C62728

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

TORONTO POLICE SERVICE

Appellant
(Applicant)

- and –

L.D., a young person

Respondent
(Responding Party)

- and -

STEVEN MIGNARDI

Respondent
(Cross-Applicant)

- and -

JUSTICE FOR CHILDREN AND YOUTH

CRIMINAL LAWYERS' ASSOCIATION

OFFICE OF THE INDEPENDENT POLICE REVIEW DIRECTOR

Interveners

FACTUM OF THE INTERVENER
JUSTICE FOR CHILDREN AND YOUTH

PART I – PROCEDURAL HISTORY

1. JFCY substantially agrees with the procedural history as set out by the Appellant.

Factum of the Appellant, Toronto Police Service, at para 1-7

PART II – OVERVIEW

2. This case concerns the extent to which youth records under the *Youth Criminal Justice Act,* S.C. 2001, c. 1 (*"YCJA"*) may be subject to access and disclosure for the purposes of police disciplinary proceedings, both by the Toronto Police Services, and the subject officer, PC Mignardi.

3. At the heart of this appeal, however, are the principles and policies underlying the youth criminal justice system and animating the *YCJA*. Indeed, there is broad consensus, both legally and scientifically, that young people are inherently vulnerable in society and in the justice system specifically, and are therefore entitled to a presumption diminished moral blameworthiness and enhanced procedural and privacy protections. Among these are strict statutory controls, established under Part 6 of the *YCJA*, over the use and dissemination of youth records to ensure that these records are not misused in proceedings outside the youth criminal justice system where these principles may not be well understood nor a young person's rights adequately protected.

4. This Court must ensure that both the provisions and the principles of the *YCJA* are rigorously defended and applied to ensure that the privacy rights to which young people are entitled – and the protective functions they perform – are safeguarded.

PART III – FACTS

5. JFCY substantially agrees with the facts as stated by the Appellant.

Factum of the Appellant, Toronto Police Service, at para 18-22

PART IV – LAW AND ARGUMENT

A. YOUNG PEOPLE ARE ENTITLED TO A RECOGNITION OF THEIR VULNERABLE PLACE IN SOCIETYAND THEIR EVOLVING CAPACITIES AND A PRESUMPTION OF DIMINISHED MORAL BLAMEWORTHINESS OR CULPABILITY

6. International, foreign, and Canadian legal traditions have recognized the inherent vulnerability of young people in society, and specifically in the criminal justice system, occasioned by their evolving capacities, lack of sophistication and maturity, and dependence on adults.

7. The United Nations Convention on the Rights of the Child ("UNCRC") – to which Canada is a signatory, and which is expressly incorporated into the *YCJA* – requires that "special safeguards and care, including legal protection" be afforded to young people "by reason of their physical and mental immaturity".

> United Nations, Convention on the Rights of the Child, Can. T.S. 1992 No. 3., Preamble, Article 40, clauses 1 and 2(b)(vii).
>
> *YCJA, supra*, Preamble
>
> UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), Article 25

8. It is furthermore a matter of scientific, and international and domestic legal consensus that young people have a reduced capacity for moral judgment as compared to an adult.

9. Indeed, widely accepted research into adolescent neurological and psychological development confirms that adolescents are physiologically and cognitively unable to think, reason, judge consequences, or make decisions like adults.

> Jones, B., Birdsell M., & Rhodes, E., "A Call For Enhanced Constitutional Protections for the Special Circumstances of Youth" (2013) 3:2 CR (7th) 350 at 352-359
>
> King, K.J., "Waiving Childhood Goodbye: How Juvenile Courts Fail to Protect Children From Unknowing, Unintelligent, and Involuntary Waiver of Miranda Rights", (2006) Wis. L. Rev. 431 at 440

10. The United States' Supreme Court, reviewing the law and sociological and scientific literature, has confirmed that young people lack maturity and a developed sense of responsibility, resulting in disproportionate involvement in reckless behaviour as compared to adults. Moreover, the Court recognized that young people are more vulnerable to negative influences and outside pressures,

explained in part by "the prevailing circumstance that juveniles have less control, or less experience with control over their own environment". Finally, the Court recognized that the character of a juvenile is not as well formed as that of an adult. As the Court stated, "The personality traits of juveniles are more transitory, less fixed".

Roper v Simmons, 543 US 551 (2005) (US Sup Ct), at III B pp 15-16

11. Accordingly, the Court confirmed that young people are less morally culpable for their conduct and concluded:

> The susceptibility of juveniles to immature and irresponsible behaviour means their irresponsible conduct is not as morally reprehensible as that of an adult. Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult. . . .

