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

and

ATTORNEY-GENERAL

OF CANADA

Respondent with respect to the J.G. matter

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PART I - STATEMENT OF THE CASE

1. The Toronto Star has applied pursuant to s.119(1)(s) of the *Youth Criminal Justice Act* for the pre-sentence reports of I.E. and A.D. and the victim impact statement related to J.G. In suggesting that the *Dagenais-Mentuck* test applies, the Applicant asks this Honourable Court to erode important privacy protections provided to youth in the *Youth Criminal Justice Act (YCJA)*.

2. As this Honourable Court is well aware, pre-sentence reports and victim impact statements in Youth Court contain deeply private information including, but not limited, to family history, education history, accounts of past behaviour issues, mental health issues, medical issues, concerns about substance abuse, previous sexual or physical abuse, developmental history, and reference to psychological stress.

3. The Court has had the benefit of hearing from an expert witness, Dr. Alan Leschied, as to the deleterious effects of

(i) breaching the privacy of young people by allowing unintended persons to see their private information as contained in pre-sentence reports and victim impact statements, and

(ii) the publication of private information related to young persons as contained in pre-sentence reports and victim impact statements.

4. By asking the Court to apply the *Dagenais-Mentuck* test in youth proceedings, the Appellant suggests that this Court should place the burden on unrepresented young persons to protect their own privacy rights.

5. As against the corporate media, an unrepresented young person is greatly disadvantaged. The Court of Appeal has made it clear that the protections of the *Charter* were not meant to be a tool for the powerful to try to roll back statutory measures designed to ameliorate the conditions of powerless or disadvantaged citizens.

6. Pre-sentence reports and victim impact statements relating to young people constitute a class of documents that the *YCJA* and common law protects. It is necessary to protect these private documents in order to promote the proper administration of justice.

7. This is not a *Charter* challenge. The Applicant has not challenged the legislation but rather, seeks to impose the *Dagenais-Mentuck* test regarding publication bans in it's application. The *Dagenais-Mentuck* test is based in *Charter* values as applied in Adult Court and relates to publication bans.

8. Taking into consideration *Charter* principles, protecting private documents such as youth pre-sentence reports and victim impact statements minimally impairs s. 2(b) of the *Charter* and is proportional having regard to it's objective. Forcing unrepresented young persons to wage *Dagenais*-type battles with the corporate media undermines the important objectives of the *Youth Criminal Justice Act*.

9. Taking *Charter* principles into account, pre-sentence reports and victim impact statements in Youth Court would be saved by the *Oakes Test* in s.1 of the *Charter.* The media is able to report on the sentencing process by being present in court and hearing the reasons of the sentencing judge. The pressing objectives of promoting rehabilitation and thus a safer society are rationally connected to the protection of private records of young people.

10. The issues raised in this case greatly impact on the administration of justice and are of a high level of public importance. As this Honourable Court has stated, this is a "test case". There is therefore a significant chance that this Honourable Court's decision will need to be reviewed by way of extraordinary remedy or appeal. In the event that the Court rules that the Toronto Star should be provided with the pre-sentence reports and / or victim impact statement, the Crown respectfully requests that the Court impose a stay of proceedings for a period of 30 days. Such a stay would allow the Crown, as well as the young people, time to review this Honourable Court's

decision and file an application for an extraordinary remedy or appeal, if need be. In addition, the Crown requests a further stay of the decision until the reviewing Court's judgment is rendered in the event of an application or appeal being filed.

PART II – STATEMENT OF THE EVIDENCE[1]

The Expert Evidence – Dr. Alan Leschied

10. Dr. Alan Leschied was qualified to testify as a forensic psychologist, with expertise in youth justice policy and law and children's mental health. Dr. Leschied's curriculum vitae was entered as an exhibit and demonstrates that he has spent the past 34 years working in these areas. Dr. Leschied has testified as an expert in courts of law as well as before legislative committees.

11. The provincial Crown relies upon Dr. Leschied's report, which was adopted in his examination-in-chief as being accurate. The report was made an exhibit in these proceedings. The Crown further relies upon Dr. Leschied's *viva voce* evidence.

12. The evidence of Dr. Leschied is referred to throughout the "Issues and Law" section of this factum. The professor's evidence was focused to a large extent on the deleterious effect of publication on rehabilitation, and the inherent concerns about stigma and secondary deviance. The literature presents that 40% of offenders in the youth criminal justice system have mental health problems. Dr. Leschied also discussed that a young person could be identified inadvertently, even by the best-intentioned reporter. Dr. Leschied spoke at length about the negative impact of disseminating pre-sentence reports on the administration of justice. Specifically, the expert was concerned about the future ability of probation officers to obtain candid information from young persons in preparing their reports, and the ultimate negative effect of a less than fulsome pre-sentence reports on the sentencing process.

[1] Due to the lack of time to obtain transcripts, the Crown has prepared a brief summary of the evidence. The Crown defers to this Honourable Court's view of the evidence for further detail and in the event of a contradiction.

The Evidence of the Lay Witnesses

13. Ms. Zeina Faddul, social worker with the Toronto District School Board, testified that she worked with E.I. for two and a half years. She had regular contact with E.I., and even saw him during the summer, although the frequency of visits was reduced in the summertime. Ms. Faddul expressed her concerns for I.E. and his family should information contained in his pre-sentence report be disseminated in the Toronto Star.

14. David Bruser, Toronto Star reporter, testified by way of adopting his affidavits. These affidavits were made exhibits in this application. Mr. Bruser's evidence is that he wants the pre-sentence reports and victim impact statement in order to write an article or series of articles about the youth criminal justice system. Mr. Bruser stated that it was his belief that having access to these records will enhance his ability to report accurately. He testified that he was present and took notes during the proceedings related to E.I., J.G., and A.D. He did not bring his notes to court on the date that he testified. As such, he could not speak to the contents of his notes other than in a general manner.

15. Ms. Michelle Moorcroft, a probation officer, testified about her concerns about the effect of pre-sentence reports being accessed by the media. Ms. Moorcroft explained what kind of information goes into pre-sentence reports and that the nature of the information is very private. Ms. Moorcroft further explained the procedure of beginning a pre-sentence report interview. Before asking the young person or his family questions, she tells them that they do not have to participate in the process. She is generally able to make the young people comfortable enough to share information with her. She also gives them a list of individuals who could see the report, including counsel for the young person, the Crown, the judge, and service providers. She does not tell young people that the media can get access to the pre-sentence report. She will change her practice if the media gets access to the pre-sentence report(s) in this case. Ms. Moorcroft said that is often difficult to get young people and their families to open up and give the fulsome information that is so necessary for pre-sentence reports. Ms.

Moorcroft expressed concern that if she tells young people and their families that the media could gain access to their pre-sentence report, that will have a deleterious effect on the quality and veracity of the information that is provided. The result would be a less informed pre-sentence report.

16. Ms. Maria Vinette, probation supervisor, also gave evidence. Ms. Vinette comes from a somewhat different perspective having not been involved in the writing of pre-sentence reports for a number of years. However, she had written a large number of pre-sentence reports over the course of her career. Ms. Vinette had similar concerns as were expressed by Ms. Moorcroft.

