Court File No. C62728

COURT OF APPEAL FOR ONTARIO

BETWEEN:

TORONTO POLICE SERVICE

Appellant

- and –

L. D., a young person

Respondent

- and -

STEVEN MIGNARDI

Respondent

FACTUM OF THE INTERVENER THE INDEPENDENT POLICE REVIEW DIRECTOR

April 13, 2017

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PART I – OVERVIEW

1. By Notice of Appeal dated September 23, 2016, the Appellant, the Chief of Police of the Toronto Police Service ("the Chief") appeals the decision of the Honourable Justice E.M. Morgan of the Superior Court of Justice, dated August 31, 2016. By Order of Associate Chief Justice Hoy dated February 13, 2017, the Independent Police Review Director ("the Director") has been granted intervener standing in this appeal.

2. This appeal considers whether Justice Morgan erred in granting the Respondent, Constable Mignardi, access to the youth records of L.D., where L.D. was a witness at Constable Mignardi's police disciplinary hearing. This disciplinary hearing was the result of a complaint made by L.D.'s youth worker alleging that Constable Mignardi had used excessive force on L.D. while L.D. was in police custody on December 18, 2012. The Director respectfully submits that, in determining this appeal, this Honourable Court should consider not only the issues raised by the Appellant, but the impact of Justice Morgan's decision on the public complaints process as a whole.

PART II – SUMMARY OF THE FACTS

3. The Director accepts as substantially correct the facts summarized at paragraphs 13 to 22 of the Appellant's factum. Additionally, the Director highlights that the Office of the Independent Police Review Director ("the OIPRD") is an independent civilian agency that receives, manages and oversees complaints made by members of the public about police across Ontario. The OIPRD came into existence on October 19, 2009, as a result of *The Report on the Police Complaints System in Ontario* ("the LeSage Report") authored by former Chief Justice Patrick LeSage. The LeSage Report recognized that

public confidence in a police complaints system contributes to increasing the overall effectiveness of police and builds greater community trust in police services. The LeSage Report also highlighted the need to make the public complaints system accessible to all persons, including vulnerable individuals.[1]

4. Presently, any member of the public may make a complaint to the Director about the conduct of a police officer. Accordingly, the OIPRD receives complaints alleging police misconduct from adults, from youths and from adults about police contact with youths.[2] Young persons generally, and in particular those who have involvement with police or the justice system, are properly considered to be vulnerable individuals.[3]

PART III – POSITION OF THE INDEPENDENT POLICE REVIEW DIRECTOR

5. The issue before this Honourable Court is whether, and in what circumstances, a police officer facing disciplinary charges can access youth records of a witness, where those records are unrelated to the incident giving rise to the disciplinary hearing, for the purpose of testing that witness' credibility. As per the Order of Associate Chief Justice Hoy, the Director's submissions will be confined to the broader systemic implications of Justice Mr. Morgan's decision.

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[1] *Report on the Police Complaints System in Ontario, the Hon. Patrick LeSage, (hereinafter The LeSage Report),* Compendium of the Independent Police Review Director, Tab 1, pp. 56, 60 to 65

[2] *Police Services Act,* R.S.O. 1990, C.P.15 at s.58(1) [hereinafter PSA]

[3] This vulnerability is recognized in the provisions of the YCJA, and is further reflected in the Policy and Procedures established by the Ministry of Children and Youth Services ("MCYS"). Specifically, MCYS has created a policy imposing a positive obligation on staff members at youth detention facilities to make a complaint to the OIPRD if they learn about allegations of police misconduct in relation to youths in their custody, where the youth chooses not to make the complaint. This positive obligation exists regardless of whether the youth consents to the staff member making the complaint: see Ministry of Children and Youth Services Policy and Procedures, Direct-Operated Secure Custody/Detention, Section 4.4: Youth Advocacy and Safeguards: External Complaint Mechanism, p.6, Compendium of the Independent Police Review Director, Tab 2.

6. Police disciplinary hearings center on the conduct of a police officer, and whether the conduct at issue constitutes misconduct as defined by the *Code of Conduct* in the *Police Services Act* ("the PSA").[4] While the Director accepts that the credibility of witnesses is relevant in the determination of whether misconduct has been proven, caution should be exercised to ensure that a hearing does not turn into a disproportionate examination of, or an aggressive attack on, the background of a witness. It is submitted, for reasons set out below, that to grant access to youth court records unrelated to the conduct in question, for the purpose of seeking to discredit a witness, will in the overwhelming majority of cases be contrary to the spirit and legislative intent of public complaints process.

