PART I – STATEMENT OF THE CASE

1. These Applications are fundamentally about the privacy rights and protections guaranteed to young people who have been dealt with under the *Youth Criminal Justice Act* S.C. 2001, c.1("*YCJA*"), and about the long term protection of society.

2. The *YCJA* protects the privacy of young people in 3 essential ways: (a) by restricting access to records; (b) by prohibiting disclosure of records and information in records that could identify a young person; and (c) by prohibiting the publication of any information that could serve to identify a young person. It is primarily the first issue that is the essence of these Applications.

   YCJA, Part 6, esp. ss. 118, 119, 129, 110 and 111.

3. These Applications specifically raise questions about the limitations on media **access** to youth records. The question of access to records must be addressed separately from any question about what can be published, and the limitations on publication of identifying information in the youth justice context.

4. This is not a case where a party is seeking to restrict media access to an open court. This is a YCJA proceeding where the Applicant was present in court for the proceedings, and thus has had access to proceedings involving the young people. Rather, the Applicant here seeks further access to specially protected records that are presumed to be inaccessible to the public.

5. From the perspective of young people, courts must vigorously limit access to, disclosure of, and publication of youth court records in accordance with the letter and principles of the *YCJA*.

6. Society's underlying and paramount interest in these Applications, and similar applications, is the successful rehabilitation and reintegration back into society of

young people who have come into conflict with the law. In accordance with well established social science research, courts play a central role in this process by protecting and promoting the privacy rights and interests of young people. Doing so is required by the *YCJA*. In protecting young people's privacy, rehabilitation is fostered. Successful rehabilitation makes society safer, thereby promoting the long term protection of society.

Testimony of Dr. A Leschied, schedule C

7. Section 118 and 119(s)(ii) of the *YCJA* requires the Court to be the gatekeeper of public access to youth records, whether for private or public use.

8. While public access to open courts is fundamental to the rule of law, the *YCJA* specifically limits these important principles in the context of youth records in favour of the protection of young people's privacy rights, their rehabilitation, and the long term protection of society.

9. A secondary issue has arisen in the course of hearing these Applications: the process by which the young people whose interests are at stake are informed of applications made to the court, and the legal representation of the young people whose youth court records are sought.

PART II – SUMMARY OF THE FACTS

10. The Applicant's factum provides a summary of facts in paragraphs 7 to 11 of their factum. Justice for Children and Youth ("JFCY") takes no issue with those facts, except with respect to paragraph 9 where reference is made to paragraph 6 of each of Mr. Bruser's Affidavits, as paragraph 6 was struck from those Affidavits by the Court on 6 October, 2011.

Applications

11. A *Toronto Star* reporter brought a number of Applications before the Ontario Court of Justice at 311 Jarvis Street, Toronto, seeking the production of a variety of youth court records.

12. Four of these Applications, related to cases involving four different young people, J.G., E.I., A.D, and D.G. and were to be heard by Madame Justice Cohen on 31 August 2011. The Applicant seeks access to three different kinds of records: (a) photographs of real evidence in each case; (b) a copy of a victim impact statement in the case of J.G.; and (c) a copy of the pre-sentence report in the case of E.I. and A.D.

13. J.G. and E.I. attended court during the hearing of these Applications.

Service

14. Proper service was not affected by the Applicant, although he made efforts to either serve or to ensure notification to the young people. At least some of the Applications were served on lawyers who had represented individual young people on their substantive matters under the *YCJA*. Efforts were made by the Applicant, previously retained counsel, provincial and federal Crown Attorneys, and others to try and ensure that each of the young people were made aware of the proceedings.

No Counsel

15. None of the young people were able to retain counsel privately, and legal aid was not made available to fund representation for the young people whose records are being sought. The individual young people remained unrepresented throughout the proceedings.

Amicus Curiae

16. JFCY was appointed by the Court to act as *Amicus Curiae*, and not as legal representative to any individual young person. At court on 31 August 2011, while in the court room, counsel from JFCY was able to review the records sought in this Application.

All records under *YCJA*

17. All parties agree that all of the records sought in these Applications are records as defined by section 114 of the *YCJA*; all are being sought within the access periods described by s. 119(2); and all of the records sought can only be accessed by way of a successful application to the youth court under s. 119(1)(s)(ii) of the *YCJA*.

Affidavit and Testimonial evidence

18. There were a number of affidavits filed with this Court, and a number of people gave oral evidence. As far as we are aware there are no transcripts of this evidence. We have attached as “Schedule C” our statement of the oral evidence.

PART III – ISSUES AND THE LAW

Relevant sections of the *YCJA*

19. There are a number of sections of the *YCJA* that address the privacy interests of young people. The preamble, ss. 2 and 3, and Part 6 of the *YCJA* all make specific reference to privacy protections. In particular, Part 6 (sections 110 to 129 of the *YCJA*) provides a detailed scheme that addresses the nature, maintenance, access, disclosure, and publication of youth records.

20. The sections of the *YCJA* most directly engaged by the Applications for access to records before this Court are ss. 118 and 119(1)(s)(ii).

21. We have attached as "Schedule B" the provisions of the *YCJA* most relevant to the Applications before this Court.

Youth justice is unique, *YCJA* provides a comprehensive regime regarding privacy and publication

22. The *YCJA* is a comprehensive statutory code that creates a unique and separate youth justice system. The primary goal of the *YCJA* is the long-term protection of the public through the rehabilitation of young people.

23. The *YCJA*'s declaration of principle, s. 3(1)(a) and (b), emphasizes rehabilitation, recognizes the unique vulnerability and reduced level of maturity of young people, and specifically enumerates the enhanced protection of privacy as cornerstones of the youth criminal justice system.

24. The Supreme Court of Canada has recognized the existence and significance of a separate criminal justice system for young people.