17. J.G. testified that he was very concerned about the Toronto Star getting access to the victim impact statement in his case. While he was aware that the victim impact statement was read out in court, it was his concern that having the information publicized would negatively affect his rehabilitation. He was also concerned for his mother. J.G. wanted to do his time and move on when he got out of custody. He was afraid that people from his past who were bad influences would contact him once they saw the article. J.G. testified that in his view, the victim impact statement could not be redacted in such a way that it would not identify him.

18. I.E. testified that there was very personal and private information contained in his pre-sentence report. He expressed that disseminating this information would have a negative impact on his ability to rehabilitate. He was particularly concerned about his family in addition to himself. He was of the view that even an edited version of the pre-sentence report could identify him. He did not know that the media might see his pre-sentence report when he participated in the interview process for the report and had he known, it would have affected what he said.

19. Irene Maryjkovitch, social worker at Springboard, testified by way of affidavit and *viva voce* evidence. The affidavit was made an exhibit. Ms. Maryjkovitch had had extensive dealings with J.G. She expressed that in her view, J.G. had great potential

for rehabilitation. Ms. Maryjkovitch expressed concern that his ability to rehabilitate would be compromised should the information in the victim impact statement be publicized.

PART III – ISSUES AND LAW

INTRODUCTION

20. Pre-sentence reports and victim impact statements are both classes of documents that contain extremely private information. It is respectfully submitted that protection of these classes of documents is necessary for the proper administration of justice.

YOUTH PRE-SENTENCE REPORTS AND VICTIM IMPACT STATEMENTS ARE CLASSES OF DOCUMENTS THAT SHOULD BE FULLY PROTECTED FROM DISSEMINATION TO THE MEDIA BECAUSE OF THEIR HIGH DEGREE OF CONFIDENTIALITY

The Private Nature of Pre-Sentence Reports and Victim Impact Statements

21. Youth pre-sentence reports contain deeply private information including, but not limited, to family history, education history, accounts of past behavioural issues, history of deviance, mental health issues, medical issues, concerns about substance abuse, developmental history, previous sexual or physical abuse and reference to psychological stress. Section 40(2) of the *YCJA* sets out what shall be included in the report. All of the areas to be covered involve highly subjective and private information about the young person.

22. Pre-sentence reports contain information involving privacy interests that are protected by a variety of statutes. Not only does the *YCJA* protect this information, but it is protected by other statutes as well. Some examples, as discussed in the evidence of Dr. Leschied, are school records (covered in the *Education Act*), child welfare information (covered in the *Child and Family Services Act),* and mental health information (*Mental Health Act).*

23. In a similar vein, most victim impact statements contain deeply private information about the psychological and physical impact of the offence, the recovery process, and include any long-lasting injuries or psychological harm. In youth proceedings, many of the victims are young persons under the age of 18 years. Another type of victim impact statement, as in the case at bar, is a community victim impact statement. The purpose of this type of victim impact statement is to describe the impact of the young person's actions on the community. In either case, details about the offender's offence(s), as well as other personal details about the offender, are present in the victim impact statement.

24. Dr. Leschied, in his uncontested evidence in these proceedings, testified at great length as to the necessity of keeping information contained in pre-sentence reports private in order to promote the long-term rehabilitation of the young persons to whom the records relate. His evidence is supported by the literature that he referred to in his evidence. The professor also spoke about the need to protect the private information contained in victim impact statements. The jurisprudence supports the professor's evidence as it relates to the importance of refraining from publication of identifying information of young persons.

> *Evidence of Dr. Leschied*
> *See for example R. v. D.B.* [2008] 2 S.C.R. 3 and
> *R. v. F.N. (Re)* [2000] 1 S.C.R. 880

25. In *R. v. K.J.B. [re Sun Media (Toronto) Corp.],* Justice Marchand of the Superior Court of Justice refused a media application for access to victim impact statements. After having accepted the "open court principle" as a guarantee that justice is administered in a non-arbitrary manner and in accordance with the rules of law, the Court stated,

> "it is my finding that the right to privacy of those young children who have come to testify about the effect of their victimization upon their private lives trumps the right of the public to having access thereto".
>
> *R. v. K.J.B. [re Sun Media (Toronto) Corp.],* [2003] O.J. No. 3557, at paras. 7 and 18

26. It is recognized that, in the case at bar, the Court is dealing with a community victim impact statement that has been read out in court. However, given that the information contained therein would tend to identify J.G., the *K.J.B.* case is applicable. Querie: if the *Star* is unable to publish the information contained in the victim impact statement since it would identify the young person, how does providing it assist the openness of the proceeding, especially when the reporter was present when it was read out in court.

R. v. K.J.B. [re Sun Media (Toronto) Corp.], supra, at paras. 7 and 18

The Difficulty With Editing Private Information

27. This Court heard from both E.I. and J.G. as to their concerns about engaging in an editing process of the information contained in E.I.'s pre-sentence report and the school's victim impact statement. While these are subjective concerns, they are very important as the young people are the only ones who can shed light on what will and what will not identify them within their communities.

28. The Court did not hear from A.D. unfortunately. The submissions of amicus curiae, Ms. Birdsell, indicated that A.D. was working out of town. The fact that he was working indicates that he is making a positive step towards his rehabilitation. It could be said that having to attend court would be a set-back upon the steps that he appears to be making. It is not appropriate to conclude that his absence from the court proceedings means that he does not assert privacy rights with respect to his pre-sentence report. A.D.'s lack of attendance however makes it that much more difficult to determine what information might identify him.

29. The absence of A.D. highlights the concerns that this Court should have of engaging in media applications for highly private information such as that contained in pre-sentence reports and victim impact statements. Even if A.D. were to have attended court, he was not represented by counsel. Ms. Birdsell, from *Justice for Children and*

Youth, did an exceptional job of assisting the Court and bringing the concerns of J.G. and E.I. forward. However, in her role as amicus, she was there as a friend of the Court. This Court and the young people in the case at bar were fortunate to have her assistance but she was not counsel to the young people. In jurisdictions outside Toronto, there is no equivalent to the legal aid clinic *Justice for Children and Youth*. Even when the Court has the benefit of amicus, as we saw with A.D., the young person may or may not attend court. This makes it impossible for the Court to have submissions as to the interests of the unrepresented young person who is not present.

30. In the case at bar, it is respectfully submits that it is not possible to edit the pre-sentence reports and victim impact statement without compromising the privacy and identity of the young persons.

31. Further, given the very personal nature of the information contained in pre-sentence reports and victim impact statements, it would not be possible to properly edit these categories of documents in a manner that respects the privacy of the subjects involved and would guarantee that they would not be identified.

32. Professor Leschied gave evidence as to how easy it would be to identify an individual youth from seemingly innocuous information. The professor spoke of a constellation of factors that could tend to identify a young person. It is submitted that in some cases, the facts of the particular offence could identify a young person. Factors that could, either alone or as a constellation, identify a young person include the origin of the young person or his or her family, the fact that the parents are separated, psychological or psychiatric difficulties, educational issues, information as to the young person's relationships, and the nature of the community in which he resides (ie. community housing, particular pockets of the city, a small town).