Roper v Simmons, supra (internal quotes omitted), at p 16

12. The United States' Supreme Court has also recognized that children and young people cannot simply be viewed as miniature adults and that a child's age is "far more than a chronological fact". Rather, "it is a fact that generates common-sense conclusions about behaviour and perception" that apply broadly to children as a class, that is: children are generally less mature and responsible than adults; lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them; lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them. These generalizations "exhibit the settled understanding that the differentiating characteristics of youth are universal".

JDB v North Carolina, 131 S Ct 2394 at 2404 (2011) (US Sup Ct) at II B, p 9-10

13. The relative vulnerability and diminished capacity for moral judgment of young people has also been recognized by this Court and the Supreme Court of Canada and, has been recognized as principle of fundamental justice under section 7 of the *Canadian Charter of Rights and Freedoms.*

14. In *DB,* the Supreme Court of Canada affirmed that the principle of diminished moral

culpability in a principle of fundamental justice that underlies the entire youth criminal justice system. Abella J. explained that young people are entitled to a separate legal *and* sentencing regime:

> . . . because of their age, young people have heightened vulnerability, less maturity and a reduced capacity for moral judgment. This entitles them to a *presumption* of diminished moral blameworthiness or culpability.
>
> *R v DB*, 2008 SCC 25, [2008] 2 SCR 3, at para 41

15. The Court furthermore affirmed that it is widely acknowledged that age plays a role in the development of judgment and moral sophistication and that young people lack a fully developed adult sense of moral judgment. They accordingly cannot be dealt with as if they were proceeding with the same degree of insight into their wrongdoing as more mature, reflective, or considered individuals. The Court confirmed that this is a legal principle fundamental to the operation of a fair legal system, and is therefore a principle of fundamental justice.

16. The Supreme Court has also commented that young people are recognized in Canadian and international law as inherently vulnerable as a class and that "the law attributes the heightened vulnerability based on chronology, not temperament."

> *AB (Litigation Guardian of) v Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 SCR 567, at para 17 (internal citations omitted)

17. In *LTH*, in discussing the procedural protections required when a young person is subject to questioning by police, the Supreme Court recognized the vulnerability of young people within the criminal justice system as a result of their age, noting their relative lack of sophistication.

> *R v LTH*, 2008 SCC 49, [2008] 2 SCR 739, at para 3

18. This Court has similarly found 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 KB*, [2003] OJ No. 3553, 67 OR (3d) 391 (ONCA), para 8

19. The concern for privacy furthermore lies at the heart of the protection against unreasonable search and seizure under section 8 of the *Charter*. Indeed, there is a significant privacy interest in

information about oneself, based on the notion of the dignity, autonomy, and integrity of the individual. These considerations have been found to apply equally, if not more strongly, in the case of young persons.

AB v Bragg Communications, supra, at para 18, citing *Toronto Star v Ontario*, 2012 ONCJ 27

20. In sum, children and youth are understood to be vulnerable members of society, deserving of special protections and safeguards and, as a result of their diminished capacity to appreciate the consequences of their actions and their incompletely developed moral reasoning and judgment, young people are unequivocally considered to be less morally responsible for criminal conduct than are adults. In other words, offending behaviour by an individual as a youth does not reflect on the moral character of that individual in the same way as adult criminal behaviour. These are foundational principles of the legal system.

B. THE PRINCIPLES OF ENHANCED VULNERABILITY AND DIMINISHED MORAL BLAMEWORTHINESS ARE RECOGNIZED IN THE PRIVACY PROVISIONS OF THE *YCJA*

21. The *YCJA* – with its recognition of children's human rights, their unique and vulnerable place in society, and their unique position in the criminal justice system - reflects Parliament's intention to codify a distinct system of criminal justice as compared to adults. To this end, the *YCJA* establishes enhanced procedural protections at all stages of criminal proceedings, from arrest to disposition to control over youth records. The Preamble recognizes that members of society share a responsibility for addressing the developmental challenges and needs of young persons into adulthood.

YCJA, supra, Preamble

22. Parliament has specifically codified the principle of diminished moral blameworthiness as an animating principle of the *Youth Criminal Justice Act*, making special mention of the need to protect young people's privacy in the Declaration of Principle, which specifically provides that: "the criminal justice system for young persons must be separate from that of adults, must be based on the principle

of diminished moral blameworthiness or culpability" and must emphasize, *inter alia*, rehabilitation and reintegration, enhanced procedural protection to ensure that young persons are treated fairly and that their rights, including their right to privacy, are protected.

> *YCJA, supra,* s. 3(1)(b) (emphasis added)

23. Moreover, the UNCRC, which is expressly incorporated into the *YCJA*, requires states parties to establish special safeguards and care, including legal protection, for young people. In the context of criminal justice in particular, the UNCRC mandates taking into account the child's age and the desirability of promoting the child's reintegration and rehabilitation. States parties must furthermore ensure that a child's privacy is protected at all stages of the proceedings.