    R. v. R.C., [2005] 3 S.C.R. 99, 2005 SCC 61, para 41, ("R.C.")

    R. v. D.B., [2008] 2 S.C.R. 3, 2008 SCC 25, para 41, ("D.B.")

25. In *D.B.* the SCC found that it is a principle of fundamental justice under s. 7 of the *Charter*, that young people are entitled to a presumption of diminished moral blameworthiness.

    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, s. 7, ("*Charter*")

    D.B., supra, paras. 41 and 69

26. A separate youth justice system, with enhanced procedural protections and recognition of the unique place of young people in society, fulfills Canada's international law obligations as signatories to the *United Nations Convention on the Rights of the Child* ("*Convention"*), and the *UN Standard Minimum Rules for the Administration of Juvenile Justice* ("*Beijing Rules"*).

    U.N., *Convention on the Rights of the Child*, Can. T.S. 1992 No.3.

    U.N., G.A.. *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*, A/RES/40/33, November 29,1985.

27. The *Convention* and the *Beijing Rules* both require that youth justice systems specially protect privacy. The *Convention* requires "special safeguards and care, including legal protection" be afforded to young people "by reason of their physical and mental immaturity". And in the criminal justice context, the *Convention* requires States parties to take into account the "…desirability of promoting the child's reintegration…", and requires that States parties shall in particular ensure that young people's "privacy is fully respected at all stages of the proceedings".

    Convention, Preamble, Article 40, clause 1 and clause 2(b)(vii)

28. The *Beijing Rules* provide at Rule 8, “Protection of Privacy”, that:

    i. the juvenile’s right to privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labelling …
    In principle, no information that may lead to the identification of a juvenile offender shall be published.

29. The *YCJA* expressly incorporates the *Convention*, codifying Canada’s international law obligations to a separate youth justice system.

    YCJA, *supra*, Preamble

Enhanced Privacy Protections Promote Public Safety

30. The rehabilitation of young people is an important social value as it ensures the long term protection of the public. Rehabilitation is achieved by not labeling, avoiding stigmatization and secondary deviance, and by respecting and accommodating the heightened vulnerability, reduced level of maturity and lesser moral blameworthiness of young people. Enhanced procedural protections, including enhanced privacy protections, are tools by which the public is protected.

    YCJA, *supra*, Premable, ss. 3 and 38
    Report and Testimony of Dr. A. Leschied, schedule C
    R. v. D.B., supra, paras 83-87, and also 159

31. The *YCJA* provides for enhanced privacy protection for young people in three ways, by (a) limiting who can access records; (b) by prohibiting disclosure of records and identifying information contained therein; and (c) by prohibiting publication of identifying information.

Protecting privacy by limiting who can access records

32. The *YCJA* protects the privacy of young people by strictly limiting who can have access to youth records, and limiting the periods of time that records will be kept. This is most clearly set out in ss. 118 and 119.

33. Section 118(1) begins with a presumption that "except as authorized or required by this Act, **no person shall be given access to a reco**rd kept under sections 114 to 116…". [emphasis added]

34. Section 119(1) enumerates an exhaustive list of people or classes of people who can access records. Section 119(1)(s) leaves room for a researcher or an unenumerated person (or class) to seek court approval for access.

35. These privacy protections are unrelated to the question of publication (which would make information known to the general public), and may be seen to be personally oriented. The limitation on access to records is to protect young persons in a personal way. Information about young people is to be protected from access by individuals, or classes of individuals. It is to keep strangers from their lives from being able to read about young people's sensitive and personal information. Protection of their privacy fosters respect for dignity, personal integrity, and autonomy of the young person.

Protecting privacy and protecting identity by prohibiting disclosure of records and identifying information

36. The *YCJA* prohibits disclosure of any information contained in youth records that would identify a young person as having been dealt with under the *YCJA*. The prohibitions on disclosure are found in many sections, including a blanket prohibition in s. 129.

Protecting privacy by prohibiting publication of identifying information

37. Sections 110 and 111 prohibit publication of any information that would identify a young person as having been dealt with or having been a victim or a witness under the *YCJA*.

38. Prohibitions on publication may be seen as publicly oriented. Young people's identities are not to be made publicly known, by individuals or by the media.

39. These Applications are specifically about the limiting who can **access** records. JFCY submits that is it crucial to the disposition of the Applications before the Court that the *YCJA* limitations on access to records be addressed separately from the *YCJA* prohibition on the publication of identifying information.

40. Unlike the Applicant's submissions, which to date focus largely on publication, the issue of access to records is an important issue to address on its own, regardless of the follow up issue of publication. The young people in these Applications care about who has access to their private information in addition to what of that information will ultimately be published. The *YCJA* specifically keeps these issues distinct as should this Honourable Court.

Separate and unique youth justice system recognized by SCC and OCA

41. The unique qualities, the legislated separateness of the youth criminal justice system, and the significance of the special protections therein, particularly special privacy protections, have been well recognized by courts, including the Supreme Court of Canada.

42. The Supreme Court of Canada has made clear that there is a separate youth criminal justice system because of the heightened vulnerability, lower maturity

and reduced capacity for moral judgement of young people, with enhanced procedural protections including privacy.

R.C., supra, para 41

D.B., supra, para 41

43. In *D.B.* the Court found that the principle of diminished culpability of young people, as recognized by the *YCJA*, falls within the scope of fundamental justice within the meaning of s.7 of the *Charter*.

D.B., *supra*, paras 41 and 69

44. In *D.B.* the Court expressly discussed why the special protection of young people's privacy interests is so crucial to rehabilitation and the protection of the public:

> …the young person's 'enhanced procedural protection …<u>including their right to privacy</u>', is stipulated to be a principle to be emphasized in the application of the Act. Scholars agree that '[p]ublication increases a youth's self-perception as an offender, disrupts the family's abilities to provide support, and negatively affects interaction with peers, teachers, and the surrounding community' (Nicholas Bala, *Young Offenders Law* (1997), at p. 215). … [emphasis original].

Ibid., para 84

45. The Ontario Court of Appeal has found (in the context of DNA orders where there was no distinction between young people and adults) that young people are to be treated differently than adults because of differences in vulnerability, maturity, experience and other factors related to their youth.

