WARNING

The court hearing this matter directs that the following notice be attached to the file:

This is a case under the *Youth Criminal Justice Act* and is subject to subsections 110(1) and 111(1) and section 129 of the Act. These provisions read as follows:

> **110. Identity of offender not to be published.**—(1) Subject to this section, no person shall publish the name of a young person, or any other information related to a young person, if it would identify the young person as a young person dealt with under this Act.
>
> . . .
>
> **111. Identity of victim or witness not to be published.**—(1) Subject to this section, no person shall publish the name of a child or young person, or any other information related to a child or a young person, if it would identify the child or young person as having been a victim of, or as having appeared as a witness in connection with, an offence committed or alleged to have been committed by a young person.
>
> . . .
>
> **129. No subsequent disclosure.**— No person who is given access to a record or to whom information is disclosed under this Act shall disclose that information to any person unless the disclosure is authorized under this Act.

Subsection 138(1) of the *Youth Criminal Justice Act,* which deals with the consequences of failure to comply with these provisions, states as follows:

> **138. Offences.**—(1) Every person who contravenes subsection 110(1) (identity of offender not to be published), 111(1) (identity of victim or witness not to be published) . . . or section 129 (no subsequent disclosure)
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> . . .
>
> (*a*) is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years; or
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> (*b*) is guilty of an offence punishable on summary conviction.

ONTARIO COURT OF JUSTICE

CITATION: []
DATE: 2016·August·11
COURT FILE No.: Toronto

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

Z. W.

Before Justice M. L. COHEN
Ruling released on August 11, 2016

Mr. Patrick Snelling ..... Counsel for the Applicant, Shannon Connelly
Ms. Mary Birdsell ..... Counsel for Justice for Children and Youth as *amicus curiae*

COHEN, M. L. J.:

[1] This is a ruling on an application for access to a pre-sentence report under the *Youth Criminal Justice Act*. Z-W is the subject of the report. The applicant is plaintiff in a negligence action commenced on December 18, 2013 in the Ontario Superior Court of Justice. Terrace Youth Residential Services and Z-W are named as co-defendants in the action.

[2] The application involves the conflict that arises when the privacy interests of young persons dealt with under the YCJA clash with the interests of parties to civil

actions in obtaining information relevant to their litigation. In this case the applicant/plaintiff seeks access to a presentence report pertaining to a young person named as a defendant in in a civil action.

[3] Pre-sentence reports are presumptively inaccessible records under the YCJA, but access may be granted under section 119(1) (s) where the applicant establishes she has a valid interest in the record, and the court is satisfied that access to the record is desirable in the interest of the proper administration of justice.

[4] My ruling explains why, in the circumstances of this case, the specific interest in the proper administration of justice I have identified is sufficiently strong to override the benefits of maintaining the privacy of the young person ito a limited extent. I deal with the privacy rights of young persons under the *Act* at some length in order to explain why the presumption against access exists, and why cogent reasons are required to displace it. I conclude my ruling with a determination that only limited access will be granted, and that dissemination of the report by the applicant will not be permitted.

Background to This Proceeding

[5] The application for access to the youth records was commenced in January, 2015. In her application, the applicant requested access to police and crown records kept under the *Act.*

[6] The application proceeded in November, 2015. The youth was neither present, nor represented. It was unclear at that time whether section 119 or section 123

of the YCJA governed the application. Section 123 requires notice to the young person of the application. As a precautionary measure, the applicant sought waiver of the notice requirement. The applicant had been unable to effect personal service on Z-W in the Superior Court action, and her whereabouts were unknown. As service was impossible, I waived the notice requirement.

[7] In the course of the proceeding I reviewed the police records, which had been subpoenaed by the applicant and which were produced to the court. After reviewing the records, and considering the submissions of counsel, I granted access for reasons given orally at that time.

[8] The applicant did not pursue her request for access to crown records. She did, however, make an oral application for access to the young person's pre-sentence report. I permitted the applicant to amend her application to include a claim for access to the presentence report.