24. The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the "Beijing Rules") elaborate on this principle recognizing that young people are "particularly susceptible to stigmatization" and the detrimental effects of labelling, and require that the privacy of a young person be protected at all stages of a criminal proceeding "in order to avoid harm being done to her or him by undue publicity or by the process of labelling".

> United Nations, Convention on the Rights of the Child, Can. T.S. 1992 No. 3., Preamble, Article 40, clauses 1 and 2(b)(vii).
>
> *YCJA, supra*, Preamble
>
> United Nations General Assembly, United Nations Standard Minimum Rules for the Administration of Juvenile Justice, A/RES/40/33, November 29, 1985, Rule 8.

25. In both the *YCJA* and under international legal instruments, the concept of diminished moral culpability suffuses all the procedural protections of that Act; it is not simply a sentencing principle, as recognized by the Supreme Court in *DB* above. Rather, all the provisions of the *YCJA* must be read as making meaningful this principle, including the non-publication and records provisions found in Part 6. Indeed, the privacy of youth records is inextricably linked to the principle of diminished moral blameworthiness in at least two significant ways.

a. Diminished moral culpability means a young person should not be labelled or stigmatized as an offender

26. First, given that youthful offending does not reflect poor moral judgment or bad character in the same way as adult offending, the emphasis of the youth criminal justice system is on rehabilitation and reintegration rather than deterrence, denunciation, or retribution.

> *R v DB*, supra, at para 62
>
> *Roper v Simmons*, *supra*, at III B, pp 16-18

27. The privacy protections are accordingly directed in part at preventing the stigmatization and labelling of young persons as offenders, consistent with the obligations under the UNCRC and the Beijing Rules.

28. In *DB*, the Supreme Court of Canada has held that the protection of privacy for young people dealt with under the *YCJA* is a significant element of their rehabilitation and reintegration, and ultimately the long-term protection of the public:

> In s. 3(1)(b)(iii) of the YCJA, as previously noted, the young person's "enhanced procedural protection . . . including their right to privacy", 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)
>
> *R v DB*, *supra*, at para 84

29. The Court further noted that stigmatizing and labelling a young person as an offender can damage the young person's developing self-image and his sense of self-worth. Identification of a young person outside the youth criminal justice system makes the young person vulnerable to greater psychological and social stress, and in so doing, renders the impact of their involvement with the criminal justice system more severe, contrary to the principles of the *YCJA* and UNCRC.

30. Similarly, in *Re FN*, the Supreme Court noted that "[s]tigmatization 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." The privacy protections were accordingly recognized as being designed to "maximize the chance of rehabilitation for young offenders."

> *FN (Re)*, 2000 SCC 35, [2000] 1 SCR 880, at para 14
>
> See also: Quebec (Minister of Justice) v Canada (Minister of Justice) (2003), 175 CCC (3d) 321 (QCCA) at para 215

31. Moreover, citing the U.S. Supreme Court with approval, the Court noted, "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.'"

> *FN (Re), supra*, at para 15, citing *Smith, Judge v Daily Mail Publishing Co.*, 443 US 97 (1979) (US Sup Ct), at pp 107-8
>
> See also: *R v RC*, 2005 SCC 61, [2005] 2 SCR 99, at para 42

32. Similarly, in *Toronto Star*, a case considering the publication provisions under Part 6 of the *YCJA*, Cohen J., in a passage that was extensively cited with approval by the Supreme Court of Canada, noted that:

> The concern to avoid labelling and stigmatization is essential to an understanding of why the protection of privacy is such an important value in the Act. . . . the protection of privacy of young persons has undoubted constitutional significance . . .
>
> The protection of privacy is a cornerstone of the Act, and, as I have argued, is recognized as having a critical relationship to rehabilitation which promotes the long-term protection of society, the stated objective of the Act.
>
> *Toronto Star v Ontario*, 2012 ONCJ 27 (OCJ), at para 40, 77
>
> *AB v Bragg Communications, supra*, at para 18

33. In sum, the privacy protections mandated under both international and domestic law perform an important protective function by allowing a young person to move forward from youth criminal justice involvement without stigma and without being later confronted by their youthful offending behaviour in a manner damaging to their self-worth, rehabilitation, and reintegration.

b. The privacy protections allow the court to control the use, and misuse, of youth records

34. Second, strict control over the use and dissemination of information about a youth is important to ensure that these records are not misused in proceedings outside the youth criminal

justice system where the principles animating the youth criminal justice system may not be well understood nor a young person's rights adequately protected.