Evidence of Professor Leschied
Also see evidence of Michelle Moorcroft, Probation Officer
And evidence of Maria Vinette, Probation Supervisor

33. The matter involving J.G. is a case in which the young person would be identified

simply by virtue of the facts of the offence. It is submitted that this Honourable Court can take judicial notice that it is very unusual for a young person to be caught with a gun at school and even more unusual for the arrest to take place at school in the manner described. If the facts contained in the victim impact statement were to be published, J.G. would be identified.

34. As discussed above, other Acts of Parliament, besides the *YCJA,* protect the privacy of information contained in pre-sentence reports. Some of the information contained in the pre-sentence reports in the case at bar are protected by other statutes. Therefore, with respect, this Honourable Court is not in a position to provide the *Toronto Star* with unedited versions of the reports. Even if that were not the case, the submission that the *Star* will undertake to edit very sensitive information is not adequate. The views of the *Star* as to what may tend to identify a young person may not reflect the reality of the young person's life within his or her community. It is further noted that there was no evidence as to how the *Star* might decide what is and what is not going to identify the young person nor how they would assess what might tend to identify the young person. It is insufficient to say that legal counsel and editors will be involved in the review of any article when all of these people are strangers to the young persons and would have no way of knowing what might identify them in their community.

35. In the context of confidential informants, the jurisprudence has made it clear that it is extremely difficult, if not impossible, to engage in an editing process that would protect an informant. The Supreme Court in *Garofoli* recognized that "even the smallest details may provide an accused person with all he or she needs to identify the informer." The Supreme Court in *Leipert*, while not completely discounting the possibility of editing, held that it is virtually impossible for the court to know what details may reveal the identity of an anonymous informer."

R. v. Leipert [1997] 1 S.C.R. 281, at para. 28
R. v. Omar [2007] O.J. No. 541 (O.C.A.), at para. 42, citing *R. v. Garofoli* (1990),

60 C.C.C.(3d) 161 (S.C.C.) at page 194[2]

36. A parallel can be drawn between the confidential informant cases and the case at bar. The reasoning of the courts when dealing with editing information to protect confidential informants can be applied in the context of private information regarding young persons. Just as the courts find it difficult, if not impossible, to determine what information would tend to identify an informant, it would be very difficult to determine what piece or pieces of information would identify a young person in his or her community.

37. It is respectfully submitted that, in the case at bar, the evidence established that it would be extremely difficult, if not impossible, to know which details could identify the young persons. Two of the young persons testified that they feared that their identity could be inadvertently disclosed. J.G. testified that it would be impossible to edit the victim impact statement in his case so as not to disclose his identity. I.E. testified that he believed that his pre-sentence report could not be editsed in a manner that would not disclose his identity.

38. Without knowledge as to what particular aspects of the young person's background or issues will identify him or her, the Court would be left to guess at how to best approach this task. Engaging in a guessing game should not be this Honourable Court's job nor should it be the job of the Toronto Star. The stakes involved in making an error are too high for the Court to let that happen.

Privacy Rights Exist Regardless of Publication

39. Even if the identities of the individuals could somehow be kept secret, which the provincial Crown disputes, there is still the issue of disclosing very private information to individuals who are not attempting to assist the young persons' rehabilitation and are

[2] Note that in *R. v. Omar,* the Ontario Court of Appeal did not agree with the suggestion that the *Leipert* decision was confined to cases involving *anonymous* informants. See para. 43.

not part of the sentencing process. The two young person who testified in the case at bar, E.I. and J.G., made it clear to the Court that they would be very upset if their information was disseminated. Their concern was not solely about publication. E.I., in fact, stated that he was very upset when he saw the Toronto Star lawyer, Mr. Stern, read his pre-sentence report. It is the provincial Crown's respectful submission that dissemination without publication of the exhibits in this case to the media would have a negative effect on the rehabilitation of the young persons involved and a chilling effect on the willingness of offenders and their families to participate in the pre-sentence report process in the future.

The Permanent Nature of Publication in the Internet Age

40. Dr. Leschied testified as to his opinion as to the impact of the internet on stigmatization. While acknowledging "the talk that would go on over the backyard fence in [his] day", he was concerned that in this day and age, print media is also on the internet. This fact is something that adds to the element of stigmatization because the time period for which people might "talk" is extended indefinitely. The information lingers in cyberspace forever.

41. With the advent of Facebook and other social media sites, it is possible for the information to be easily disseminated amongst members of a young person's community. No longer does one have to pay for a newspaper. One can find all of the major newspapers online. In order to disseminate the information further, all it takes is for a friend, acquaintance or neighbour to email the article to members of the community. Another easy method of dissemination is to link the media article to one's Facebook page. As it is common for young people to have a hundred or hundreds of "friends" on Facebook, the detrimental effect is obvious.

42. The Supreme Court in *Dagenais* recognized the impact of technological

advances on the effect of bans on jury impartiality, finding that jury impartiality is substantially diminished. In 1994, when the decision was released, the Court's concerns related to television and radio broadcasting through cable television, satellite dishes, and shortwave radios. The effect of the internet on media accessibility is an extension of these forms of information dissemination. Arguably, the effect of the internet on the dissemination of information is far greater than the effect of television and radio.

Dagenais v. Canadian Broadcasting Corp. [1994] 3 S.C.R. 835, at para. 89[3]

Promoting the Proper Administration of Justice

43. Providing the media with pre-sentence reports and victim impact statements for young persons is contrary to the administration of justice for two reasons.

(1) Providing the Media With Youth Pre-Sentence Reports Has a Detrimental Effect on Rehabilitation

44. The Preamble to the *YCJA* begins by stating that members of society share a responsibility to address the developmental challenges and needs of young persons and to guide them into adulthood. The preamble further states that Canada is a party to the *United Nations Convention on the Rights of the Child* and states that young persons have special protections of their rights and freedoms pursuant to the *Charter.* Meaningful consequences and rehabilitation are entrenched as integral *YCJA* principles in the preamble.

Preamble to the *YCJA*

45. The Declaration of Principle, found in section 3 of the *Act,* starts out by saying that the youth criminal justice system is intended to prevent crime by addressing the circumstances underlying a young person's offending behaviour, rehabilitate offenders and reintegrate them into society and to ensure that a young person is subject to meaningful consequences for his or her behaviour. These goals are there, according to

[3] Tab 1 of the Applicant's Book of Authorities

the Declaration, to promote the long-term protection of the public.

Section 3(1)(a) of the *YCJA*

46. The Declaration of Principle goes on to say that the criminal justice system for young people must emphasize… rehabilitation and reintegration.

Section 3(1)(b)(i) of the *YCJA*

47. The Declaration also refers to rehabilitation and reintegration when it states that the measures taken against young people who commit offences must, where appropriate, involve… social or other agencies [involved] in the young person's rehabilitation and reintegration.

Section 3(1)(c)(iii) of the *YCJA*

48. The Declaration of Principle concludes by saying that "This Act shall be liberally construed so as to ensure that young persons are dealt with in accordance with the principles set out in subsection (1).