[9] As pre-sentence reports contain highly personal information, and given the absence of the young person, I proposed the appointment of *amicus* to address the privacy issues. On consent, I appointed Justice for Children and Youth as *amicus curiae.* Justice for Children and Youth is a Toronto legal aid clinic that provides advocacy and representation for young persons charged with criminal offences. Counsel for the applicant and the youth subsequently provided me with written submissions. The Crown took no position on the application.

[10] In ruling on this application, I have reviewed the court record relating to the

charges, including the information, the guilty plea, the sentencing hearing, and the pre-sentence report. As the pre-sentence report is the only document in issue, I will confine my ruling to the issue of access to that report.

The Superior Court Action

[11] The applicant/plaintiff in the Superior Court action, was, at the material time, a youth worker employed by Terrace Youth Residential Services. In her Statement of Claim, she pleads that on January 1, 2012, at the direction of Terrace Youth Residential Services, she was transporting the young person in a motor vehicle on a highway. The applicant states that while she was driving, and without notice, the young person removed her own seat belt, grabbed the steering wheel, and repeatedly struck the applicant while the vehicle was in operation. The applicant was unable to resist as she was driving the vehicle. Eventually she was able to pull the car over and stop, whereupon the young person exited the car and entered another vehicle.

[12] The applicant alleges that as a result of the young person's conduct, she sustained serious injuries, including a concussion and a fractured nose. She also alleges she suffered psychological and neurological injuries, including depression, post-traumatic stress disorder, and short-term memory loss. She pleads that the injuries have resulted in permanent, serious impairments which have significantly impacted her ability to earn income, and to perform ordinary domestic functions. She

states she will require extensive therapy and treatment.

[13] In her Statement of Claim, the applicant pleads that the defendant Terrace Youth was negligent, and breached its duty of care to her under the *Occupational Health and Safety Act,* by reason of the following:

- Failing to make any or in the alternative, any sufficient inquiries to ensure that the young person was a suitable individual for transport in the defendant vehicle while operated by the applicant without any other staff member or members;

- Failing to ensure that the young person was a suitable person to be transported by the applicant without additional support;

- Failing to provide additional staff or adequate support or protection to the applicant when they knew or ought to have known the young person was lacking in self-control and who could cause injury to the operation of a motor vehicle in all the circumstances; Failing to warn the applicant of the young person's propensity for violence despite directing that the applicant transport the young person alone in the motor vehicle; and

- Failing to provide the applicant with a vehicle properly equipped to separate the young person from the applicant while the vehicle is in operation to avoid creating a known hazard for the applicant.

[14] In its Statement of Defence, the defendant Terrace Residential Youth Services, denies legal responsibility for the damages caused by the actions of Z-W, and denies liability for any damages caused by her.

[15] The applicant submits that she should be granted access to the pre-sentence report as "…it contains information that aids the applicant in her civil suit, information that could not be obtained otherwise." In particular, the applicant

seeks access to information contained in the report which relates to the young person's "propensity for violence." She proposes that other portions of the report not relating to that issue may be redacted.

[16] As shall become clear, the following pleading by the defendant is of particular relevance to this application:

> At all times *this defendant had no knowledge, actual or constructive, of any possible physical harm occurring to the plaintiff from the co-defendant*. Had such knowledge come to the attention of this Defendant, it would have taken steps to warn the Plaintiff of such harm and/or would have taken such appropriate steps to prevent any harm. (emphasis mine)

[17] In the same vein, the following pleading by the applicant/plaintiff is of particular relevance:

> [Z-W] was being transported by the Plaintiff at the direction of Terrace Youth. Terrace Youth had the Plaintiff transport [Z-W] pursuant to its obligations under a service agreement whereby *it provided contract services to third parties unknown to the Plaintiff.* (emphasis mine)

Youth Court Proceedings

[18] As a result of the incident, the young person was charged with assault causing bodily harm to the applicant. She was also charged with a number of counts of failing to comply with a recognizance. On June 15, 2012, Z-W plead guilty to the lesser and included offence of assault *simpliciter*, and to one charge of failing to comply with recognizance. The Youth Court judge ordered a pre-sentence report.