R. v. K.B., [2003] O.J. No. 3553, 67 O.R. (3d) 391, para 8

46. These cases recognize Parliament's clear choice, through the *YCJA*, to prefer the rehabilitation of young people and the resulting long term protection of society over unfettered access to youth records. While maintaining a court entirely open to the public, (to which the Applicant had access in these cases) the *YCJA* specifically and properly treats young people and their privacy rights

differently than adults. As set out below, the Applicant's argument fails to adequately address this fundamental contextual difference.

The *Dagenais / Mentuck* test is not the correct test for youth context

47. The Applicant cites the open court principle as the reason that access should be granted to the youth court records sought. He argues that the *Dagenais / Mentuck* test is the appropriate mechanism by which decisions to provide access to youth records should be made, because it should be seen to apply to any discretionary decision made by a judge limiting free expression.

    Dagenais v. Canadian Broadcasting Corp., [1994] 3 S.C.R. 835 ("*Dagenais*")

    R. v. Mentuck, 2001 SCC 76, [2001] 3 S.C.R. 442 ("*Mentuck*")

    CBC v. The Queen, 2011 SCC 3, [2011] 1 S.C.R. 65

    R. v. Canadian Broadcasting Corp., 2010 ONCA 726, 102 O.R. (3d) 673

48. With respect, the Applicant's argument is fundamentally flawed. It entirely ignores the legislative scheme regarding youth records as laid out in the *YCJA*, and misunderstands the unique and separate nature of the youth criminal justice system.

49. In analysing "the need for confidentiality" in the youth justice context, the Supreme Court of Canada in *F.N.(Re)*, specifically noted that the *Dagenais* discussion of non-publication is a "different context".

    F.N. (Re), [2000] 1 S.C.R. 880, 2000 SCC 35, para 14, ("*F.N.*")

50. The Applicant ignores the significance, principles and provisions of the *YCJA* in his approach to these Applications. He cites no judicial authority where consideration has been given to the access of court records in the youth justice

context.

51. The *YCJA* is Parliament's complete response to the question of open courts, access to, disclosure of, and publication of youth court records. The *YCJA* specifically provides enhanced protections of privacy for young people, which are not provided to adults. The Applicant's submissions, including the authorities on which he relies, do not attend to this critical difference.

52. This approach completely ignores the existence of the *YCJA*, and runs contrary to well established principles of statutory interpretation.

Statutory Interpretation – Statute can oust the common law

53. It is a well established principle of statutory interpretation that a statute can oust the common law, and that resort to a common law test, such as *Dagenais/ Mentuck*, is considered inappropriate when the legislation to be applied is broad and detailed enough to offer a comprehensive regulation of the matter.

    Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes – 4th ed.*, (Canada: Butterworths, December 2002) at p 350, ("*Sullivan & Driedger*")

54. Parliament will be seen to have intended to oust the common law especially where the statute, or part thereof, provides a comprehensive code. A comprehensive code can be identified when the legislation to be applied is broad and detailed enough to offer a comprehensive regulation of the legal issue in question. In this case the question of access to, disclosure of, and publication of youth records is regulated in a complete manner by the *YCJA*. Where, in a case such as this, the "adjudicative machinery" exists in the statute, resort to the common law test will be seen to be duplicative.[1]

[1] This was the approach adopted by L'Heureux-Dube J. in the case of *Gendron* v. *Supply & Services Union of the Public Service Alliance of Canada, Loc. 50057* at [1990] 1 S.C.R. 1298 at 1317 where the Court held that because the common law duty of fair representation had been incorporated into the *Canada Labour Code*, an employee could not bring an action against his union for breach of the common law duty of fair representation. The *Canada Labour Code* was held to be a comprehensive, exclusive code for this purpose.

Sullivan & Driedger, *Ibid.*, at 350

Gendron v. Supply & Services Union of the Public Service Alliance of Canada, Loc. 50057, [1990] 1 S.C.R. 1298, at 1317, [1990] SCJ No. 55

55. The ousting of the common law will be particularly clear where the language of the statute approximates the language the courts have used in the common law interpretation of the issue.

56. In this case the language in s 119(s)(ii) is a very close approximation of the language the courts have used in cases where the *Dagenais / Mentuk* test was applicable. As such, ss. 118 and 119 set out the proper approach to be followed in the youth justice context.

57. Furthermore, the Applicant's assertion that because the constitutional guarantee of freedom of the press as contained in section 2(b) of the *Charter* is implicated in this case, an importation of *Dagenais / Mentuck* into the *YCJA* is required, fundamentally misapprehends the relationship between the courts and the legislature generally.

58. While the Applicant is of course correct that if "legislation is amenable to two interpretations, a court should choose the interpretation that upholds the legislation as constitutional." (See, *Slaight Communications Inc. v. Davidson* (1983), 93 N.R. 183 (S.C.C.) at p. 1078.) The Applicant's assertion that an importation of *Dagenais / Mentuck* into the *YCJA* regime provides the only constitutional method to govern access, disclosure, and publication of youth records is incorrect.

59. As noted by a majority of the Supreme Court in the case of *R. v. Mills* at paras. 57 and 58:

> "If 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. Such a situation could only undermine rather than enhance

democracy. Legislative change and the development of the common law are different ….
Courts do not hold a monopoly on the protection and promotion of rights and freedoms; Parliament also plays a role in this regard and is often able to act as a significant ally for vulnerable groups." [emphasis added]

[1999] 3 S.C.R. 668, [1999] S.C.J. No. 68, ("*Mills*")

60. The proper question for this Court, as it was for the Supreme Court in *Mills* is whether Parliament has outlined a constitutionally acceptable procedure in the *YCJA* for dealing with access, disclosure, and publication of youth records. In our respectful submission, Parliament has done so and resort to the common law is not required in order to ensure compliance with the *Charter*.