35. As this Court recognized in *SL v NB*, the jurisdiction for determining appropriate access to and disclosure of youth records has been delegated exclusively to youth justice court judges, noting:

> [y]outh justice court judges are familiar with the principles and policies animating the [*YCJA*]. They are also familiar with the terms of the Act and the specific provisions sprinkled throughout the Act that touch on access issues. Youth justice court judges also know what records are generated by the youth justice court system, and have daily experience in considering and balancing the competing interests which may clash on access applications.
>
> *SL v NB*, 252 DLR (4th) 508, 2005 CanLII 11391 (ONCA), at para 54

36. In other words, youth justice court justices are expert in the policies and principles animating the *YCJA* – notably, the unique vulnerabilities of young people in the criminal justice system, the principle of diminished moral culpability and the related need to protect young people's privacy and promote rehabilitation and reintegration. Further, they understand the context in which youth records are generated and in which youthful offending occurs.

37. It is accordingly appropriate that youth court justices perform a gatekeeping function in determining the appropriate use of youth records to avoid placing the individual to whom those records relate in the position of not only being inappropriately confronted by their youthful offending in a manner contrary to the *YCJA*, but having to account for their youthful errors and explain the context and meaning of those youth records as it applies to, for example, their credibility or character. Indeed, Parliament has seen fit to protect young people as a class under the *YCJA* precisely to avoid putting young people in the position of having to enforce their rights to privacy in any particular case.

> AB v Bragg Communications Inc, supra, at para 17

c. Parliament has accordingly created a complete code for access to youth records

38. As such, in Part 6 of the *YCJA*, Parliament has enacted a strict statutory code governing access to and disclosure of youth records which, as this Court has stated, "demonstrate beyond peradventure Parliament's intention to maintain tight control over access to records pertaining to

young offender proceedings".

SL v NB, supra, at para 42

39. The *YCJA* provides for enhanced privacy protections in three ways: by limiting who can access records, prohibiting disclosure of records that may identify young persons, and prohibiting publication of identifying information.

40. "Record" is given a broad meaning under the *YCJA* and includes anything containing information, regardless of form, that is created or kept for the purposes of dealing with a young person pursuant to the *YCJA.* These include records held by court (s. 114), police (s. 115), and the Crown (s. 116). The scope of records generated and held under the *YCJA* is accordingly exceedingly wide and could include anything from police notes, to an occurrence report, to synopses produced for the purposes of a bail hearing, to the contents of the Crown brief, to pre-sentence reports, to mental health and medical reports.

41. Under section 110, no person shall publish the name of a young person, or any other information related to a young person, if to do so would identify the young person as having been dealt with under the Act. "Publish" has been given a broad and purposive interpretation by the Supreme Court of Canada. As the Court affirmed, it "can refer to something as formal as a government report or an article in a newspaper or as informal as court observers spreading gossip and innuendo". This broad prohibition means that disclosure of information contained in a record must be pre-authorized under one of the limited exceptions set out in the *YCJA,* or must be specifically judicially authorized.

FN (Re), supra, at para 24

42. Similarly, section 118 enacts a presumptive prohibition on access to and disclosure of youth records. Where access is permitted, section 129 prohibits further disclosure. This is reinforced by section 138, which creates an offence for contravention of the non-publication and non-disclosure

provisions of the Act. The prohibition is "unequivocal and unqualified".

SL v NB, supra, at para 45

43. The persons to whom and purposes for which records may be disclosed are specifically delineated in sections 118 to 129. As this Court has noted, generally access to 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 the privacy of young persons who have come into conflict with the law."

SL v NB, supra, at para 42

d. The Statutory Tests under Section 119(1)(s) and 123

44. To this end, Part 6 establishes statutory tests for access where the person seeking the records is a stranger to the youth criminal justice proceedings concerning the young person, or seeks the records for a purpose outside the administration of the youth criminal justice system.

45. In particular, s. 119(1) of the *YCJA* enumerates an exhaustive list of persons or classes of persons who can access records. These records can be accessed only while a record falls within the access periods referred to s. 119(2), which varies depending on the manner in which the young person's charges were resolved. Section 119(1)(s) creates a basket clause pursuant to which non-enumerated persons may access the records, requiring that they demonstrate: a valid interest in the record, and that access is desirable in the public interest or for research purposes, or desirable in the interest of the proper administration of justice.

46. After the close of an access period, records may only be accessed pursuant to s. 123 on notice to the young person. This section establishes a more stringent test for access, requiring a person seeking access to establish: a valid and substantial interest in the records, and that access is necessary in the interest of the administration of justice.

See also: *FN (Re), supra*, at para 36

47. As this Court has recognized, the onus is on the person seeking the records to establish not

only an interest in the records, but a sufficient public interest capable of overcoming the privacy interests of the young person to whom the records relate. In other words, a consideration of the proper administration of justice must balance the applicant's interest in the information sought against the young person's privacy and the fair and proper function of the youth justice system. The importance of that interest – which, as the foregoing demonstrates, has a significant constitutional dimension – cannot be underestimated in that calculus. The access to and disclosure of records under the *YCJA* should be cautiously restricted and the privacy of young people jealously guarded.