[19] The sentencing hearing proceeded on January 15, 2013, and the young

person received a ten month conditional discharge. The pre-sentence report was made an exhibit at the sentencing hearing.

The Pre-Sentence Report

[20] The pre-sentence report indicates that the youth was in the care of a children's aid society at the time of the incident. She had been apprehended on a child protection warrant after she left her placement without permission, and was subsequently placed with Terrace Residential Youth Services. The incident occurred during the course of her placement with Terrace Residential Youth Services.

[21] It is important to note that, although the pre-sentence report formally complies with the informational requirements set out in section 40 of the *Act*, in fact it is almost entirely dependent on information contained in the child protection file. That file included mental health assessments which were referred to in the report.

Which Section of the YCJA Applies to the Application?

[22] Section 119 and section 123 both permit access to youth records in specific circumstances. Section 119(1) specifies categories of persons who may apply for access to records, and provides for access periods,[1] during which certain applicants may be entitled to, or permitted to have, access to records. The access periods are

[1] Under section 119(2), the length of the access period varies in proportion to the seriousness of the disposition or the nature of the offence. By way of example, the access period for records of withdrawals and reprimands is two months (s.119(2)(c)), whereas the access period for records where a young person is found guilty of an indictable offence is five years from the completion of the sentence imposed by the court.

set out in section 119(2). Whether an application for access is governed by section 119 or section 123 will depend on whether the records fall within the access period, in which case section 119 governs, or outside the access period, in which case the application will be dealt with under section 123.

[23] A pre-sentence report is a court record kept under section 114 of the *YCJA*. After the end of the access period, Section 128 provides for the disposition or destruction of records, and for prohibition on the use and disclosure of records. The general rule, set out in section 128, is that once the access periods expire,

> …no record kept under sections 114 to116 may be used for any purpose that would identify the young person to whom the record relates as a young person dealt with under this Act…

[24] On a records application under section 119 or section 123, it is important to bear in mind why access periods exist. Youth records are not treated the same way as adult criminal records. Section 128 is one of several sections that expresses that difference.

[25] The delineation of an access period governing access to youth court records is consistent with the presumption of diminished moral blameworthiness for young persons upon which the criminal justice system for young persons is based. The inaccessibility of the record protects a youth from the long -term negative consequences of his or her youthful offending behaviour, and is in keeping with the rehabilitative intentions of the *Act*.

[26] Section 123 provides for an exception to Section 128. Because the application for access to records is brought after the expiry of the access period, Section 123 provides a more stringent test for access than section 119. As a result, determining which section applies is essential.

Analysis

[27] Applications for access to youth records require the court to follow a step by step process. The application will be governed by the provisions of Part 6 of the Act.

[28] The first step for a court adjudicating an application for access to youth records is to identify the type of record sought, and to ensure that the records which are the subject of the application are produced to the court through subpoena for review by the judge. This review is conducted by the judge alone because of the privacy of the records.

[29] Different types of records are identified in Part 6. The record sought in this application is a pre-sentence report. Pursuant to Section 40(4) of the Act, a pre-sentence report forms part of the record of the case in which it was requested. Accordingly, the pre-sentence report is a court record under section 114 of the Act. Although it is generated by a probation officer, and will come into the hands of the Crown and Defence counsel, and possibly others, it remains a court record, and access to it is governed by the sections of the *Act* which provide for access to section 114 records.

[30] The court records were available to me without subpoena. As I have indi-

cated, I have reviewed the court records relevant to this application.

[31] The next step for the court is determining whether the record falls within or outside the access period.

[32] In the case at bar the young person was found guilty of the offence of assault as an included offence of assault causing bodily harm. The Crown elected to proceed by indictment[2]. In the result, the court imposed a conditional discharge. Thus the access period is governed by section 119 (2) (f), which provides that the access period expires

> (f) if the young person is found guilty of the offence and the youth sentence is a conditional discharge, the period ending three years after the young person is found guilty;

[33] The sentence of conditional discharge was imposed January 15, 2013. The access period under sub-section 119(2) (f) is the period ending three years after the young person is found guilty. An application made after the access period proceeds under section 123. In this case the application for access to the record was filed with the court of January 19, 2015. Accordingly, the application was made within the access period, and section 119 governs the request for access.