61. Sections 14(1) and 67(9)(a) provide further support for Parliament's intention that the *YCJA* is to be paramount legal authority on youth justice matters. Both sections give primacy to the *YCJA* over other statutes in the context of youth justice matters, including the *Criminal Code*.

62. Support for the *YCJA* functioning as a complete code which by necessary implication ousts the common law can be found in *R. v. A.Y.D.* where the Applicant's argument was identical to these Applications:

> I am not convinced that the *Dagenais Mentuk* test applies to an application under the *YCJA* in the manner suggested by the Applicants. The *YCJA* enacts a distinct framework for dealing with proceedings involving young persons. This framework must be interpreted in light of the Declaration of Principle set out in s. 3, which expressly emphasizes the young person's right to privacy. Accordingly, the *Dagenais Mentuk* test must be considered in the unique context of youth criminal justice, taking into account the protections afforded to young persons.
>
> [2011] A.J. No. 103 (ABQB), at para 23

Onus properly rests with the Applicant

63. In treating these Applications as though they were publication bans sought by young people, the Applicant argues that the affected young people bear the onus and must provide convincing evidence to establish the prejudice that would result if access to records were provided. The Applicant essentially argues that there is a rebuttable presumption that media will have access to records.

64. The Applicant's argument is incorrect. In fact, it completely ignores the opposite approach mandated by Parliament in ss. 118 and 119 of the *YCJA*, and the Supreme Court of Canada's decisions in *F.N.*, *D.B.*, *R.C.*, and the Ontario Court of Appeal in K.B. on the purpose and interpretation of the *YCJA*.

65. The *YCJA* begins with a presumption that privacy and identity will be protected, and that no person shall be given access to records. It is not the other way around, as argued by the Applicant.

66. Requiring young people to bring evidence to establish the negative effect on their rehabilitation by granting access to their records, in effect, leaves potentially unrepresented and highly vulnerable people, as young as 12 years old, to argue for the application of protections that are automatically afforded to them through the *YCJA*. This approach is totally inconsistent with the entire youth justice scheme as enacted in the *YCJA*.

67. The *YCJA* does not require the young person to submit evidence to show that access, disclosure or publication would result in a detrimental effect on his or her rehabilitation. The *YCJA* is founded on the recognition of well established social science evidence, and international acceptance of the notion that protecting privacy promotes rehabilitation. Further, the Supreme Court of Canada has recognized that public access, disclosure and publication is detrimental to rehabilitation and to the long-term protection of the public, and should only be

given where there is a greater, more pressing administration of justice interest involved. Such a pressing interest on behalf of the media does not exist on these Applications.

68. To allow otherwise would leave vulnerable, unsophisticated, and generally unrepresented young people to seek to protect their privacy rights against media organizations, or other well resourced entities. It is exactly that sort of power imbalance that is specifically eliminated by the *YCJA*.

69. The Applicant's argument amounts to saying that because they are the media they are entitled to access. This is not the intention of Parliament under the *YCJA*. Section 119(1) provides a long list of enumerated people, or classes of people, who will be given access to records, and the media is not on the list.

70. Although the list in s. 119(1) is not exhaustive, and leaves open the possibility of the media seeking access through s. 119(1)(s)(ii), if Parliament had intended the media to be presumed to have access to records they would have appeared in the enumerated list.

YCJA **Presumption Against Public Access and Disclosure of Youth Records**

71. Parliament has addressed the issues of access, maintenance, disclosure and publication of youth records through a detailed and specific legal framework that proactively provides young people in conflict with the law with enhanced privacy protections. This is a unique feature of the youth criminal justice system that is not equalled in the adult system.

72. In *F.N.* the Court addressed the ultimate question of whether court personnel who have access to youth records (dockets) can disclose them to a school

board. In so doing the Court pronounced generally about the importance of the confidentiality and publication protections, and their underlying significance under the "*YOA*" (the forerunner to the *YCJA*). At paragraph 14, Justice Binnie stated that:

> Stigmatization or premature "labelling" of a young offender still in his or her formative years is well understood as a problem in the juvenile justice system. A young person once stigmatized as a lawbreaker may, unless given help and redirection, render the stigma a self-fulfilling prophecy. In the long run, society is best protected by preventing recurrence. Lamer C.J., in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, pointed out in another context that non-publication is designed to "maximize the chances of rehabilitation for 'young offenders'" (p. 883). A concern about stigma was also emphasized by Rehnquist J. (as he then was) of the United States Supreme Court in *Smith, Judge v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979), at pp. 107-8:
>
> > This insistence on confidentiality is born of a tender concern for the welfare of the child, to hide his youthful errors and "bury them in the graveyard of the forgotten past". . . . The prohibition of publication of a juvenile's name is designed to protect the young person from the stigma of his misconduct and is rooted in the principle that a court concerned with juvenile affairs serves as a rehabilitative and protective agency of the State. . . . Publication of the names of juvenile offenders may seriously impair the rehabilitative goals of the juvenile justice system and handicap the youths' prospects for adjustment in society and acceptance by the public. [Citations omitted.]
>
> > *F.N., supra*, para 14

73. Specifically, the Supreme Court of Canada in *F.N.* stated that the open court principle may be limited where "the public interest in confidentiality outweighs the public interest in openness." The Court recognized that there may be competing interests, described in that case (decided under the *YOA*) as rehabilitation and the safety of the public. We know that the *YCJA* has resolved that characterization of competing interests in recognizing that rehabilitation is in fact what ensures public safety.

    Ibid., paras 10 and 11

    YCJA, supra, s. 3, see also preamble.

74. The Applicant points out that the Court in *F.N.* goes on in paragraph 12 to talk about the "sliver of information" that is protected. In that paragraph the Court is talking about the fact that the young person's identity may not be published, and admits that there may be "other information" that would tend to identify a young person. These comments are not in regard to the question of access.