> *SL v NB*, supra, at para 42
> *R v ZW*, 2016 ONCJ 490 (OCJ), at para 44-45

48. At a minimum, an applicant seeking access to and permission to disclose a youth criminal justice record must, to the satisfaction of the youth court judge: 1) identify the particular record or records sought with a high degree of specificity, 2) identify the intended use and purpose of each record sought, and 3) establish the likely relevance of the information in the private record sought, to the intended purpose and use of that record. For use in in a civil or criminal proceeding, for example, this might mean that the record must be logically probative of an issue for trial or hearing. These factors, as a minimum standard, must be satisfied to ensure that the judge can engage in an appropriately rigorous analysis of what constitutes a valid or valid and substantial interest, that is desirable or necessary in the interests of the proper administration of justice.

49. The statutory tests require the applicant to establish an interest in each record being sought. As above, a "record" is not simply a summary of findings of guilt. Sections 119(1)(s) and 123 specifically refer to "the record", rather than records as a class, indicating an intention that an applicant establish an interest in each record being sought.

50. This interpretation finds support in the case law. Indeed, this Court has recognized that "[d]ifferent records are to be treated differently"; indeed, the privacy interest in particular types of

records varies. For example, a pre-sentence report, which may contain intensely personal information about a young person, may attract a greater privacy interest than a mere record of a finding of guilt. The Supreme Court has further recognized that a valid interest must be established in *the* record sought, requiring the nature of the record to be considered in the analysis above. Indeed, some records may meet the statutory tests and some may fail.

> *SL v NB*, *supra*, at para 42
> *Re FN*, *supra*, at para 36
> *R v JB*, 2008 ONCJ 209 (OCJ), at para 10-19

51. It is therefore appropriate, and indeed necessary, that a judge considering an application under section 119 or 123, review the records being sought and be satisfied that the applicant has established a sufficient interest in *each* record to which access is granted. The requirement for this basis to be established as a condition precedent to access prevents an applicant from embarking on a fishing expedition at the expense of the privacy, dignity, autonomy, and rehabilitation of the young person. Determinations as to weight or admissibility to be made in another proceeding after the records have been accessed or disclosed do not adequately address the interests at stake for the young person, nor the protections and controls imposed by the *YCJA*.

> *Re JD*, 2009 ONCJ 505 (OCJ), at para 82

52. The nature of the proceeding in which the records are to be used, and the purpose for which they will be used, is also a relevant consideration. Indeed, under sections 119(1)(s) and 123(5), a youth court justice is entitled to specify the extent to which records may be accessed and used and to specify permissible and impermissible uses for a particular record. Records that may be accessed and disclosed for one purpose in a particular type of proceeding may be withheld in others given the different interests at play. As a relevant example, a criminal trial is distinct in important ways from an administrative proceeding and accordingly different interests are at stake for the applicant. JFCY supports the submissions of the Appellant in this regard.

Factum of the Appellant, at para 9, 40-64

See also: *May v Ferndale Institution*, [2005] 3 SCR 809, 2005 SCC 82, at para 90-92

53. These interests are different yet again where the application is at the instance of young person in order to vindicate their own rights. Accordingly, the analysis of what is in the proper administration of justice will depend on the nature of the other proceeding and the uses to which the records will be put.

Re JD, *supra*, at para 44

54. These statutory tests, and other provisions of the *YCJA*, also evidence Parliament's intention that a young person's privacy interests, and the protection of records becomes more stringent over time; a young person does not lose the protection of the YCJA simply by reaching the age of majority, illustrating Parliament's intention that information concerning youthful offenders be "buried in the graveyard of the forgotten past". This approach reflects the recognition of the social and other vulnerabilities of young people: their evolving maturity and capacities, susceptibility to outside pressures and lack of control over their environment, and transitory personality traits, rather than an indication of a criminally inclined or morally bereft character.

55. In particular, the test under section 123 – concerning access to records after the access period - is stricter test than that under section 119. Moreover, following the close of the access periods set out in section 119(2), records may be destroyed at the discretion of the body keeping them – and therefore permanently inaccessible for any purpose - evidencing an intention these records become less accessible with the passage of time and a recognition that their importance and use both within and outside the youth criminal justice diminishes over time.

56. Taken together, the above provisions establish a complete code, one evidencing Parliament's intention to strictly control access to and disclosure of records under the Act and only where the statutory provisions are satisfied. Satisfaction of the statutory tests is the *only* means by which an

applicant may access these records.

57. The *YCJA* in fact establishes a *sui generis* records regime, distinct from the disclosure regimes established with respect to other types of records, such as under *Stinchcombe, O'Connor,* or *Wagg*. JFCY supports the submissions of the Appellant Toronto Police Service in this regard.