[34] The next step is for the court to determine which sub-section of section 119 (1) governs the application.

[35] The applicant is a victim of the offence. As such she is entitled to access to court records related to the offence under section 119(1) (d). However, although the

applicant as victim has a statutory right of access to a record kept under section 114, section 129 limits the use she can make of the record:

> s. 129 No person who is given access to a record or to whom information is disclosed under this Act shall disclose that information to any other person unless the disclosure is authorized under this Act.

[36] As Blacklock, J. stated in *R. v. S.F*. (2007 ONCJ 577 (Ont. CJ),

> **...**I also want to emphasize that the fact that these parties have a statutory right to access these documents does not mean by virtue of that right that they are entitled to reveal the document's content to others in the context of civil litigation or otherwise. When a party is seeking access to documents for a purpose which will of necessity expose the document or its contents to a broader audience, it is appropriate in my view, for the court to consider the matter under section 119(s). This is because what is being sought in that situation is not just that the victim have access personally. In reality access is being sought for the victim and a class of other persons. In this case the additional class of persons would be those who may of necessity have access to the documents in issue during the course of the civil litigation. (par. 25)

[37] It is for the reasons outlined by Justice Blacklock that the applicant, who seeks access to the record for purposes of civil litigation, must bring her application under section 119(s). Section 119(1) (s) provides for access to

> (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 is
>
> (ii)desirable in the interest of the proper administration of justice.

[38] The next and most complicated step is applying the two part test under section 119(1)(s): The applicant must demonstrate she has a valid interest in the record, and must satisfy the court that access to the record is desirable in the interest of the proper administration of justice.

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[2] The crown proceeded summarily on the charge of failing to comply with recognizance.

[39] I have considered whether the applicant has a valid interest in the record. The following circumstances are relevant: The applicant is the victim of the offence, and she suffered serious injuries as a result. As a victim, she had a statutory entitlement to a copy of the record under section 119 (1) (d). The offence resulted in injuries which led her to institute civil proceedings. The applicant seeks damages against the defendant Terrace Youth for negligence in failing to ensure that she would be protected from potential violence when she transported the young person. The information in the record sought is potentially relevant to the proceedings.

[40] In *F.N. (Re),* [2000] 1 S.C.R. 880 (S.C.C.) Binnie, J. pointed out that

> A "valid interest" has been held to include institution of civil proceedings: Re Smith and Clerk of Youth Court (1986), 31 C.C.C. (3d) 27 (Ont. U.F. Ct.) (par 34)

[41] I am satisfied that the records contain information that would assist the applicant in her litigation. In all these circumstances I am satisfied the applicant has a valid interest in the record.

[42] My finding that the applicant has a valid interest in the record does not dispose of the application. The court must still determine whether granting her access to the record is desirable in the interest of the proper administration of justice. This requirement should be understood as a factor which limits the ability of persons having valid interests in records to access those records. The discretion in the Court to make court records available to persons deemed “to have a valid interest in the record" is limited by the need for the court to be satisfied that access is desirable in the

interest of the proper administration of justice. (see: In *F.N. (Re)* (par. 34)).

[43] I turn therefore to the next step: Has the applicant satisfied the court that access is desirable in the interest of the proper administration of justice?

[44] To answer this question properly, the court must begin with the analytical context. The fact that the record may be useful in some way in the litigation is not sufficient to dispose of the question. More is at stake in the application than the applicant's interests in the litigation.

[45] As pointed out by Doherty, J. in *SL v NB*, [2005] O.J. No. 1411 (Ont. C.A.), litigants can be restricted in prosecuting their claims by other valid policy concerns. In this case, the policy concern is the premium placed on the privacy interests of all young persons involved in proceedings under the YCJA (par. 36). Thus, in determining whether access is desirable in the interest of the proper administration of justice, the court must balance the litigant's interest in the information against the young person's privacy rights within Canada's youth justice system.