Section 3(2) of the *YCJA*

49. The purpose of sentencing in section 38(1) of the *YCJA* is to hold a young person accountable for an offence through the imposition of just sanctions that have meaningful consequences for the young person and that promote his or her rehabilitation and reintegration into society, thereby contributing to the long-term protection of the public. Further, the sentence must be the one that is most likely to rehabilitate the young person and reintegrate him into society.

Sections 38(1) and 38(2)(e)(ii) of the *YCJA*

50. There can be no doubt that the principles of rehabilitation and reintegration are entrenched in multiple places in the *YCJA.* The importance of rehabilitation has also been recognized by the Supreme Court in *R. v. D.B.*. and *R. v. F.N. (Re).*

R. v. D.B., supra
R. v. F.N. (Re), supra

51. The reasoning behind the emphasis on rehabilitation in the youth sentencing process is discussed in Madame Justice Abella's decision in *R. v. D.B.* Her Ladyship stated that "it is widely acknowledged that age plays a role in the development of judgement and moral sophistication…" The judgment goes on to quote Professor Manson, "the general principle that applies to youthful offenders… is that a lack of experience with the world warrants leniency and optimism for the future". The judgment goes on to quote Professor Bala at length on the issue of diminished moral blameworthiness of young persons and the need to have a separate justice system for youth than for adults. The Court ultimately adopts these principles.

R. v. D.B., supra, at paragraphs 62 to 67

52. More importantly for the purpose of this records application, the correlation between publicity and rehabilitation, as referred to in the evidence of Dr. Leschied, has been accepted by the Supreme Court in *R. v. D.B.* The Court concluded that "lifting a ban on publication makes the young person vulnerable to greater psychological stress and social stress". In the end, the Court held that the loss of both the youth sentence and the publication ban rendered the reverse onus provisions unconstitutional, breaching section 7 of the *Charter* and not saved by section 1.

R. v. D.B., supra, at para. 87

53. In *R. v. D.B.,* the Supreme Court spoke about the right to privacy as entrenched in the *YCJA.* The Court adopted Professor Bala's commentary in his 1997 publication, *Young Offender's Law:* "scholars agree that "publication increases a youth's self-perception as an offender, disrupts, the family's ability to provide support, and negatively affects interaction with peers, teachers, and the surrounding community".

R. v. D.B., supra, at para. 84

54. The Court went further and noted that international instruments have recognized the negative impact of such media attention on young people. Quoting from Rule 8 of the *"Beijing Rules" [The United Nations Standard Minimum Rules for the Administration*

of Juvenile Justice][4]: "the juvenile's right to privacy shall be respected at all stages in order to avoid harm being caused to him or her 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." (emphasis added)

R. v. D.B., supra, at para. 85

55. In the end, the Court held that the loss of both the youth sentence and the publication ban rendered the reverse onus provisions unconstitutional, breaching section 7 of the *Charter* and were not saved by section 1.

R. v. D.B., supra, at para. 95

56. In *F.N. (Re),* the Supreme Court held that the public interest in confidentiality of Youth Court dockets outweighs the public interest in openness. The Court held that in the long run, society is best protected by preventing recurrence and maximizing the chances of rehabilitation for young offenders. Concerns regarding stigma and premature labelling were highlighted.

R. v. F.N. (Re) [2000] 1 S.C.R. 880

57. Dr. Leschied's evidence that the dissemination and publication of information that could lead to the identification of young people would be expected to have a detrimental effect on rehabilitation is therefore supported by the Supreme Court decisions in *R. v. D.B.* and *R. v. F.N.*

(2) Providing the Media With Youth Pre-Sentence Reports and Victim Impact Statements Has a Chilling Effect on the Sentencing Process and Ultimately, on the Administration of Justice

Pre-Sentence Reports

58. As this Court heard from the evidence called on this application, obtaining personal information from young people is difficult at the best of times. If young people, or their families, were to be aware that their private information could be placed in the

[4] The Beijing Rules were adopted by the General Assembly Resolution A/RES/40/33

hands of the media, the process of obtaining the necessary information for the purpose of preparing pre-sentence reports would be thwarted. Young people, as a general rule, would be less forthcoming and more selective in the information that they chose to provide. As a result, probation officers would be in a disadvantaged position to provide relevant information about young people and appropriate rehabilitative plans in their reports. As a result, sentencing judges will be less able to meet out appropriate sentences that take into account the particular young person's background, challenges, abilities and disabilities. The result would be less information to base a sentencing decision. This would make it more difficult to include meaningful consequences in the sentence and would reduce the likelihood that the sentence will lead to successful rehabilitation. As this Honourable Court pointed out at the beginning of these proceedings, this is the chilling effect of providing the media with pre-sentence reports for young people.

Evidence of Dr. Leschied
Evidence of Michelle Moorcroft, Probation Officer
Evidence of Maria Vinette, Probation Supervisor

Victim Input

59. Victim impact statements are governed by section 722 of the *Criminal Code.* Section 722.2 of the *Code* requires sentencing judges to inquire as to whether or not the victim wishes to provide a victim impact statement. The *YCJA* makes it clear that victims play an important role in the youth criminal justice system. Section 3(1)(c)(ii) of the *Act* states that "within the limits of fair and proportionate accountability, the measures taken against young persons who commit offences should encourage the repair of harm done to victims and the community". Section 38(2)(e)(iii) requires sentencing judges to acknowledge the harm done to victims ad communities. Section 38(3)(b) and (c) require sentencing judges to take into account the harm done to victims and any reparation made to victims or the community. Further, the preamble to the *YCJA* states that Canadians should have a youth criminal justice system that takes into account the interests of victims.

Sections 722 and 722.2 of the *Criminal Code of Canada*
Sections 3(1)(c)(ii), 38(2)(e)(iii) and 38(3)(b)and (c) of the *Youth Criminal Justice*

Act, and Preamble to the *YCJA*

60. In youth proceedings, victim input can also be garnered through the pre-sentence report. Section 40(3)(b) of the *YCJA* requires probation officers to interview victims for the purpose of pre-sentence reports where reasonably possible.

Section 40(3)(b) of the *YCJA*

61. There is no dispute that victim input forms an integral part of the sentencing process. That being said, there is no obligation on the part of victims to participate in the process by providing victim impact statements or participating in interviews for the purpose of pre-sentence reports. When they do, it is important that their privacy is respected as occurred in *K.J.B..* To hold otherwise would result in victims being less likely to participate in the process. As a result, victim input in the form of pre-sentence reports and victim impact statements would be less available to sentencing courts. Once again, this would lead to a less informed sentencing judge who is ultimately deprived of a full appreciation of the impact of the crime on the young person. This would create a disadvantage for the sentencing judge who is attempting to craft a sentence that involves meaningful consequences. It also would lead to a compromise in the ability of the justice system to assist the young person in his or her understanding of the impact of the crime on the victim.