7. In the present appeal, Constable Mignardi brought a youth court application pursuant to the *Youth Criminal Justice Act* ("the YCJA") seeking *all* of L.D.'s youth records "relating to the offences, *investigations, detentions,* arrests, convictions and/or prosecutions" of L.D.". [5] The application was dismissed, but on appeal, Justice Morgan granted access to all of the records requested, as well as to records of outstanding charges and a transcript of a judicial proceeding involving L.D. that occurred five months after the incident giving rise to the complaint.[6]

8. As Justice Morgan's decision is the first decision dealing with access to youth records for cross-examination in a police disciplinary context, it is respectfully submitted

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[4] PSA, s. 66(3), s. 68(5), Code of Conduct, O/Reg. 268/10

[5]. Notice of Application dated April 13, 2015, Appeal Book and Compendium of the Appellant, Chief of Police of the Toronto Police Service, Tab 10. Further, the summons *duces tecum* filed in support of the application required the Chief to bring all youth records relating to "any outstanding charges, discharges, extra judicial sanctions, peace bonds or diversion", and the entire Crown briefs, including police notes, for each matter: *ibid,* Tab 12.

[6]. Superior Court of Justice Order of Justice Morgan, dated March 15, 2017, Supplementary Appeal Book and Compendium of the Appellant Chief of Police, Toronto Police Service, Tab 1.

that it sets a precedent. Unfortunately, if Justice Morgan's reasoning for granting access to the records is followed in future cases, it is a precedent which will allow increased access to *all* youth records of witnesses at police disciplinary hearings. This can only serve to undermine and erode public confidence in the police disciplinary process.

9. Professional disciplinary hearings, like police disciplinary hearings, are neither criminal nor quasi-criminal in nature because they do not result in true penal consequences. Police disciplinary hearings, like other professional disciplinary proceedings, are administrative and regulatory in nature. Therefore, the principles of disclosure as established in *R. v. Stinchcombe* do not apply in police disciplinary matters and it is improper to import rights and obligations from criminal or quasi-criminal proceedings into an administrative law context.[7] Notably, access to such youth records for the purposes of cross-examination does not appear to take place in disciplinary proceedings involving other professionals.[8] Justice Morgan erred in fundamentally misapprehending this administrative nature of police disciplinary hearings.

10. This error was further compounded by his mischaracterization and misapplication of the concept of "reduced moral culpability". Specifically, Justice Morgan erroneously found that, because young people are protected under the YCJA due to their "impulsivity, their lack of forethought, their misunderstanding of situations and their overall reduced capacity for moral judgment", these factors weighed in favour of

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[7] *R. v. Wigglesworth* [1987] 2 SCR at pp. 552-555, 560; *May v. Ferndale Institution*, [2005] 3 SCR 809, at pp. 849-850; *Re Trumbley et al. and Fleming et al,* 1986 CanLII 146 (ON CA); *Cardi v Peel Regional Police Service*, 2013 CanLII 101384 (ON CPC) at paras. 81 and 82

[8] A possible explanation is that doctors, nurses, engineers, accountants or other professionals facing disciplinary hearings are not aware of the complainant's criminal antecedents. Police officers, however, by virtue of their employment and their employment related duties have occasion to learn of a complainant's or witnesses' prior interactions with police. As such, they are always well-positioned to know whether such records exist and to request them through their counsel.

disclosing youth records where the young person was effectively the "accuser" and not the accused, and his or her evidence was being "deployed" against another person.

11. Firstly, it is submitted that Justice Morgan's ruling is contrary to jurisprudence which has recognized that, in a criminal prosecution where the right to full answer and defence is actually engaged, the right to cross-examine witnesses with respect to prior criminal acts may be curtailed in the case of youth records, and is minimally restricted (if at all permitted) to findings of guilt.[9] Secondly, the ruling appears to ignore that the complaint in this case was initiated by L.D.'s youth worker and that L.D. was *not* the "accuser" in this case, but merely a witness.

12. Lastly, but perhaps most importantly, the Director submits that Justice Morgan's ruling runs counter to the spirit and principles of the LeSage Report, the PSA and the YCJA. Youths are recognized as a vulnerable group in our society and are granted additional protections under the law. Notwithstanding these protections, Justice Morgan appears to have created blanket access to youth records for the purposes of cross-examination as he reasoned that *all* types of youth records are necessary for an officer to make full answer and defence.