[46] The status of privacy as a value in the *Youth Criminal Justice Act* cannot be under-estimated. The Preamble to the *Act* notes that Canada is a party to the *United Nations Convention on the Rights of the Child*. Article 40 of the *Convention* provides that

> 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.

[47] In this way, the Preamble affirms that respecting the privacy of young persons involved in penal proceedings is an aspect of Canada's international obligations, and reflects Canada's participation in an international consensus on the importance of privacy in the youth justice context.

[48] The Declaration of Principles continues this theme in the Canadian context. The Declaration of Principles articulates "the policy for Canada with respect to young persons." It declares that the criminal justice system for young persons must emphasize enhanced procedural protection to ensure that young persons are treated fairly and that their rights, including their right to privacy, are protected.

[49] Section 40 of the *Act*, which limits dissemination of pre-sentence reports, and Section 34, which limits disclosure of mental health assessments, similarly protect the privacy of young persons.

[50] Most striking in this context is Part Six of the *Act*, which governs publication, records and information, and has as its explicit purpose the protection of privacy of young persons dealt with under the *Act*. Publication of information that would identity of the young person is prohibited, and access to records created or kept for the purposes of the *Act* is either prohibited or severely restricted.

[51] Section 110 sets out the fundamental rule:

> Subject to this section, no person shall publish the name of a young person, or any other information related to a young person, if it would identify the young person as a young person dealt with under this Act.

[52] Section 118 controls access to records:

> Except as authorized or required by this Act, no person shall be given access to a record kept under sections 114 to 116, and no information contained in it may be given to any person, where to do so would identify the young person to whom it relates as a young person dealt with under this Act.

[53] In *S.L. v. N.B.,* , Doherty, J. says

> Section 118 announces an unequivocal and unqualified prohibition against access to records kept by the court, police, or Crown except as required or authorized under the Act. This prohibition is made all the more emphatic by s. 138 which makes it an offence to violate s. 118. (par.46)

[54] Supreme Court jurisprudence over the past decade explains why privacy is such an important value in the *Act*:

- *R. v. R.C.,* [2005] 3 S.C.R. 99:

  > In protecting the privacy interests of young persons convicted of criminal offences, Parliament has not seen itself as compromising, much less as sacrificing, the interests of the public. Rather, as Binnie J. noted in *F.N. (Re)*, [2000] 1 S.C.R. 880, protecting the privacy interests of young persons serves rehabilitative objectives and thereby contributes to the long--term protection of society:
  >
  > > Stigmatization or premature “labelling” of a young offender still in his or her formative years is well understood as a problem in the juvenile justice system. A young person once stigmatized as a lawbreaker may, unless given help and redirection, render the stigma a self- fulfilling prophecy. [para. 14]

- *R v D. B.*, [2008] 2 SCR 3:

  > 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

- *A.B. v. Bragg Communications Inc.*, [2012] 2 SCR 567:

  > Recognition of the *inherent* vulnerability of children has consistent and deep roots in Canadian law. This results in protection for young people’s privacy under the *Criminal Code*, R.S.C. 1985, c. C-46 (s. 486), the *Youth*

> *Criminal Justice Act*, S.C. 2002, c. 1 (s. 110), and child welfare legislation, not to mention international protections such as the *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3, all based on age, not the sensitivity of the particular child.

[55] I conclude that the "interest in the proper administration of justice" includes protecting the privacy of young persons.

[56] Considering the foregoing analysis, I turn to the application of my section 119(10(s) analysis to the specific record sought in this case – the pre-sentence report.