75. The Ontario Court of Appeal more recently pronounced on the issue of enhanced privacy protections, stating:

> An overview of Part 6 [of the *YCJA*] demonstrates a clear intention to protect the privacy of young persons. In doing so, the Act seeks to avoid the premature labelling of young offenders as outlaws and to thereby facilitate their rehabilitation and their reintegration into the law-abiding community. [citing *F.N.*]
>
> *S.L. v. N.B.*, [2005] O.J. No. 1411, 195 C.C.C. (3d) 481, at para 35 ("*S.L./ N.B.*")

76. In that case Justice Doherty recognized a presumption of privacy. In reference to ss. 117 through 129, he continued at para 42:

> Those provisions demonstrate beyond peradventure Parliament's intention to maintain **tight control over access** to records pertaining to young offender proceedings whether those records are made and kept by the court, the Crown, or the police. Generally speaking, **access to those records is limited to circumstances where the efficient operation of the young offender system, or some other valid public interest is sufficiently strong to override the benefits of maintaining privacy** of young persons who have come into conflict with the law. Different records are also treated differently.
> [emphasis added]

77. Justice Doherty recognized the *YCJA* as providing a "statutory scheme controlling access to records", and stated that "Section 118 announces an unequivocal and unqualified prohibition against

access to records …”. He also stated that even in cases where access to records is granted, disclosure of any information received is restricted by s. 129; and that s. 118 provides for an unequivocal and unqualified prohibition against access. Section 138 reinforces the significance of the privacy sections, 118, 119, 129, 110, and 111, by making their violation an offence.

S.L./N.B., supra, at para 44 and 45

78. Following the reasoning of the Ontario Court of Appeal in *S.L./N.B.*, the Supreme Court in *F.N.*, *D.B.,* and *R.C.*, and while recognizing the significance of the open court principle and the jurisprudence on which it is based, other youth courts in other provinces have recognized that the *YCJA* creates a unique and separate system, as well as a requirement for a different approach when addressing the question of access to youth records.

See for example

R. v. B.J., [2009] A.J. No. 905, 479 A.R. 248, para 31, (“*B.J.*”)

R.v. Telegraph Journal, [2010] N.B.J. No. 227, 257 C.C.C. (3d) 125, paras 29 – 31, (“*Tel.Journal*”)

R. v. A.A.B., [2006] N.S.J. No. 226, 244 N.S.R. (2d) 90, paras 10-11, (“*A.A.B.*”)

R. v. A.Y.D., [2011] A.J. No. 1031, 2011 ABQB 590 (“*A.Y.D.*”)

R. v. G.D.S., [2007] N.S.J. No. 390, 226 C.C.C. (3d) 196, paras 35-38, (“*G.D.S.*”)

79. These cases, survey the case law, including the publication ban cases, and those that provide relevant guidance to *YCJA* interpretation. The cases then generally conclude that the youth justice context is unique, that young people should be treated differently than adults in the criminal justice context, and that the

YCJA requires a restrictive approach to media access to records.

80. The Court in *A.Y.D.* found that the *YCJA* imposes a general ban on access to youth records; that "access" and "publication" are two distinct concepts under the YCJA and should be dealt with separately; and, that there is no presumption of media access to youth records.

A.Y.D., supra, at paras. 18 -20, and 25

81. According to a number of these cases, the *YCJA* enacts "a valid exception to the broad application of the openness principle" which appropriately balances competing interests in favour of restricting access and prohibiting publication of the identity of young persons, because protecting such information assists rehabilitation.

Tel.Journal, *supra*, at paras 29 – 31

A.A.B., *supra*, at paras 10-11

See also, A.Y.D., *supra*, and *G.D.S.*, *supra*

82. The Nova Scotia Provincial Court in *A.A.B.*, after acknowledging the important place in Canadian law of most of the cases on which the Applicant relies, says:

> In respect of criminal cases involving young persons there is recognition by the courts that there is a valid exception to the broad application of the openness principle. While youth courts are courts that are open to the public there are provisions dealing with non-disclosure of identifying information and the provisions restricting access to the records.
>
> *A.A.B.*, *supra*, para 10

83. None of these cases discuss a presumption of media access, and there are no direct parallels to the specific facts of the Applications before this Court.

84. By creating a scheme that differs from the normal adult context, the *YCJA* recognizes that public access to, disclosure of, and publication of youth records inhibit rehabilitation and so are presumptively restricted.

85. The basic premise of this *YCJA* regime, as interpreted by these various courts, is clear: where privacy is protected and stigmatization is limited, the rehabilitation and reintegration process is encouraged and made meaningful.

86. Given the unique characteristics of young people and their place in society, the *YCJA* specifically provides that the privacy interests of young people are to trump other important societal interests in access to information. Thus the issue here does not amount to a public interest competing with a private interest; rather, the public interests in a free press and an open court compete with the long-term public interest in a safe society.

87. Therefore, notwithstanding a general public interest in open courts, when considering s. 119 applications for access to youth records, the court must recognize these important youth justice principles and protections, which ultimately militate in favour of society's long term well-being.

Access to youth records under the YCJA: s. 118 and 119

88. Section 118 prohibits **access** to youth records except as otherwise authorized by the *YCJA*. This section, together with the entire *YCJA* scheme, means that there is a legislative presumption that there will not be public access to youth records. The media can only have

access to youth records by making a successful application to the youth court under s. 119(1)(s)(ii).

89. Section 119(1) specifically articulates the basis on which decisions can be made to grant access to records to a list of enumerated people, and includes subsection (s), leaving open the possibility of access by someone not otherwise enumerated.

90. Under s. 119(1)(s)(ii) the court can grant access to youth records where there is "a person or class of persons shown to have a valid interest in the records, to the extent directed by the judge, if the judge is satisfied that access to the records is **desirable in the interest of the proper administration of justice**". [emphasis added]

91. When considering whether granting access is desirable in the interest of the "proper administration of justice", it is vital to keep in mind that it is within the youth criminal justice system that the Application is being considered; and the proper administration of youth justice must be assessed as it relates to the individual young person whose records are being sought. Specifically, the youth context is a context in which Parliament has seen fit to create a scheme that prioritizes the protection of young people's privacy and the protection of the public over other pressing societal interests; including access to records, and the disclosure or publication of information that would identify a young person as having been dealt with under the *YCJA*.