Factum of the Appellant Toronto Police Service, at para 40-64

58. While the procedure for determining access to *YCJA*-protected records may resemble that of *O'Connor,* that is, the applicant must first establish the "likely relevance" of the records and the court then inquires into their true relevance and balance this against the privacy interests at stake – the test established under Part 6 of the *YCJA* must be considered to be more stringent, given that the privacy interests for youth records have both statutory and constitutional protection over and above that attaching to other types of records, and the unique vulnerabilities of young people.

59. Given the principles and purposes at stake under the *YCJA*, the access and disclosure regime is stringent and the threshold to rebut the presumption against access is intentionally high. There is a heavy onus on those who seek to displace the protections to which a young person is presumed to be entitled under the *YCJA.*

R v DB, supra, at para 87

C. APPLICATION TO THE CASE AT BAR AND THE RIGHT TO MAKE FULL ANSWER AND DEFENCE

60. In the case at bar, the Appellant sought the records related to the December 18, 2012 incident, which is the subject of the police disciplinary proceedings, for the purpose of conducting that hearing. The Respondent, PC Mignardi, cross-applied for access to not only the records related to December 18, 2012, but all records related to L.D. of any kind, including unrelated records of any contact with police or the criminal justice system, for the purposes of cross-examining L.D. as to his character and credibility in order to make full answer and defence. As outlined by the Appellant, the scope of

records sought was exceptionally broad and indeed much broader than the records accessed by the Office of the Independent Review Director in the course of its investigation.

Factum of the Appellant Toronto Police Services, at para 3

a. The Toronto Police Service's Application for Records

61. Neither the Cohen J. nor Morgan J. commented on the Appellant's application for the December 18, 2012 records.

62. As the Appellant has noted, it sought these records for the purpose of holding a disciplinary proceeding, a proceeding with both an employment character, as well as an important public accountability function. The limited scope of records sought is necessary to allow the parties and witnesses to discuss the events of December 18, 2012 in the course of the hearing. Given the broad prohibitions against publication and access, the judicial authorization of a youth court justice is necessary to allow even the fact of LD's detention to be discussed in the course of the hearing.

63. It may be therefore that a youth justice court would be satisfied that this purpose meets the relevant statutory test. Given the distinct interests at stake – both the privacy interest in the specific records sought as well as the intended use – this warrants a distinct and nuanced analysis, separate from the consideration of PC Mignardi's cross-application.

b. PC Mignardi's Cross-Application

64. The right to make full answer and defence in a criminal trial – including cross-examination on credibility – is unquestionably an important societal value with constitutional dimensions. Courts have recognized that a young person may be cross-examined on their prior discreditable conduct in the context of a criminal trial, where the right to make full answer and defence is constitutionally enshrined. The weight of that evidence – nature of the prior behaviour, the age of the witness at the time of the acts, and the passage of time - is generally a question for the trier of fact to determine.

R v Upton, 2008 NSSC 338, 239 CCC (3d) 409, at para 23

65. However, even in the context of a criminal trial where the highest standards of natural justice apply, access to a young person's records is not absolute or unfettered. In some cases, disclosure and cross-examination contemplates only findings of guilt, rather than wholesale access to every record of a witness's contact with the criminal justice system. Moreover, judges can and routinely do limit the scope of records available for cross-examination based on an inquiry into the validity of the applicant's interest in each record, largely determined by their relevance to the question of credibility as weighed against the privacy interest in particular types of records. As in *ZW*, the Court found that the fact that records may be useful is not sufficient to dispose of the question given the other interests at stake.

R v Upton, supra
R v JB, supra, at para 10-19
R v MD, [2015] OJ No 2150 (OCJ) at para 56
R v ZW, supra, at para 44

66. Accordingly, the fact that records may disclose information useful to the defence is not on its own sufficient to overcome the stringent privacy protections of the *YCJA*, which themselves have a significant constitutional dimension, as described above. In *JB*, the Court also identified such matters as the seriousness of the jeopardy facing the accused, its potential impact on the character or credibility of the witness, the remoteness in time between the events contained in the material sought and the events before the court in the accused's trial.

R v JB, supra, at para 9

67. Importantly, this analysis must be done prior to disclosure to ensure the validity of the applicant's interest in the records and the interests of the proper administration of justice, in order to safeguard the young person's rights.

68. As has been argued by the Appellant, the nature of the proceedings and the "jeopardy" faced by PC Mignardi is not the stigma of a criminal conviction, nor a criminal trial where his innocence is

at stake; the procedural protections of a criminal trial do not apply. Accordingly, the degree to which PC Mignardi is entitled to access the unrelated youth record of L.D. must be significantly tempered in the court's analysis.

c. Analysis in the Courts Below

69. Accordingly, it was appropriate for Cohen J. to review the records at issue prior to their release, inquire into the degree to which they impact on L.D.'s character and credibility for the purposes of a police disciplinary proceeding and conclude that, given the context in which they were generated and taking account of the legal and social consensus on the moral culpability and character of youthful offenders – PC Mignardi had not established a sufficient interest in obtaining those records. Having actually viewed the records, she is in a superior position to make this determination and is entitled to deference.