[57] Pre-sentence reports are provided for in section 40 of the *Act*. The pre-sentence report is a "report on the personal and family history and present environment of a young person" (s.2). Pre-sentence reports are not ordered in every case, but when ordered they are a critical element in the sentencing process. Unless a report is dispensed with, a youth justice court must consider a pre-sentence report before imposing a custodial sentence (s. 39), and must consider the recommendations in any pre-sentence report before imposing a youth sentence (s.42). A judge must also consider a pre-sentence report before imposing an adult sentence. (s.72)

[58] Section 40 ensures "that a sentencing court is provided with a pre-sentence report containing sufficient individualized information to allow the court to craft a sentence that is appropriate for and meaningful to the young person." (*R. v. S.A.C.*,[2008] 2 S.C.R. 675 at par. 37). In satisfaction of this obligation, the author of a pre-sentence report will interview the young person, his or her family members, and others in the community (school authorities, social workers, doctors, etc.) who

are in a position to provide relevant information. Much of this information will be highly personal to the youth and his family. Some of it, - particularly mental health and child protection information, -will also be subject to a variety of legislation which protects the young person's privacy outside the ambit of the *YCJA*.

[59] Pursuant to section 40, the pre-sentence report can only be given to a narrow range of persons: the young person, a parent, and counsel for the defence and the Crown. It can be withheld from a private prosecutor.

[60] Pursuant to section 40, a copy of all or part of a report may also be supplied to other courts, the young person's youth worker, and other persons with a valid interest in the report. In this context, "valid interest," in my view, requires that a "valid interest" will have some direct connection with the youth and the case. With the exception of the limited permission granted to the Provincial Director for administrative purposes, the court is the gatekeeper for distribution of the report.

[61] The question of access to a pre-sentence report should lead us to think more profoundly about the privacy of such reports. In *R. v. O'Connor*, 1995] 4 S.C.R. 411(S.C.C.), Justice L'Heureux-Dube states that

> Respect for individual privacy is an essential component of what it means to be "free,"' and that when a private document or record is revealed and the reasonable expectation of privacy therein is thereby displaced, the invasion is not with respect to the particular document or record in question. Rather, it is an invasion of the dignity and self -worth of the individual, who enjoys the right to privacy as an essential aspect of his or her liberty in a free and democratic society. (par. 119)

[62] This stricture must be regarded as having even more force in a case where

highly personal information is conveyed by or about a vulnerable and developing youth in circumstances of relative statutory compulsion.

[63] Considering all of these factors, it is beyond dispute that an exceptional degree of privacy attaches to pre-sentence reports.

[64] In addition to addressing a youth's privacy interests comprised in the notion of "the proper administration of justice" and, because the balancing of interests is undertaken under the rubric of the proper administration of justice, I have also considered the following: A probation officer obtains information exclusively for the purposes of assisting the court with sentencing. The information should be as ample and as accurate as possible to enable the court to impose a sentence which addresses proportionate accountability, and rehabilitation, and which is informed by an understanding of the underlying causes of the offending. A more complete report enables the court to make a fairer decision on sentencing. It is reasonable to suppose that that the information in the presentence report may be more complete where the confidentiality of the report is protected. While the confidentiality of a presentence report cannot be absolute, the need to protect that confidentiality is a factor to be weighed in the balancing required by section 119(1) (s).

[65] I turn then to applicant's side of the ledger. How is her interest in the record to be weighed in determining the interest of the proper administration of justice? In my view the applicant in this case has a strong but limited interest.

[66] The applicant is suing the operators of a group home for youth. The de-

fendant in the lawsuit pleads that

> At all times this defendant had no knowledge, actual or constructive, of any possible physical harm occurring to the plaintiff from the co--defendant.

[67] The plaintiff/applicant, for her part, pleads that

> "the defendant had the Plaintiff transport [Z-W] pursuant to its obligations under a service agreement whereby it provided contract services to third parties unknown to the Plaintiff."

[68] From these pleadings it would appear one issue in the litigation is the defendant's knowledge of the background of the young person, and whether the defendant did know, or should have known, that the young person's behaviour might pose a risk to anyone in authority transporting her.

[69] The presentence report can provide the applicant with information relating to the identities of possible third parties who may have had relevant information at the material time. Access to this information will assist the process of discovery, and serve the truth-seeking function of the litigation.

[70] All of these matters are directly related to the interest of the proper administration of justice.

[71] Finally, access will serve a public interest. Ascertaining the proper parties to be named in the lawsuit, is necessary not only for the benefit of the applicant in pursuing her litigation, but also for purposes of identifying the locus of responsibility for protecting youth workers dealing with troubled youth in the course of their employment.