R. v. R.C., [2005] 3 S.C.R. 99, 2005 SCC 61, para. 45

92. This approach is entirely consistent with:

- the special youth justice context mandated by the *YCJA*;
- an individualised approach of the youth criminal justice system; and

- the best interests of the young person principle,

all of which are designed to protect and promote the long term well-being of the society.

93. These Applications do not involve privacy for its own sake. It must be remembered that the key difference between records concerning young people and records concerning adults involves the developing personal identity, the heightened vulnerability, and reduced level of maturity of young people. It is these special considerations that infuse the particular notion of the proper administration of justice, under s. 119, in the context of youth record applications. Rehabilitation and reintegration contemplate this special youth justice context and require a hightened level of privacy protection.

    Testimony of Dr. A. Leschied, schedule C
    D.B., supra, paras 41, and 83-87
    S.L./N.B., supra, para 35

94. The *YCJA* specifically contemplates this balance, which is premised on the public safety interest that comes from rehabilitating young people. As such, the open court principle has not been undermined by this youth justice regime - quite the opposite, it is specifically contemplated by it.

95. However, unlike in general open court applications for publication bans, the *YCJA* creates a presumption of restricting access, disclosure and publication in the context of youth records. Applications for access to records should be specifically considered in the interests of the long term protection of the public through effective and meaningful opportunities for rehabilitation and reintegration.

96. As noted by the Ontario Court of Appeal in *SL / NB*, there would need to be a different public interest of sufficient gravity to override the presumption of privacy that is created by this regime.

97. The Applicant is incorrect in suggesting that the open court principle provides such sufficient gravity in the youth court context. The public interest in the administration of justice in youth matters is met by a court that is open to anyone, and wherein a person or the media can report on what they have heard excepting publication of information that would serve to identify the young person.

98. Going further and providing the media access to private youth records is not necessary to support the public interest in having information about youth justice, youth crime, the effectiveness of responses, and information on the administration of justice (as described in the *YCJA* preamble). In fact, doing so undermines the more fundamental public interest at stake in this case: public safety through the rehabilitation and reintegration of young people, by placing young people's rehabilitation at risk, by infringing their privacy rights, and making society less safe.

Best Interests of the Young Person

99. Further, JFCY submits that when considering whether providing access to a particular record is desirable in the interest of the proper administration of justice, the court should include a consideration of the young person's best interests.

Convention, supra, Art. 3 clause 1

100. Any assessment of the young person's best interests will take into consideration the young person's individual journey to rehabilitation,

including the fact that a sentenced young person has already begun the rehabilitative process.

101. Further, significant considerations include the young person's specific social, developmental, learning, health and mental health vulnerabilities, familial circumstances, as well as the psychological impact of providing the media with access. The Court has heard evidence about the high levels of young people with mental health and learning disabilities, characteristics that may created even greater layers of vulnerability around providing media access to private records.

102. All of these considerations are significant concerns to the goal of meaningful rehabilitation, and should be an important part of the consideration of what is desirable in the proper administration of justice.

Different classes of records attract different levels of privacy protection

103. As noted above, there are three different kinds of records sought in the Applications before the Court: (a) Photographs of real evidence; (b) a victim impact statement ("VIS"); and (c) two pre-sentence reports ("PSR").

104. Youth records will contain information with varying levels of personal, private and sensitive information. Different records will inevitably have different levels of sensitivity. It is appropriate that different levels of privacy protection, and a focus on different stages of the

YCJA's privacy provisions are appropriate for different kinds of records

S.L. v. N.B., supra, paras 42 and 49

The records sought in these Applications

Photographs

105. This Court has given access to the photographs of real evidence. Under s.129 the Applicant cannot disclose those records to anyone unless authorised to do so by the *YCJA*, and pursuant to s. 110(1) must ensure that any publication of the photos or their contents does not identify the young person to whom the record relates.

Victim Impact Statements

106. The Applicant seeks a VIS, which in our submission ought to attract a higher level of judicial scrutiny with respect to the privacy interest it engages, due to the potential for much higher levels of sensitive, private and personal information typically contained therein.

107. By its very nature a VIS will typically include a significant amount of very private and highly personal information; not only about the young person, and the circumstances surrounding the offence, but also about victims and others affected by the crime that was committed.

108. Young victims and witnesses are entitled to privacy protections by virtue of s. 111 of the *YCJA*. Victims and witnesses will not normally be involved in applications such as these, and as a result the court is left to be vigilant on their behalf.

109. Much of the information typically contained in a VIS will identify a young person - accused, witness or victim. The identifying information in a VIS is typically detailed and difficult to properly redact in a way that will ensure meaningful protection for young people's privacy.

VIS sought in this Application

110. Regarding the VIS sought in this Application, the Court has had the benefit of J.G.'s testimony that he is extremely upset to know that the media might possibly get access to the VIS from his record, and that it is interfering with his rehabilitation.

Testimony of J.G, schedule C

111. The evidence is that the VIS in the matter of J.G. was read aloud in its entirety in court. It provided details about a singularly unique incident. The author was an adult school administrator and the Applicant was in court to hear and took notes about the VIS. This is in many respects an unusual factual scenario.

Affidavit of David Bruser
Affidavit and testimony of J.G., schedule C

112. A societal interest in access to the VIS has thus already been met. Therefore, notwithstanding the fact that the VIS was read aloud in court, this Court should not provide access to a copy of the VIS to the media, as no further public interest would justify disclosure. In addition, it is replete with personal information, and would require redaction that would be so extensive as to leave the VIS devoid of content.

113. In the case of J.G., his fears and anxieties about potentially being identified are extreme. It is his and a counsellor's uncontroverted

evidence that his safety and rehabilitation depend on his ability to make a complete break from his past. J.G. testified that he is extremely concerned not only about his rehabilitation, but about his personal safety. He is acutely aware that his case was unique and notorious, and it is his belief that any publication of the information in the VIS could serve to identify him in his community, potentially brining negative peer involvement, that he has thus far successfully escaped from, back into his life.