70. By contrast, Morgan J. conflated the first-party disclosure obligations applicable to a criminal trial with the exclusive access regime established by *YCJA*. In permitting unmitigated access to records unrelated to the incident in question, and failing to scrutinize the extent of PC Mignardi's interest in each record sought relative to the privacy interests attaching to those records, Morgan J. essentially abdicated the court's role as gatekeeper and guardian of L.D.'s privacy rights.

71. By allowing access to all records of L.D.'s contact with the youth criminal justice system , Morgan J. countenanced an impermissible fishing expedition, reasoning that a youth's reduced moral culpability requires an increased need to access an undetermined swath of youth criminal justice records in order to impugn their credibility. Respectfully, this analysis completely misunderstands the vulnerabilities of young people and the principle of reduced moral culpability. Morgan J. wrongfully equates reduced moral blameworthiness and the vulnerabilities of young people with inherent untrustworthiness.

72. To be less morally culpable is not to be inherently unreliable, nor inherently untrustworthy or lacking in credibility. This kind of negative stereotyping is exactly the kind of mischief that children's human rights instruments, notably the UNCRC and the Beijing Rules, have sought to guard against. The *YCJA* has incorporated these children's human rights principles, and has legislated detailed procedures and protections in order to remedy the discrimination, vulnerability and stigmatization that may inappropriately and harmfully befall children who are involved in the criminal justice system.

73. Moreover, simply allowing unfettered access to *all* records concerning an individual's youthful offending, leaving the determination of weight and admissibility to an inexpert decision-maker, eviscerates the protections afforded to him by the *YCJA.* The individual is improperly placed in the position of having to defend his privacy rights, and his own credibility and character, contrary to and robbing him of the benefit of the presumption of diminished moral blameworthiness operating throughout the privacy protections of the *YCJA.* He is furthermore subject to the stigma and labelling against which Parliament and the Supreme Court of Canada have seen fit to protect young people *as a class*. Mere initialization inadequately accounts for and protects these privacy interests and significantly underestimates and misapprehends their significance. L.D. is entitled to protection of his privacy interests against intrusion by PC Mignardi as well as against the public at large.

74. Certainly, PC Mignardi must be given the opportunity to know the case against him and test the evidence of the Toronto Police Service concerning the alleged misconduct as a matter of procedural fairness. This may therefore warrant access to records related to the incident in question and would likely include the ability to cross-examine L.D. on his evidence in this regard.

75. However, this does not justify Morgan J.'s conclusion that L.D.'s youthfulness indicates a greater propensity to lie and therefore warrants enhanced scrutiny of his evidence, at the expense of

his privacy. Such a conclusion is baseless and flies in the face of the principles and protections of the *YCJA.* Indeed, there is no social science evidence to suggest – and certainly none was presented in the court below – that young people are more likely to lie than adults or are inherently unreliable, a finding endorsed by the Supreme Court of Canada.

> *R v RW,* [1992] 2 SCR 122, at pp 132-133
> See also: *R v AF,* 2007 BCPC 345, at para 29

76. It is profoundly problematic, and contrary to the *YCJA* and jurisprudence of the Supreme Court of Canada, that a presumption intended to perform a protective function and operate in a young person's favour be subverted to his detriment. This underscores the need for decision-makers familiar with the youth criminal justice system to determine appropriate access to, disclosure of, and permissible use of youth records in accordance with the principles and policies of the *YCJA.*

PART V – ORDER SOUGHT

77. JFCY takes no position as to the disposition of the appeal. If this Court should decide to substitute its own decision for that of the court below, the Court must undertake its analysis of the relevant statutory tests and its own review of the records in question and they should be subpoenaed for this purpose.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 18th day of April, 2017.

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Jane Stewart & Mary Birdsell
Justice for Children and Youth

SCHEDULE A – LIST OF AUTHORITIES

Roper v Simmons, 543 US 551 (2005) (US Sup Ct)

JDB v North Carolina, 131 S Ct 2394 at 2404 (2011) (US Sup Ct)

R v DB, 2008 SCC 25, [2008] 2 SCR 3

AB (Litigation Guardian of) v Bragg Communications Inc., 2012 SCC 46, [2012] 2 SCR 567

R v LTH, 2008 SCC 49, [2008] 2 SCR 739

R v KB, [2003] OJ No. 3553, 67 OR (3d) 391 (ONCA)

FN (Re), 2000 SCC 35, [2000] 1 SCR 880

Quebec (Minister of Justice) v Canada (Minister of Justice) (2003), 175 CCC (3d) 321 (QCCA)

R v RC, 2005 SCC 61, [2005] 2 SCR 99

Toronto Star v Ontario, 2012 ONCJ 27 (OCJ)