[72] Here I bear in mind the comments of Binnie, J. in Re F(N):

> I should add, parenthetically, that in *Person Unknown v. S. (M.)* (1986), 43 M.V.R. 306 (Ont. Prov. Ct. (Fam. Div.)), it was held that under the predecessor section "a broader notion of justice is involved, the proper administration of justice not being limited to the administration of the particular case but extending to the overall interests of society" (p. 312) (emphasis added). I think this is too broad. A control subject to such a broad exception would in effect be no control at all and would render superfluous many of the other restrictions and protections carefully written by Parliament into the Act. F.N. (Re), [2000] 1 S.C.R. 880

[73] I would distinguish the case at bar from this *dicta.* I do not rely on the benefit to the “overall interests of society”, although such a benefit could transpire. Rather, I rely on the *Youth Criminal Justice Act* as the lens through which “the interest of the proper administration of justice” is to be defined. Thus, in addition to my reasoning regarding the protection of privacy of young persons, I find that the interest of the proper administration of justice may be defined to include furthering the objectives of the *Youth Criminal Justice Act*.

[74] The relevant objectives declared in Section 3(1) are “promoting the rehabilitation and reintegration of young persons who have committed offences”, and “supporting the prevention of crime by referring young persons to programs or agencies in the community to address the circumstances underlying their offending behaviour”. Programs and agencies in the community which serve young people dealt with under the *Act* are charged with addressing the circumstances underlying their offending behaviour. Access to records during the access period is available to such agencies under section 119(1) (n) of the *Act.* Workers committed to addressing the circumstances underlying a youth’s offending behaviour should be protected from the risk such behaviour may present. Indeed, the youth themselves are entitled to a responsible system. The applicant’s civil action engages these issues, and access

will further her ability to conduct the action.

[75] Taking all of these circumstances into account, I am satisfied that it is desirable in the proper administration of justice that access, albeit limited, be granted to the applicant in this case.

[76] As a final step, I turn then to the question of the extent of access that will be granted. This question is also a matter of discretion for the court. Section 119(1)(s) provides that access may be granted "to the extent directed by the judge". Again, the extent of the access must be determined by asking what is desirable in the interest of the proper administration of justice.

[77] As I have indicated, the information in the pre-sentence report is almost entirely derived from a child protection file. The record discloses that the youth was in Children's Aid Society care at the time of the incident, and further that the child protection records contain mental health information. The applicant seeks access to this information to establish that the youth had "a propensity for violence," and that the defendant was negligent in failing to ensure that the applicant had appropriate security in transporting the youth.

[78] It appears from the pre-sentence report that the information in the pre-sentence report was provided by a child protection worker. The author also had access to, and reviewed, two mental health assessments. Presumably these were furnished by the child protect worker. In providing access to the pre-sentence report, I do not express any view about the validity or reliability of the second or third hand

information or opinions referenced in the pre-sentence report. My intention is to provide the applicant with potentially relevant evidence of the *existence* of child protection records and mental health assessments for discovery purposes. This limits the access and the disclosure that I intend to authorize.

[79] Child protection and mental health records attract a high degree of privacy. Maintaining this privacy is also desirable in the interests of the proper administration of justice.

[80] I deal first with child protection files, which engage genuine privacy concerns for the young person involved, as well as members of her family. In R. v. T.F. [2009] O.J. No. 5802 (Ont. C.J.), Katarynych, J. dismissed an application for production of child protection records brought pursuant to section 278 of the *Criminal Code*. The accused youth had applied for child protection records for purposes of cross-examination of two foster youths expected to testify in the Crown's case. One foster youth was the complainant.

[81] In the course of her ruling, Justice Katarynych observed that

> Children's Aid Society records overarch the whole of a foster child's life in foster care. They also reach into his life before foster care; specifically, the historical backdrop that required the foster care. That reach can be a particularly intrusive documentation of very personal information. (par.97)

[82] She went on to state that

> Certainly the Child and Family Services Act itself requires attention to a child's privacy. Superior Court Justice O'Connor in the *L. (F.)* case identified one such provision; the prohibition on publication of identifying information in s. 45(8) of the *Act*. Subsection 45(8) is set within a number of privacy protections for the child in relation to court proceedings under Part III of the Act. See *CFSA* s. 45(1) (10). That privacy encompasses documentary and other information placed before the court in those hearings.

