ONTARIO COURT OF JUSTICE

(Toronto Region)

TORONTO STAR NEWSPAPERS LTD.

Applicant

v.

I.E.

Respondent

and

A.D.

Respondent

and

J.G.

Respondent

and

ATTORNEY-GENERAL

OF ONTARIO

Respondent

ATTORNEY-GENERAL

OF CANADA

Respondent with respect to the J.G. matter

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SURREBUTTAL SUBMISSIONS

1. The Provincial Crown submits this surrebuttal factum to correct select misstatements of the provincial Crown's position in the Applicant's "Reply Factum" and in response to select points made by the Applicant. This surrebuttal factum is not intended to re-state the position of this Respondent and does not purport to respond to every point that is disputed in the Applicant's second lengthy factum.

2. The Applicant is not correct in paragraph 4 when it states that the provincial Crown takes the position that the "goal of the youth criminal justice system is restricted to rehabilitation and reintegration of young persons under the *YCJA*". The provincial Crown never said that in its factum. Similarly, the provincial Crown never stated that these goals were the ``primary goals`` of the *YCJA* as the Applicant asserts in paragraph 21 of its factum. The provincial Crown noted in it's factum that rehabilitation and reintegration were integral goals of the *YCJA* and certainly highlighted the numerous places where rehabilitation and reintegration are mentioned in the *YCJA* because those principles are relevant to the applications before this Court. The provincial Crown notes that there are other very important goals of the *YCJA*, such as proportionate accountability, reparation for harm done, and meaningful consequences for young persons who offend.

3. The Applicant is incorrect when it states in paragraph 6 that the provincial Crown has improperly invoked section 8 of the *Canadian Charter of Rights and Freedoms.* Nowhere in the provincial Crown`s factum is section 8 of the *Charter* mentioned.

4. Paragraph 20 of the Applicant`s reply factum suggests that the provincial Crown`s argument is ``tantamount to a call for closed courts`` in youth proceedings. This submission does not accurately portray the provincial Crown`s position. The provincial Crown was not suggesting that the media could only report on the reasons of the sentencing judge. The media has free access to sit in the public gallery during youth sentencing proceedings and to report on what it observes, including the reasons for judgment. The point that was missed by the Applicant was that the particular exhibits in this case contain extremely sensitive personal and identifying

information and that the media can report fairly and accurately with the assistance of the judge`s reasons for sentence, without resort to the pre-sentence reports and victim impact statements. In other words, it is not necessary to breach the confidentiality of the young persons to whom pre-sentence reports and victim impact statements relate in order to accurately report on the youth criminal justice system.

5. The provincial Crown disagrees with the statement of the Applicant in paragraph 25 of its reply factum that the provincial Crown is relying on out-dated case law. The provincial Crown outlined the history of exclusion provisions in youth legislation and accurately stated the current law. The point intended to be made by the provincial Crown was that when drafting the *YCJA*, the legislators contemplated that there could be a need for exclusion of the public in certain cases. It is not something that the provincial Crown advocated for in any of the cases before the Court. However, the exclusion provision becomes relevant when this Honourable Court applies section 119(1)(s) in the present applications because the material sought is of a heightened personal and sensitive nature.

6. The Applicant asserts at paragraph 34 that Ms. Moorcroft is lacking sufficient experience to speak to the subject matter of this application. As this Honourable Court is well-aware, Ms. Moorcroft spent several years working with the youth at 311 Jarvis, and has extensive experience working with youth in conflict with the law. She has authored approximately twenty-one pre-sentence reports. It is submitted that given the evidence of the amount of work that goes into authoring these reports, twenty-one reports is a substantial number.

7. The provincial Crown also disputes the Applicant`s assertion at paragraph 34 of its reply factum that this Court should infer bias from the testimony of Ms. Moorcroft and Ms. Vinette. Ms. Moorcroft and Ms. Vinette are both professionals, it is submitted, with no motive in testifying other than to continue to be able to do their jobs effectively. They expressed concern about their ability to collect information from young people and their families should the media be able to gain access to pre-sentence reports. The Applicant can point to no evidence to suggest that either of these witnesses had a motive to keep their work free from scrutiny. In reality, as this Court knows, the work of probation officers is under constant scrutiny as pre-sentence

reports are audited internally, as the Court heard, and also read by judges, prosecutors, defence lawyers, offenders and their families, as well as service providers.

8. Paragraph 43 of the Applicant`s reply factum seems to suggest that because social media has made the dissemination of information quicker and more rampant, this factor favours more openness as opposed to the protection of young persons` private records. This is not what the Supreme Court was saying in *Dagenais* nor was it what Mr. Justice Nordheimer was saying in *J.S.R.*. The Courts in each case were not dealing with the protection of exhibits of a private nature in Youth Court proceedings. That being said, the acceptance of the profound impact of social media on the dissemination of information in both cases supports Dr. Leschied`s evidence regarding his concerns about social media and that the stigma and secondary deviance increase with publication. Therefore, these cases render this Respondent`s submission regarding the need to keep confidential, sensitive material of young people out of the media`s control that much more compelling.

9. Paragraph 45 of the Applicant`s reply factum states that the young persons in the current applications would feel only embarrassed or experience discomfort should their private information be provided to the Toronto Star and potentially made public. The provincial Crown disputes this characterization of the evidence of the young persons who testified in these proceedings. Further, it is the Provincial Crown`s position that E.I.`s and J.G.`s evidence must be considered in light of the evidence of Dr. Leschied that young people are not always quick to open up and articulate their feelings. As well, the Respondent improperly suggests that records applications are dependent upon the ability of young persons to articulate their positions.

