight to the accused's right to make a full defence than the SCC had in *O'Connor.*

The constitutionality of the new procedure was challenged within a few weeks of the amendments being proclaimed into force. The November 1999 SCC decision in *R. v. Mills* (1999), 180 D.L.R. (4th) 1 (SCC) upheld the constitutionality of the new procedure set out in the *Criminal Code.*

After *Mills:* Application of the *Criminal Code* to Student Records held by School Boards

1. The new *Criminal Code* procedure applies only to sexual assault and related proceedings where production is sought of a record in which "there is a reasonable expectation of privacy". "Education" records are deemed to be records in which there is a reasonable expectation of privacy (ss. 278.1, 278.2).

Production of Student Records in Sexual Assault Cases

2. The new procedure also applies to "any records containing personal information the production or disclosure of which is protected" by any other provincial or federal legislation (s. 278.1). The personal information found in student records is protected by section 266 of the *Education Act.*

3. An accused in sexual assault or related proceedings wishing to obtain the production of student records must serve the person having "possession or control" of the student records, with:

   1) a written application to the trial Judge for production of the student records (ss. 278.3(1)-(3),(5)); and,

   2) a subpoena (s. 278.3(5)).

   Both documents must be served at the same time and at least 7 days before the matter is to be heard by the trial Judge, unless the Judge orders otherwise. The application must also be served on the Crown, the student whose records are sought, and any other person to whom the record relates if that is known to the accused (s. 278.3(5)).

4. At the hearing, the Judge will determine whether he or she should review the student records. Both the school board and the student may make submissions as to whether the student records should be produced for review by the Judge. No members of the public are permitted to attend this hearing (s. 278.4).

   The Court must be persuaded by the accused that the records are "likely relevant to an issue at trial or to the competence of a witness to testify" and that the production of the record to the Judge "is necessary in the interests of justice", all without either the accused or the court being able to see the records at issue. The Judge must consider certain criteria, for example, whether production of the record is based on a discriminatory belief or bias (s. 278.5).

   Furthermore, eleven "assertions" relating to the general nature of confidential records are specifically prohibited from being sufficient to establishing relevance. For example, an accused cannot simply assert that student records relate to medical or psychiatric treatment (s. 278.3(4)).

5. If the Judge orders it, the school board must provide the student records to the Judge. The Judge must then determine if, in accordance with the criteria set out above, the student records should be produced to the accused. If the student records are to be produced to the accused, the Judge may impose conditions, such as requiring certain information to be deleted (ss. 278.6, 278.7).

6. If the Judge refuses to order production of the student records, the student records must be kept by the Court in a sealed package, unless the Judge rules otherwise. The student records will be returned when any appeal is completed or the time for an appeal has expired (s.278.7(6)).

Looking to the Future

Since *Mills*, it has been observed that the primary emphasis has moved away from the right of the accused toward a balance between the rights of the accused to make a full defence and the equality and privacy rights of the student whose records are at issue.[1] What happens in the future will depend on whether, in the year 2000, the pendulum has finished its swing or has only just begun.

At minimum, it can be safely predicted that the production of confidential records, including student records, in the context of sexual assault charges will continue to be a matter of controversy. It is a certainty that school boards must continue to be vigilant in ensuring that student records are only produced in accordance with the requirements of the *Criminal Code* and the *Education Act.*

1. See *R. v. Shearing,* [2000] B.C.J. No. 235 (B.C. C.A.), at para. 93 and commentary in *R. v. Murray,* [2000] O.J. No. 1367 (Ont. S.C.J.), at para. 13.

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