Evidence of Dr. Leschied
R. v. K.J.B. [re Sun Media (Toronto) Corp.], supra, at paras. 7 and 18

The Chilling Effect: Parallel to Informer Privilege

62. The Supreme Court of Canada considered the interface between the informer privilege rule and the open court principle in *Named Person v. Vancouver Sun.* The media outlet in that case argued that the informer privilege rule is discretionary and that judges have the power to determine on a case-by-case basis whether the courtroom should be closed in order to protect the privilege of the informer. Mr. Justice Bastarache, writing for the majority, held that the informer privilege is mandatory and subject only to the “innocence at stake” exception. It was made clear that if an informer

requests an *in camera* hearing, one will be held. The mandatory nature of the privilege is aimed in part to protect the identity of the informant but *also to promote the proper administration of justice*. The mandatory nature of the privilege was said to "encourage would-be informers to come forward and report on crimes, safe in the knowledge that their identity will be protected".

> *Named Person v. Vancouver Sun* [2007] S.C.J. No. 43 (S.C.C.), at paras. 39 to 40
> *Also see R. v. X.Y.* [2011] O.J. No. 1479 (O.C.A.), at para. 22

63. A parallel argument is made in this case. Protecting the privacy of the information contained in pre-sentence reports and victim impact statements will serve the administration of justice. Just as the Supreme Court held that informants will be more likely to come forward and report on crimes, safe in the knowledge that their identity will be protected, young persons, whether offenders or victims, will be more likely to participate in the preparation of pre-sentence report and / or victim impact statements.

The Effect on the Sentencing Process of Compromised Pre-Sentence Reports and Reduced or Absent Victim Input

64. Youth Courts rely heavily on the information contained in pre-sentence reports and victim impact statements in order to craft a sentence that will provide for meaningful consequences and to promote the young person's rehabilitation. Without fulsome information, the Youth Court would be disadvantaged in it's ability to sentence individual young persons.

Conclusion

65. There is no dispute that the open court principle applies in Youth Court. However, the *YCJA* and the common law require that the open court principle be modified in youth proceedings. The media has a right to be present and report on what happens in Youth Court (subject to legislative restrictions and as long as nothing they report will identify the young person). However, when it comes to youth court records,

interested parties, including the media, do not have a right of access. The media has a right to *apply* for access. The nature of the records, and the privacy implications of providing media access, must be considered upon such an application. Highly confidential youth court records such as pre-sentence reports and victim impact statements must remain confidential. The media, in reporting on sentences, has the judge's reasoning in the reasons for sentence to rely upon. Given that judges are required to provide adequate reasons to allow one to understand the reasons behind their sentences, the media has sufficient information to rely upon in it's quest to monitor the youth court process. Not only will releasing highly confidential documents to the media infringe on the privacy rights of the young persons involved, to do so will be detrimental to the proper administration of justice.

R. v. Sheppard [2002] 1 S.C.R. 869 (S.C.C.)

ALTERNATIVE ARGUMENT: WHAT IS THE CORRECT TEST TO BE APPLIED IN A MEDIA APPLICATION FOR PRE-SENTENCE REPORTS AND VICTIM IMPACT STATEMENTS?

The Legislation: Section 119(1)(s)(ii) of the Youth Criminal Justice Act

66. Section 119(1)(s)(ii) of the *Youth Criminal Justice Act* provides the framework for the test to be applied in this application. Section 119(1)(s) reads as follows:

> 119. (1) Subject to subsections (4) to (6), from the date that a record is created until the end of the applicable period set out in subsection (2), the following persons, on request, shall be given access to a record kept under section 114, and may be given access to a record kept under sections 115 and 116:
>
> (s) any person or member of a class of persons that a youth justice court judge considers has a valid interest in the record, to the extent directed by the judge, if the judge is satisfied that access to the record
>
> (ii) desirable in the proper administration of justice.

S.L. v. N.B. [2005] O.J. No. 1411, at para. 46
R. v. B.J. [2009] A.J. No. 905 (Alta. Prov. Ct.)
R. v. A.Y.D. [2011] A.J. No. 1031 (Alta. Ct. Q.B.), at para. 23

67. The media falls within the definition in s.119(1)(s) of a class of persons with a valid interest in records of court proceedings *to the extent directed by a judge and if access is desirable in the interest of the proper administration of justice.*

R. v. N.Y. [2008] O.J. No. 1979 (O.S.C.J. - Youth Justice Court), Sproat, J., at para. 1
R. v. N.Y. [2008] O.J. No. 1217 (O.S.C.J. – Youth Justice Court), Sproat, J., at para. 93
R. v. R.D.S. (1995), 142 N.S.R. (2d) 321 (N.S.S.C.), at para. 34
a*s cited in R. v. B.J.* [2009] A.J. No. 905 (Alta. Prov. Ct.), at para. 4

The Dagenais-Mentuck Test Does Not Apply to Records Applications Pursuant to the YCJA

68. The Applicant proposes that the *Dagenais-Mentuck* test applies to *YCJA* records applications. With respect, this argument undermines the important objectives of the *Youth Criminal Justice Act* and ignores the privacy rights of young persons that are entrenched in the *YCJA* and the common law.

69. The *Dagenais-Mentuck* test is based in *Charter* values as applied in adult court and without regard to the rights historically given to young persons. As the Honourable Madame Justice Abella stated in *R. v. D.B.*., “young people who commit crimes have historically been treated separately and distinctly from adults”.

R. v. D.B. [2008] 2 S.C.R. 3, at para. 1

70. There is very little guidance in the jurisprudence. However, a recent Alberta case

dealing with a media application for trial exhibits, *R. v. A.Y.D*., supports the Provincial Crown's position that the *Dagenais-Mentuck* test does *not* apply to *YCJA* records applications.

R. v. A.Y.D. [2011] A.J. No. 1031 (Alta. Ct. Q.B.), at para. 23

71. As noted by Gill, J. in his judgment in *A.Y.D.,* "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". Gill, J. quoted from the Honourable Mr. Justice Doherty's judgment in *L.(S.) v. B.(N.),* in regards to the benefits of maintaining the privacy of young persons.

L.(S.) v. B.(N.), [2005] O.J. No. 1411 (O.C.A.)
R. v. A.Y.D., supra, at paras. 23 and 24

72. By asking the Court to apply the *Dagenais-Mentuck* test in youth proceedings, the Appellant suggests that this Court should place the burden on unrepresented young persons to protect their own privacy rights. As against the corporate media, an unrepresented young person is greatly disadvantaged. The protections of the *Charter* are not meant to be a tool for the powerful to try to roll back statutory measures designed to ameliorate the conditions of powerless or disadvantaged citizens.

THE CONFLICTING RIGHTS OF THE MEDIA AND THE YOUNG PERSONS

The Rights of Young Persons to Privacy is Recognized by Statute and Common Law and is Entrenched in Section 7 of the *Charter*

73. Historically, criminal proceedings involving "juvenile delinquents" were held *in camera.* The Supreme Court in *Re: Southam Inc. v. The Queen (No. 1)* struck down the provision in the *Juvenile Delinquents Act (JDA)* that required all youth criminal court proceedings to be held *in camera.* In so doing, the Court reviewed comparable legislation and found that the majority approach was that juvenile courts are given

discretion to exclude members of the public depending on it's view of the circumstances. The Court held that an absolute ban in all circumstances was not a reasonable limit on right of access to the courts. The Court suggested an amendment "giving jurisdiction to the Court to exclude the public from juvenile court proceedings where it concludes, under the circumstances, that it is the best interests of the child or others concerned or in the best interests of the administration of justice".