> Other provisions, unconnected from court proceedings, are threaded through the and protect privacy rights of children who are within that Act's jurisdiction, and the *Child and Family Services Act* to identify personal information of others as it relates to the child. (par. 105)

[83] Any court entertaining an application for access to child protection records would need to consider the privacy of those records. This court has no jurisdiction to conduct that inquiry, or to order access to those child protection records. The jurisdiction of the youth court is exclusively over records as defined in section 2(1) *YCJA*:

> ***record*** includes anything containing information, regardless of its physical form or characteristics, including microform, sound recording, videotape, machine-readable record, and any copy of any of those things, that is *created or kept for the purposes of this Act or for the investigation of an offence that is or could be prosecuted under this Act*. (my emphasis)

[84] A child protection record is not a record as defined by the *YCJA*. The fact that a record is referenced in a pre-sentence report does not open that record to an access application under the *Act*. The proper administration of justice requires that access to information in child protection records be requested through the appropriate application in the appropriate court and not through the device of a records application in the youth court.

[85] The same reasoning holds true for the reference to mental health assessments. Mental health assessments are an extremely sensitive form of personal information and attract an extraordinary degree of privacy.

[86] The author of the pre-sentence reports states that the mental health records were "requisitioned by the Children's Aid." Mental health assessments in child

protection matters are prepared for purposes of assisting the Children's Aid Society in carrying out its responsibilities to promote the best interests, protection and well-being of children. The production of such reports is governed by specific provisions in the *Child and Family Services Act*. If the reports were prepared in some other context, they are in any event governed by legislation which protects the dissemination of personal information and mental health records.

[87] Mental health records are not governed by the *YCJA* merely because the author of a pre-sentence report has reviewed them. The summary of two mental health assessments received as part of disclosure of child protection information does not make those records part of the court record. The proper administration of justice requires that access to mental health information in child protection records, or otherwise, also be requested through the appropriate application in the appropriate court, and not through the device of a records application in the youth court.

[88] Finally, I have considering the following sections of the *Act* which support the Order I intend to make:

[89] Section 122 of the Act provides

> A person who is required or authorized to be given access to a record under section 119, 120, 123 or 124 may be given any information contained in the record and may be given a copy of any part of the record.

[90] Section 129 provides that

> No person who is given access to a record or to whom information is disclosed under this Act shall disclose that information to any other person unless the disclosure is authorized under this Act.

Conclusion

[91] In this case, I have found that the applicant has a valid interest in the record and that and that access to the record is desirable in the interest of the proper administration of justice. The access I am ordering is intended to assist the applicant in ascertaining the appropriate parties to the litigation and for discovery purposes in the litigation. I am limiting the extent of the access for the reasons I have indicated above. The applicant will be given access to those portions of the pre-sentence report which are not based on information from child protection files or mental health assessments, but which identify the existence of such information. My order is as follows:

1. The applicant will have access to the pre-sentence report as redacted by the Court.

2. The name of the young person on the front page of the report will be redacted such that only the initials are shown;

3. Page 2 of the report will not be redacted;

4. Page 3 will be redacted entirely with the exception of the youth record and the names of the father and mother

5. Page 4 will be entirely redacted except for the sentence “V. continues to be a ward of the Children’s Aid Society of Peel,” and the paragraph entitled “Young Person’s Plans”;

6. Page 5 will be entirely redacted except for the sentence “V. continues to have the support of the Children’s Aid Society,” and the sentence “In regard to the subject’s education, V. has stated that she dislikes school.”

7. The redacted pre-sentence report will remain in the direct possession of counsel for the applicant in the Superior Court litigation under conditions of confidentiality and will not be disseminated in any way.

Released: August 11, 2016

Signed: “Justice M. L. Cohen”