Affidavit and Testimony of J.G., schedule C
Affidavit and testimony of Ms. I. Marynowich, schedule C

114. JFCY submits that this young person may view access to the VIS by the media – regardless of what might be published – as dangerous and an affront to his privacy, and thereby damaging to his rehabilitation. Further, the public interest in J.G.'s rehabilitation is of such significance that restricting access to the VIS is what is required by in the interests of the administration of justice in this Application.

115. Further, JFCY submits that as the VIS sought in this Application is replete with personal and identifying information, and the Applicant may not be aware what information would serve to identify the young person in his community, the Court should not allow access to this record.

116. The court has heard evidence from a number of different witnesses that it is much more than just names, addresses, phone numbers and photographs that might serve to identify a young person in their community.

Testimony of Dr. A. Leschied, schedule C
Testimony of Ms. M. Moorcroft, schedule C
Testimony of Ms. M. Vinette, schedule C

Testimony of J.G., schedule C, schedule C
Testimony of E.I., schedule C

117. Numerous direct and indirect references to a young person's life circumstances can result in identification. In fact, a given constellation of facts, which each on their own would not be identifying, might, taken together, become identifying.

118. In the alternative if the Court grants access to the VIS, the Court should prohibit its publication. Further, and in the alternative, the Court should redact any and all private information that could pose a risk of identifying J.G. In this case such a redaction is required as the potential negative consequences to the young person are very severe. Because his case was unique and notorious, any one piece, and certainly any constellation of facts or information might be identifying.

119. JFCY submits that, in the event that this Court grants access to the records sought, but with redactions, the young people affected should have an opportunity to make submissions regarding what information should be redacted.

120. JFCY agrees with the Applicant that the Applicant is presumed and expected to comply with the law, and that it is not the Court's role to decide what the Applicant may publish.

121. A redacted version of the VIS could serve as a guide to the Applicant regarding what information the court considers to be potentially identifying. JFCY submits that the Court is well positioned to provide such guidance in the event that any access is granted.

Pre-Sentence Reports

122. PSRs are the third class of records sought. JFCY submits that PSRs, by their very nature, are:

- replete with personal and private information of the most sensitive nature;
- are intended exclusively to ensure meaningful rehabilitation and reintegration;
- are intended exclusively to be read by those administering to a young person's rehabilitation;

and thereby require the most restrictive level of privacy protection afforded by the *YCJA*.

123. In fact section 40(7) of the *YCJA* provides for a PSR to be withheld from a private prosecutor if it is not necessary for the prosecution of the case. It is hard to envision a situation where the PSR would be necessary for prosecution, as it is not created until after there has been a finding of guilt, and so it may be routinely kept private even from the private prosecutor in a case.

124. JFCY submits that s. 40(7) evidences Parliament's intention to maintain strict privacy of PSRs. The *YCJA* intends for PSRs to be for the exclusive use of the court and those responsible for the young person's rehabilitation.

125. PSRs are designed and intended to assist the court to fashion sentences that are responsive to young people's individual and specific rehabilitation needs. They are intended to provide the Court with the most complete picture possible of the young person who is to be sentenced.

126. The details included in the information provided in a PSR typically go well beyond information about the criminal law matter before the court.

127. These records are designed, and in fact are legally required, to be highly personal and private. They will often also involve information about third parties. The *YCJA* mandates that PSRs shall contain interviews with the young person, the victim, the young person's parents and extended family, history of criminal and non-criminal behaviour in the community, information about relationships, family history and dynamics, possible family deficits, the young persons future plans, information about maturity, character, school, health, mental health and development. This Court heard testimony that PSRs will also contain information about community and faith group involvement, immigration information, and even information about a mother's pregnancy.

YCJA, *supra*, s. 40
Testimony of Ms. M. Moorcroft, schedule C
Testimony of Ms. M. Vinette, schedule C

128. Since *Hunter v. Southam Inc.,* [1984] 2 S.C.R. 145, the Supreme Court of Canada has recognized that section 8 of the *Charter* protects a person's reasonable expectation of privacy.

129. JFCY submits that although the young person by participating in the pre-sentence report process has waived some of their privacy rights; personal information which is protected by other Acts of Parliament or a provincial legislature such as information pertaining to medical, psychiatric, therapeutic or counselling services; education, employment, child welfare, adoption and social services still attracts a constitutionally protected reasonable expectation of privacy, and in

particular attracts this expectation vis a vis disclosure to the media.

130. Support for the proposition that this type of information attracts a reasonable expectation of privacy is seen through the instances outlined in the evidence where young people were able to assert their privacy rights in relation to information protected by other legislative schemes, for example, by not consenting to their Ontario Student Record being reviewed or their employer being contacted by a probation office. In those instances the privacy of their personal information was maintained by the *YCJA* pre-sentence report scheme.

131. The media are not on the enumerated list of individuals who as a right may be given access to a youth record; and the evidence made clear that given current practices of probation officers young people have not been specifically told before deciding whether or not to waive their privacy rights that personal information which is protected by other legislative schemes may be shared with the media via an application for access to a pre-sentence report. We would submit the instances in which this type of highly sensitive information protected by other legislative schemes would be read aloud in court so that the media can take notes upon it are exceedingly rare.

Testimony Ms. M. Moorcroft, schedule C
Testimony of Ms. M. Vinette, schedule C

132. By permitting the Applicant access to personal information in PSRs protected by other legislative schemes. a back door encroachment on section 8 is being sanctioned. The privacy and confidentially normally afforded this personal information ought not to be lost for young people because of criminal justice system involvement. It would contrary to the proper administration of justice to allow access

to the media.

133. The privacy and confidentiality normally afforded this personal information ought not to be lost for young people because of criminal justice system involvement. It would be contrary to the proper administration of justice to allow access to the media.