Re: Southam Inc. v. The Queen (No. 1) (1983), 41 O.R. (2d) 113, at page 134

74. While the Supreme Court in *Southam* did not endorse an absolute ban in all cases, it did conclude that there was a rational basis for the exclusion of the public from hearings under the *JDA*.

Re: Southam Inc. v. The Queen (No. 1), supra, at page 134

75. Section 132 of the *YCJA* provides discretion to the Court to exclude members of the public from the court in certain circumstances. The justifications in the *Act* for exclusion are:

(a) any evidence or information presented to the court or justice would be seriously injurious or seriously prejudicial to

(i) the young person who is being dealt with in the proceedings,

(ii) a child or young person who is a witness in the proceedings, or

(iii) a child or young person who is aggrieved by or the victim of the offence charged in the proceedings; or

(b) it would be in the interest of public morals, the maintenance of order or the proper administration of justice to exclude any or all members of the public from the court room.

Section 132 of the *YCJA*

76. The constitutionality of a provision similar to the above provision, s. 39 of the *Young Offenders Act*, was upheld by Justice Holland in *R. v. Southam Inc.* In so holding, Holland, J. stated:

> In my view, based on the evidence which I heard from expert witnesses, the protection and rehabilitation of young people involved in the criminal justice system is a social value of the "superordinate importance" which justifies the abrogation of fundamental freedom of expression, including freedom of the press, to the extent effected by s.38(1) of the YOA. Section 38(1) is, in my view, a reasonable limitation on that freedom.
>
> *R*. v. Southam Inc. [1984] O.J. No. 3398 (Ont. H.C.J.), at para. 73, aff'd. 25 C.C.C.(3d) 119 (O.C.A.), leave to appeal to S.C.C. refused.

77. The Declaration of Principle in section 3(1)(b)(iii) of the *YCJA* states that "the criminal justice system for young persons must be separate from that of adults and emphasize… enhanced procedural protection to ensure that young persons are treated fairly and that their rights, including their *right to privacy*, are protected".

Section 3(1)(b)(iii) of the *YCJA*

78. The Declaration of Principle further states that "special considerations apply in respect of proceedings against young persons, and in particular, young persons have rights and freedoms in their own right…"

Section 3(1)(d)(1) of the *YCJA*

79. Unlike the *Criminal Code of Canada,* the *YCJA* protects the records of the Court in Youth Court proceedings. The legislation confers upon the Youth Justice Court the jurisdiction to decide if and to whom youth court records can be disseminated. In the event that records are released, the statutory regime also places restrictions on the copying and retention of youth court records.

Sections 118 to 129 of the *YCJA*

80. As discussed above, the Supreme Court of Canada has recognized that young persons who offend have constitutionally entrenched privacy rights.

R. v. D.B., supra

81. In *R. v. D.B.,* the Supreme Court of Canada, the Court struck down the reverse onus provision for presumptive offences that existed in the *YCJA*. The Court held that

placing the burden on the young person to demonstrate that the sentence should not be an adult sentence is a violation section 7 of the *Charter* and is not saved by section 1. In that case, the Court also commented extensively on the loss of privacy protections for young people that ensued from receiving an adult sentence and therefore losing the benefit of the *YCJA* publication ban.

R. v. D.B., supra

82. Abella, J., in reviewing the jurisprudence, quoted extensively from a case she referred to as the "Quebec Reference". The Quebec Court of Appeal had also examined the constitutionality of these provisions and had found four fundamental principles of fundamental justice violated by the reverse onus provision:

(i) young offenders must be dealt with separately from adults;
(ii) rehabilitation, rather than suppression or dissuasion, must be at the heart of legislative and judicial interventions with young persons;
(iii) the justice system for minors must limit the disclosure of the minor's identity so as to prevent stigmatization that can limit rehabilitation;
(iv) it is imperative that the justice system for minors consider the best interests of the child.

Quebec (Minister of Justice) v. Canada (Minister of Justice) (2003), 175 C.C.C.(3d) 321, at para. 15, as cited in *R. v. D.B.* [2008] 2 S.C.R. 3, at para. 32.

83. The Supreme Court in *Dagenais* recognized the benefits of publication bans in certain circumstances. These benefits include: (a) the protection of vulnerable witnesses, including children, police informants, and victims of sexual offences, (b) maximizing the chance that witnesses will testify because they will not be fearful of the consequences of publicity, (c) reserving the privacy rights of individuals involved in the criminal justice process (for example, the accused and his or her family as well as the victims and the witnesses and their families), and (d) maximizing the chance of rehabilitation of "young offenders".

Dagenais v. Canadian Broadcasting Corp., supra, at page 57

84. Restrictions on access to records minimizes the stigmatization of young persons

and increases the likelihood of rehabilitation. While the Youth Justice Court is generally an open court, there are restrictions as well on publication. As well, the Youth Justice Court has the authority, as noted above, to exclude some or all members of the public in a youth court proceeding.

R. v. Telegraph Journal [2010] N.B.J. No. 227 (N.B. Prov. Ct.), at paras. 14 to 17

Media Rights to Youth Court Records

85. The "open court principle" applies to Youth Court in a m*odified manner in accordance with the provisions of the YCJA*.

R. v. D.B. [2008] 2 S.C.R. 3
Re: Southam Inc. and The Queen (No. 1) (1983), 41 O.R. (2d) 113 (C.A.)
Sections 3(1)(b)(iii), 110, 111, 118-129 of the *YCJA*
Preamble to YCJA

86. There is jurisprudence to support the notion that the media has a valid interest in Youth Court records in general. However, section 119(1)(s) confers upon the Youth Court the obligation to determine if releasing a particular Youth Court record to the media is "desirable in the public interest of the proper administration of justice". In so determining, the Court must consider all of the interests at stake including those of the media, those of the specific young persons to whom the records relate, and society as a whole.

Dagenais v. Canadian Broadcasting Corp. [1994] 3 S.C.R. 835 (S.C.C.), at para. 72

No Hierarchy of Rights

87. *Dagenais* holds that all *Charter* rights must be treated on a footing of equality: "A hierarchical approach to rights, which places some over others, must be avoided, both when interpreting the *Charter* and when developing the common law." Yet on their proposal, media rights get undeserved mechanistic, automatic primacy, at the price of the rights of young persons and of society's interest in the long-term protection of the public. According to the Applicant's proposal, no balancing of these equally valued

rights occurs unless the young persons first discharge their heavy burden of proof. That is not equality.

Dagenais v. Canadian Broadcasting Corp., supra, at para. 72

88. *Dagenais* further holds that "when the protected rights of two individuals come into conflict, as can occur in the case of publication bans, *Charter* principles require a balance to be achieved that fully respects the importance of both sets of rights".