SL v NB, 252 DLR (4th) 508, 2005 CanLII 11391 (ONCA)

R v ZW, 2016 ONCJ 490 (OCJ)

R v JB, 2008 ONCJ 209 (OCJ)

Re JD, 2009 ONCJ 505 (OCJ)

May v Ferndale Institution, [2005] 3 SCR 809, 2005 SCC 82

R v Upton, 2008 NSSC 338, 239 CCC (3d) 409 (NSCA)

R v MD, [2015] OJ No 2150 (OCJ)

R v RW, [1992] 2 SCR 122

R v AF, 2007 BCPC 345

SCHEDULE B – LEGISLATIVE PROVISIONS

United Nations, Convention on the Rights of the Child, Can. T.S. 1992 No. 3.
Preamble, Article 40, clauses 1 and 2(b)(vii).

Preamble

The States Parties to the present Convention,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Bearing in mind that the peoples of the United Nations have, in the Charter, reaffirmed their faith in fundamental human rights and in the dignity and worth of the human person, and have determined to promote social progress and better standards of life in larger freedom,

Recognizing that the United Nations has, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

Recalling that, in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance,

Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,

Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,

Considering that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity,

Bearing in mind that the need to extend particular care to the child has been stated in the Geneva Declaration of the Rights of the Child of 1924 and in the Declaration of the Rights of the Child adopted by the General Assembly on 20 November 1959 and recognized in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights (in particular in articles 23 and 24), in the International Covenant on Economic, Social and Cultural Rights (in particular in article 10) and in the statutes and relevant instruments of specialized agencies and international organizations concerned with the welfare of children,

Bearing in mind that, as indicated in the Declaration of the Rights of the Child, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth",

Recalling the provisions of the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally; the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules); and the Declaration on the Protection of Women and Children in Emergency and Armed Conflict, Recognizing that, in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need special consideration,

Taking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child, Recognizing the importance of international co-operation for improving the living conditions of children in every country, in particular in the developing countries,

…

Article 40

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:
…

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:
…

(vii) To have his or her privacy fully respected at all stages of the proceedings.

Youth Criminal Justice Act - S.C. 2002, c. 1 Preamble, s.3(1)(b)

Preamble

WHEREAS members of society share a responsibility to address the developmental challenges and the needs of young persons and to guide them into adulthood;

WHEREAS communities, families, parents and others concerned with the development of young persons should, through multi-disciplinary approaches, take reasonable steps to prevent youth crime by addressing its underlying causes, to respond to the needs of young persons, and to provide guidance and support to those at risk of committing crimes;

WHEREAS information about youth justice, youth crime and the effectiveness of measures taken to address youth crime should be publicly available;

WHEREAS Canada is a party to the United Nations Convention on the Rights of the Child and recognizes that young persons have rights and freedoms, including those stated in the Canadian Charter of Rights and Freedoms and the Canadian Bill of Rights, and have special guarantees of their rights and freedoms;

AND WHEREAS Canadian society should have a youth criminal justice system that commands respect, takes into account the interests of victims, fosters responsibility and ensures accountability through meaningful consequences and effective rehabilitation and reintegration, and that reserves its most serious intervention for the most serious crimes and reduces the over-reliance on incarceration for non-violent young persons;

…

3 (1) The following principles apply in this Act:
…

(b) the criminal justice system for young persons must be separate from that of adults, must be based on the principle of diminished moral blameworthiness or culpability and must emphasize the following:

(i) rehabilitation and reintegration,

(ii) fair and proportionate accountability that is consistent with the greater dependency of young persons and their reduced level of maturity,

(iii) enhanced procedural protection to ensure that young persons are treated fairly and that their rights, including their right to privacy, are protected,

(iv) timely intervention that reinforces the link between the offending behaviour and its consequences, and

(v) the promptness and speed with which persons responsible for enforcing this Act must act, given young persons' perception of time;

UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), Article 25

Article 25.
…

(2) Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

United Nations General Assembly, United Nations Standard Minimum Rules for the Administration of Juvenile Justice, A/RES/40/33, November 29, 1985. Rule 8.

Rule 8. Protection of privacy

8.1 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.

8.2 In principle, no information that may lead to the identification of a juvenile offender shall be published.

Commentary
Rule 8 stresses the importance of the protection of the juvenile's right to privacy. Young persons are particularly susceptible to stigmatization. Criminological research into labelling processes has provided evidence of the detrimental effects (of different kinds) resulting from the permanent identification of young persons as "delinquent" or "criminal".

Rule 8 stresses the importance of protecting the juvenile from the adverse effects that may result from the publication in the mass media of information about the case (for example the names of young offenders, alleged or convicted). The interest of the individual should be protected and upheld, at least in principle. (The general contents of rule 8 are further specified in rule 2 1.)