10. In paragraph 51, the Applicant suggests that the *Dufour* decision is of `no help` to the provincial Crown. With respect, the fact that Mr. Dufour was acquitted of murder despite a very strong Crown case would have been a matter of great interest to the public. The media applied for access to the videotaped confession of the accused in order to report accurately and fully to the public about the acquittal. The fact that the young persons in the cases before this Court were convicted does not render *Dufour* inapplicable. The Crown did not suggest that the fact scenario in *Dufour* was the same. Rather, the point was that the Court had to balance the rights of the acquitted accused with that of the public`s right to know and chose to protect the

acquitted accused, despite the very compelling argument that the public had a right to know what the case was against him.

11. It is the Crown`s position that, in light of the fact that the Applicant sat in court during these proceedings, heard the sentencing submissions of the Crown and defence, and heard the reasons for judgment, it is appropriate for the Court to deny access to the confidential exhibits being sought in this case. Protection of these exhibits is necessary to protect the privacy rights of the young people as well as the right of the public to a proper working justice system free from the chilling effect of the dissemination of pre-sentence reports and victim impact statements. Justice for Children and Youth has taken the same position.

12. Part Four of the Applicant`s reply factum suggests that there is ``no evidence of chill``. That is not a correct characterization of the evidence in the case at bar. Further, common sense tells us that there would be a chilling effect to the dissemination and publication of pre-sentence reports and victim impact statements. This Honourable Court recognized this even before any evidence was called. Concerns about chill are also reflected in the factum of Justice for Children and Youth.

13. In paragraph 67 of the Applicant`s reply factum, the Applicant suggests that the provincial Crown`s submission that ``in *some* cases, the facts of a particular offence could identify a young person`` is to be taken to mean that courtrooms should be closed or that the media should never report on individual cases in Youth Court. That is not the intent of the provincial Crown`s submission. This argument ignores the use of the word ``some`` by the provincial Crown. The provincial Crown agrees with the Applicant that the *YCJA* was drafted in a manner that provides for media access to the proceedings. That being said, the more unique the crime or circumstances surrounding the crime, the more difficult it is to report on that crime without identifying the young person charged or convicted. Such cases would be unusual.

14. Part F of the Applicant`s reply factum suggests that the provincial Crown has failed to demonstrate that a stay is merited in this case. It is not clear that the test suggested by the Applicant is the correct one to be applied in this case. However, if the Court does apply this test, the Provincial Crown submits that the test is met in more than one way.

15. The young persons to whom the private records relate would suffer irreparable harm because their private information would be made public. As courts have stated time and again, there is no way of getting one`s private information back once it has been disseminated. Should confidentiality be breached, as Dr. Leschied stated, one could expect stigma and secondary deviance to come into play and to have a deleterious effect on rehabilitation and ultimately, on public safety.

16. Further, the chilling effect on the administration of justice should young people and their families become aware that pre-sentence reports were no longer confidential, and could be published in the media, would lead to irreparable harm to the community. Youth Courts cannot function properly in sentencing young persons who offend without the tool of pre-sentence reports. A lack of information about the offender will, in many cases, lead to a less meaningful disposition for the offender and for the community and will be less likely to result in the rehabilitation of the young person. Public safety will therefore be compromised. The same can be said for victim impact statements.

17. The Applicant is correct that it would be more ``convenient`` to deny a stay should the Court be inclined to release the exhibits. However, the Applicant has conceded the importance of the ``serious question to be determined in this case``. The jurisprudence on point is sparse and varied in terms of the appropriate test to be applied. The ends of justice would not be met if the Court refused a stay in this case on the basis that it was not convenient.

18. It is incorrect for the Applicant to suggest, as it did in paragraph 80 of its reply factum, that the provincial Crown has been in any way trying to prolong these proceedings. Rather, the provincial Crown has sought to ensure that the appropriate parties were served, which was not the case initially. When the Applicant had difficulty serving some of the young persons, and initially there were nine young persons involved in a variety of applications, the provincial Crown assisted in notifying the young persons of these applications. Given the importance of this application to the administration of justice, all parties, including the Applicant, have requested time to consult on and consider their positions, to research available evidence, to

conduct legal research, and to write facta. The provincial Crown has worked as hard as possible to ensure that these applications proceed as efficiently as possible.

19. The provincial Crown further disputes the suggestion in paragraph 80 of the Applicant`s reply factum that ``a continued delay in this proceeding would significantly prejudice the Applicant`s freedom of expression and the ability of the public to be informed about the criminal justice system``. Timely reporting is necessary, for example, for a reporter who is covering the day to day proceedings in a murder trial. The argument that reporting must be timely must be considered in light of the fact that the Applicant sat in the courtroom for the sentencing proceedings of the young persons in the applications before the Court and could have reported on them at the time. To suggest that he can`t report accurately without the pre-sentence reports and victim impact statement in these proceedings runs contrary to the Applicant's recent demonstrated ability to report on a number of sentencing proceedings without resort to pre-sentence reports or victim impact statements. Further, the Applicant is not reporting on a single case but rather on an impression of the youth criminal justice system at 311 Jarvis. It also must be recognized that the Applicant waited to make all nine of his records applications at one time instead of making the applications before the presiding judges and while the young persons were still in court dealing with their matters. While timeliness is always important, it is of diminished importance in the circumstances before this Court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED ON OCTOBER 31, 2011 BY:

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Amy Barkin,

Assistant Crown Attorney