134. There is a public interest, in the context of sentencing, in ensuring accountability. Accurate and useful PSRs require candour and completeness, which will only be possible if the private nature of these documents is protected. Young people, families and third parties may limit their participation in providing information for PSRs if they do not view them as being confidential.

Testimony of Dr. A. Leschied, schedule C
Testimony of Ms. M. Moorcroft, schedule C
Testimony of Ms. M. Vinette, schedule C
Testimony of E.I., schedule C

135. Providing members of the media with access to these records militates against the effective preparation of PSRs. There is therefore no valid public interest in giving the media access to intrude so deeply into the personal life of young people in conflict with the law. Quite the opposite: the public interest – as specifically contemplated by the *YCJA* – militates against such access.

PSRs sought by these Applications

136. This Court heard evidence from a number of witnesses, expert and lay, that providing public / media access to PSRs would have a negative effect on the psychological well being of young people, a

negative effect on their rehabilitation, and would create a chill in the information gathering, reporting and usefulness of PSR creation.

Report and Testimony of Dr. A. Leschied, schedule C
Testimony of Ms. M. Moorcroft, schedule C
Testimony of Ms. M. Vinette, schedule C
Affidavit and Testimony of E.I., schedule C

137. Specifically E.I. testified that he has been very anxious, has been loosing sleep, is very worried for his family, and has been losing focus on his rehabilitation, not only at the thought of the media being able to read his PSR, but as a result of the Application.

Testimony of E.I., schedule C

138. E.I. testified that he considers the PSR in his case to be private. He described it as containing all of 15 years of his life. He thought it would only be read by people in the court context who are responsible for him. He testified that he would be embarrassed, and feel ashamed to have someone else read it. Indeed he was upset and felt the court was unfair, “tragic” when he saw in court that the Applicant’s lawyer was allowed to read it.

Testimony of E.I., schedule C

139. E.I.’s testimony made clear that he is not only very concerned about the possible publication of information in his PSR, he is also extremely concerned by the possibility of someone who is a stranger to his life simply reading the information in his PSR.

140. He expressed serious concerns for his parents, his family, himself, and the reputation of his country of origin.

141. Giving access to E.I.'s PSR would be detrimental to E.I.'s psychological well being, and to his rehabilitation, and is not in his best interests.

Testimony of Ms. Z. Faddoul, schedule C
Testimony of E.I., schedule C

142. JFCY submits that PSRs should not be made accessible to media applicants, and that access to the PSRs sought on these Applications should not be granted.

143. The Court has heard evidence that some parts of E.I.'s PSR may have been read or referred to in court, and that the Applicant was in court to hear what was said. Hearing parts of a PSR that are referred to in open court is entirely different than being able to read and have possession of the extremely sensitive details that will fill a typical PSR.

144. Again, the *YCJA* provides for a distinction between our open court, which the Applicant attended, and access to the records that may have been read or referred to in open court. They are not the same thing, as confirmed by the *YCJA*, and should therefore not be treated as such.

145. In sum, JFCY submits that providing media access to PSRs is contrary to the intention of the *YCJA*; is not based on any "public interest in the efficient operation of the young offender system, sufficiently strong to override the benefits of maintaining privacy" as required by *SL / NB*; and it is not desirable in the interest of the proper administration of youth justice. Quite the opposite, providing access to PSRs would be detrimental to the proper administration of youth criminal justice.

S.L./N.B., supra, para 42

146. In the alternative, if this Court grants access to the PSRs sought in these Applications, JFCY submits that the Court's role in protecting the privacy of young people's information mandates that they be extensively redacted – removing all potentially personally sensitive information.

147. Not only should potentially identifying information be removed, but any and all information the privacy of which would be protected at its normal source, as well as all details not directly related to the events of the offence, should be removed.

148. If any access is provided, extensive redactions would serve to protect privacy, and would also, as in the case of VISs, serve as a guide to a media applicant regarding what information might serve to identify a young person. As noted in paragraph 121 above, the Court is well positioned to provide this guidance.

Notice and Representation in records Applications

149. Youth records typically involve highly sensitive private information of young people. Further, the granting of access to records under the *YCJA* happens by way of third party applications and may, as in the cases at hand, involve detailed and complex legal argument.

150. Applications for access must therefore be served on young people who must have access to representation by counsel in order that they may meaningfully respond.

151. JFCY submits that, as a matter of process, when applications of this nature are brought, the prosecutor (whether the provincial Attorney general, or the federal Prosecution Service) should be responsible for ensuring that an affected young person is properly served.

152. At present it does not seem that there is any established process by which a young person whose records are being sought can have funded counsel appointed on their behalf. JFCY submits that this creates serious process concerns, and places the young person in a position of serious disadvantage, especially when facing a well funded corporate entity.

PART IV – ORDER REQUESTED

153. JFCY acknowledges that This Honourable Court has provided the Applicant access to the photographs that are exhibits in the various Applications, but that all identifying information was to be redacted.

154. JFCY asks that the Court decline to give access to any pre-sentence reports as they are extremely personal and potentially highly prejudicial documents. In the alternative, if the Court sees fit to provide the Applicant with access to pre-sentence reports, JFCY asks the Court to engage in a careful process of redaction in order to remove any and all personal information of a private nature, and any and all information that may tend to identify the young people in question.

155. JFCY respectfully asks that the Court decline to give access to the victim impact statement, because it is also replete with the personal information of a kind that ought to be protected from disclosure under the *YCJA*, and because the case in question is unique and notorious In the alternative, if the Court sees fit to provide access to the victim

impact statement, we ask the Court to engage in a careful process of redaction in order to remove any and all personal information of a private nature, and any and all information that would tend to identify the young person in question..

ALL OF WHICH IS RESPECTFULLY SUBMITTED

October 17, 2011

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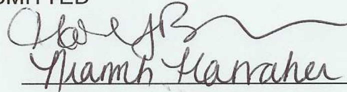
ALL OF WHICH IS RESPECTFULLY SUBMITTED



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