Dagenais v. Canadian Broadcasting Corp., *supra,* at para. 72

Examples of Cases Where Media Rights Have Been Limited in Adult Court

89. It is respectfully submitted that this Court must look to jurisprudence in the adult courts with some caution, keeping in mind that the decisions were made in the context of a different system of justice. The Toronto Star's argument relies on the jurisprudence in the adult context. It is easy to be inadvertently misguided by the adult jurisprudence. It is important to always keep in mind the fact that these cases were decided with little or no regard to youth justice principles. That being said, there are some cases in the adult criminal jurisprudence that demonstrate that even in the adult system, the open court principle usually enjoyed by the media, is trumped by other rights.

90. *Vickery v. Nova Scotia Supreme Court (Prothonotary)* involved an application for video and audio taped exhibits in an adult murder trial in which the accused was ultimately acquitted. The audio tapes contained an alleged confession and the videotape contained an alleged re-enactment of the killing. The Supreme Court denied the media access to these exhibits. In it's conclusion, Mr. Justice Stevenson, writing for the majority of the Court, quoted Mr. Justice Dickson in *Nova Scotia (Attorney-General) v. MacIntyre:* "…curtailment of public accessibility can only be justified where there is present the need to protect social values of a superordinate importance. One of these is the protection of the innocent."

Vickery v. Nova Scotia Supreme Court (Prothonotary) [1991] S.C.J. No. 23, at para. 35, citing *Nova Scotia (Attorney-General) v. McIntyre* [1982] S.C.J. No. 1

91. Taking into account the correlation between privacy and rehabilitation in youth justice, as acknowledged by the Supreme Court, protecting young persons' privacy rights is a value that is of equal importance as protecting an acquitted person's privacy. In that case, the audios and video in question were strong evidence pointing to the guilt of the accused. While the Court had quite properly excluded the evidence, the media was restricted in it's ability to report about this key evidence in a high profile murder case. However, the need to protect the acquitted accused, who is presumed innocent, trumped over the open court principle.

92. *Canadian Broadcasting Corp. v. The Queen*[5], the *Dufour* case, involves similar facts to the *Vickery* case. The media applied for permission to broadcast the video recording of an acquitted accused's statement tendered in evidence at trial. The media was not permitted to broadcast the statement. The Court held,

> the fact that Mr. Dufour had been acquitted and his particular vulnerability are factors that give meaning to Dickson, J.'s comment in *MacIntyre*, at pages 186-187, that there are cases in which the protection of social values must prevail over openness. In my view, a situation requiring the protection of vulnerable individuals, especially after they have been acquitted is one such case.
>
> *Canadian Broadcasting Corp. v. The Queen* [2011] 1 S.C.R. 65, at para. 19

93. *Toronto Star Newspapers Ltd. v. Canada* involved a constitutional challenge to the section 517 *Criminal Code* bail hearing publication ban. The Supreme Court upheld the constitutionality of the s.517 publication ban despite it's limits on freedom of expression. Mr. Justice Deschamps, writing for the majority, commented that "if they know that the evidence could be published, accused persons might have to make decisions they would not otherwise have made…" The Court referred to it's earlier decision in *Canadian Newspapers Co. v. Canada (Attorney-General)* in which the publication ban on the identity of complainants was upheld. Deschamps, J. quoted with approval from the earlier case as follows:

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[5] Tab 34 of the Applicant's authorities

> Obviously, since fear of publication is one of the factors that influences the reporting of sexual assault, certainty with respect to non-publication at the time of deciding whether or not to report plays a vital role in that decision…
>
> *Toronto Star Newspapers Ltd. v. Canada* [2010] S.C.J. No. 21, at para. 43, citing *Canadian Newspapers Co. v. Canada (Attorney-General)* [1988] 2 S.C.R. 122
>
> *Also see Canadian Broadcasting Corporation v. The Attorney General for New Brunswick* [1996] 3 S.C.R. 480[6]

94. The fear of publication acknowledged in the *Toronto Star* and the *Canadian Newspapers* cases cited above, are relevant in the instant case. The provincial Crown has submitted that there will be a chilling effect on the willingness of offenders and their families to participate in the youth pre-sentence report process should they be aware that the media can publish the contents of these documents. It has further been argued that victims would be less forthcoming and less willing to write victim impact statements if they could be accessed by the media and reported on. This argument is supported by these cases.

95. It is interesting to observe that in the *Toronto Star* bail hearing publication ban case, the Supreme Court noted that newly arrested accused persons often have a limited understanding of the court process… and a limited ability to instruct counsel. Evidence was called that Duty Counsel regularly have a very limited amount of time to interview accused persons and that accused persons often participate in the bail hearing process with limited time to have their questions answered. Just as the limited representation of adult accused at bail hearings was a relevant factor to take in account, the lack of representation expected in cases involving young persons faced with s.119 applications brought on by the media must be taken into account.

96. *Canadian Broadcasting Corp. v. Canada (Attorney-General)* is a very recent Supreme Court decision regarding “cameras in the courtroom” in Canada. The Court was faced with a constitutional challenge to court house directives that prohibited the press from filming, take photographs, conducting interviews in the courthouse, and

broadcasting official audio recordings of hearings. The Court held that these measures were constitutional. After re-iterating the "open court principle", Mr. Justice Deschamps commented that "this Court has noted on numerous occasions that the protection of s.2(b) of the *Charter* is not without it's limits and that governments should not be required to justify every exclusion or regulation of a form of expression… this is just as true in the context of freedom of the press." The Court looked to the American experience, including the O.J. Simpson case, before coming to it's conclusion that these rules posed a justifiable limit on freedom of expression.

> *Canadian Broadcasting Corp. v. Canada (Attorney-General)* [2011] 1 S.C.R. 19, at para. 32

97. In his reasons, Mr. Justice Deschamps stated that:

> The evidence shows that allowing journalists to film, take photographs, and conduct interviews in courthouses without restrictions had many adverse consequences for the administration of justice. For example, these activities accentuated the anxiety and stress witnesses felt when compelled to testify, which in the long run undermined the search for the truth…. Thus, the evidence shows that the presence and the conduct of journalists outside courtrooms had a negative effect on the decorum and serenity of hearings. When the testimony of a victim or witness is compromised in any way, it not only hurts the defendant's case, but also the structure of our judiciary in its search for the truth… The increased presence of journalists also appears to have created a great stress for witnesses and their family members.

> *Canadian Broadcasting Corp. v. Canada (Attorney-General)*, supra, at paras. 67, 68 and 73

98. The Court concluded by saying that:

> freedom of the press and the fair administration of justice are essential to the proper functioning of a democratic society and must be harmonized with one another. Each one is just as vital as the other. Freedom of the press cannot foster self-fulfillment, democratic discourse and truth finding if it has a negative impact on the fair administration of justice…

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[6] Tab 5 of the Applicant's authorities

Canadian Broadcasting Corp. v. Canada (Attorney-General), supra, at para. 98

99. A parallel can once again be drawn to the instant case. The protection of witnesses and their families, as well as the decorum of the courtroom and search for the truth, were found in the *C.B.C.* case to justify limits on the freedom of the press. Surely, the protection of the privacy of disadvantaged young persons, offenders and witnesses, and the resulting protection of the principle of rehabilitation and public safety, also justifies limits on the press to access private records.

CHARTER PRINCIPLES – A GENERAL OVERVIEW

Introduction

100. The case at bar does not involve a constitutional challenge. However, this Honourable Court is being asked to balance important *Charter* principles. The provincial Crown asks the Court to accept that protection of young persons' privacy rights, protected by s.7 of the *Charter,* is justified in light of the Toronto Star's right to freedom of expression pursuant to s.2(b) of the *Charter*.

A Minimal Infringement on Section 2(b) Rights Requires Minimal Justification

101. Preferring the protection of privacy rights as contained in youth pre-sentence reports and victim impact statements over the media's right to freedom of expression needs minimal s. 1 justification. The government's s. 1 burden varies with the s. 2(b) infringement's severity. The less severe the s. 2(b) infringement, the less is the government's s. 1 burden.

102. Protecting these important privacy interests minimally infringes s. 2(b), since:

(i) The press or the public is not stopped from attending youth proceedings and gathering information for publication;

(ii) The media are free to publish a wealth of information revealed at an open, public trial as long as they don't publish the name of the young persons involved, or anything that would identify them.

(i) There is no objective or systematic evidence to support the Applicant's position that obtaining pre-sentence reports and victim impact statements are necessary to either inform the public or hold courts accountable.

(iv) There is no objective or systematic evidence to support the Applicant's position that a class-based privilege makes it impossible to inform the public on the sentencing process in youth court, to report critically on it, and to hold courts accountable.

(v) Mr. Bruser, in this case, wishes to write an article or series of articles on the Youth Court at 311 Jarvis. In each case, Mr. Bruser was in court to hear the submissions and reasons for judgment of the sentencing judge. *R. v. Sheppard* makes it clear that sentencing judges have a duty to provide meaningful reasons for their decisions. As long as he does not identify any of the young people in his article, Mr. Bruser would have material with which to write about the youth justice process.

R. v. Sheppard, supra

Pressing Objectives

103. As discussed above, protecting privacy rights of young people promotes their rehabilitation, which is a fundamental principle in the *Youth Criminal Justice Act. F*urther, protecting the privacy rights of individuals promotes the public's interest in the proper administration of justice.

Rational Connection

104. The protecting of young persons' privacy rights is rationally connected to the pressing objectives at hand. Dr. Leschied pointed out in his evidence the necessarity of protecting these rights in order to promote long-term rehabilitation. As noted above, the Supreme Court in *R. v. D.B.* and *R. v. F.N. (Re)* has recognized this principle. Further, it is submitted that the evidence at this hearing established that the ability of gathering information for the purpose of writing pre-sentence reports is largely dependant on the young person and their family being satisfied that their privacy will be respected. Courts

have also recognized that victim participation is compromised by concerns about publicity. Without an assurance of privacy protections, the court will undoubtedly, in many cases, be faced with less fulsome pre-sentence reports and compromised victim input. As such, will be significantly deprived in it's ability to craft a rehabilitative sentence for the young person that provides for meaningful consequences. Given that the principles of rehabilitation and accountability promote the long-term protection of the public, compromising these principles is deleterious to the administration of justice.

Evidence of Dr. Leschied
Evidence of Michelle Moorcroft
Evidence of Maria Vinette
R. v. D.B., supra
R. v. F.N. (Re), supra
Section 3(1) of the *YCJA*

REQUEST FOR STAY OF ORDER

105. The issues raised in this case greatly impact on the administration of justice and are of a high level of public importance. As this Honourable Court has stated, this is a

"test case". There is therefore a significant chance that this Honourable Court's decision will need to be reviewed by way of extraordinary remedy or appeal. In the event that the Court rules that the Toronto Star should be provided with part or all of the pre-sentence reports and / or victim impact statement, the Crown respectfully requests that the Court impose a stay of proceedings for a period of 30 days. Such a stay would allow the Crown, as well as the young people, time to review this Honourable Court's decision and file an application for an extraordinary remedy or appeal, if need be. In addition, the Crown requests a further stay of the decision until the reviewing Court's judgment is rendered in the event of an application or appeal being filed.

See for example R. v. Mentuck [2001] S.C.C. 76[7]

Also see:

R. v. Provo [1989] 2 S.C.R. 3, at para. 30

R. v. Taylor [2006] B.C.J. No. 1343 (B.C.C.A.), at para. 13

O'Connor v. Nova Scotia [2001] N.S.J. No. 90 (N.S.C.A.), at para. 23

Dagenais v. Canadian Broadcasting Corp. [1994] 3 S.C.R. 835, at para. 89[8]

[7] See Tab 2 of the Applicant's authorities
[8] Tab 1 of the Applicant's Book of Authorities

PART IV - ORDERS REQUESTED

106. It is respectfully requested that this Honourable Court declare that youth pre-sentence reports and victim impact statements are to be kept private and are not to be disclosed to the media.

107. In the alternative, it is respectfully requested that the Court deny the Toronto Star access to the pre-sentence reports of E.I. and A.D. as well as the victim impact statement related to J.G.

108. In the alternative, it is respectfully requested that access to these records be limited by way of redaction. In the event that this Honourable Court decides to redact some or all of the records, the parties should be given an opportunity to make submissions as to the appropriate redactions. The Court should do the redacting. The Toronto Star should not be given that responsibility.

109. In the event that this Honourable Court decides to provide access to the Toronto Star to part or all of the records, it is respectfully requested that the Court impose a stay of proceedings for a period of 30 days in order to allow for time for consideration of an extraordinary remedy or appeal. In addition, the Crown requests a further stay of the decision until the reviewing Court's judgment is rendered in the event of an application or appeal being filed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of October, 2011.

_____

Amy Barkin,
Assistant Crown Attorney

SCHEDULE OF AUTHORITIES

Canadian Broadcasting Corp. v. The Queen [2011] 1 S.C.R. 65

Toronto Star Newspapers Ltd. v. Canada [2010] S.C.J. No. 21

R. v. D.B. [2008] 2 S.C.R. 3

Named Person v. Vancouver Sun [2007] S.C.J. No. 43 (S.C.C.)

R. v. Sheppard [2002] 1 S.C.R. 869 (S.C.C.)

R. v. Mentuck [2001] S.C.C. 76

R. v. F.N. (Re) [2000] 1 S.C.R. 880

R. v. Leipert [1997] 1 S.C.R. 281

Canadian Broadcasting Corporation v. The Attorney General for New Brunswick [1996] 3 S.C.R. 480

Dagenais v. Canadian Broadcasting Corp. [1994] 3 S.C.R. 835

Vickery v. Nova Scotia Supreme Court (Prothonotary) [1991] S.C.J. No. 23

R. v. Provo [1989] 2 S.C.R. 3, at para. 30

R. v. X.Y. [2011] O.J. No. 1479 (O.C.A.)

R. v. Omar [2007] O.J. No. 541 (O.C.A.)

S.L. v. N.B. [2005] O.J. No. 1411 (C.A.)

Re: Southam Inc. v. The Queen (No. 1) (1983), 41 O.R. (2d) 113 (C.A.)

R. v. N.Y. [2008] O.J. No. 1979 (O.S.C.J. - Youth Justice Court), Sproat, J.

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R. v. K.J.B. [re Sun Media (Toronto) Corp.], [2003] O.J. No. 3557 (O.S.C.J.)

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