13. It is respectfully submitted that this wholesale access to youth records by a police officer, where the records are unrelated to the conduct at issue at the disciplinary proceeding, would have a chilling effect on youth complainants and witnesses. It will inhibit and discourage youth, or a person acting on behalf of a youth, from making a

[9] *R. v. Sheik-Qasim,* 2007 CanLII 52983 (ONSC) at paras. 14, 23; *R. v. Hankey,* 2008 CanLII 68109 ONSC at paras. 14 to 15

public complaint about the conduct of an officer, thereby discouraging the legitimate exercise of rights and the pursuit of legal remedies. Youths in particular may be less willing to file a complaint with the OIPRD or assist in the investigations of police complaints, if their prior unrelated youth records are going to be accessed and used for the sole purpose of seeking to discredit them.

14. Justice Morgan's decision also fails to recognize that youth witnesses such as L.D., who are merely witnesses, will almost certainly be unable to retain counsel to resist these applications and are poorly situated to represent themselves or even understand the impact of the legal proceedings if they wish to defend their privacy interests. This impact would have a greater effect on youths who were not the target of the alleged police misconduct but were merely present for the incident. This will only serve to further discourage and inhibit persons from either exercising their legal right to make a complaint, or from participating as witnesses in investigations where another party has made the complaint. This chilling effect would be counter to the purpose and spirit of the Director's legislative mandate, especially the goal of accessibility to the police complaints system for marginalized or vulnerable groups, and can only serve to erode the core value of ensuring public confidence in the public complaints process.

PART IV – ADDITIONAL ISSUES

15. The Director raises no additional issues.

PART V – ORDER REQUESTED

16. The Director respectfully requests that this Honourable Court grant the relief sought by the Appellant.

ALL OF WHICH is respectfully submitted this 13th day of April, 2017.

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SCHEDULE A
LIST OF AUTHORITIES

R. v. Wigglesworth [1987] 2 SCR

May v. Ferndale Institution, [2005] 3 SCR 809

Re Trumbley et al. and Fleming et al, 1986 CanLII 146 (ON CA)

Cardi v Peel Regional Police Service, 2013 CanLII 101384 (ON CPC)

R. v. Sheik-Qasim, 2007 CanLII 52983 (ONSC)

R. v. Hankey, 2008 CanLII 68109 ONSC

SCHEDULE B
RELEVANT STATUTORY PROVISIONS

POLICE SERVICES ACT, RSO 1990 C P 15

PART V
COMPLAINTS AND DISCIPLINARY PROCEEDINGS

Complaint may be made to Independent Police Review Director

58. (1) Any member of the public may make a complaint under this Part to the Independent Police Review Director about,

(a) the policies of or services provided by a police force; or

(b) the conduct of a police officer. 2007, c. 5, s. 10.

Review and Investigation of Complaints

Complaints about police officer's conduct
66. (1) The chief of police shall cause every complaint referred to him or her by the Independent Police Review Director under clause 61 (5) (a) to be investigated and the investigation to be reported on in a written report. 2007, c. 5, s. 10.

Unsubstantiated complaint
(2) If at the conclusion of the investigation and on review of the written report submitted to him or her the chief of police is of the opinion that the complaint is unsubstantiated, the chief of police shall take no action in response to the complaint and shall notify the complainant, the police officer who is the subject of the complaint and the Independent Police Review Director, in writing, together with a copy of the written report, of the decision and of the complainant's right under subsection 71 (1) to ask the Independent Police Review Director to review the decision within 30 days of receiving the notice. 2007, c. 5, s. 10.

Hearing to be held
(3) Subject to subsection (4), if at the conclusion of the investigation and on review of the written report submitted to him or her the chief of police believes on reasonable grounds that the police officer's conduct constitutes misconduct as defined in section 80 or unsatisfactory work performance, he or she shall hold a hearing into the matter. 2007, c. 5, s. 10.

Complaints about police officer's conduct, Independent Police Review Director investigation

68. (1) The Independent Police Review Director shall cause every complaint retained by him or her under clause 61 (5) (c) to be investigated and the investigation to be reported on in a written report. 2007, c. 5, s. 10.

Matter referred to chief of police
(3) If at the conclusion of the investigation the Independent Police Review Director believes on reasonable grounds that the conduct of the police officer who is the subject of the complaint constitutes misconduct as defined in section 80 or unsatisfactory work performance, he or she shall refer the matter, together with the written report, to the chief of police of the police force to which the complaint relates. 2007, c. 5, s. 10.

Same
(4) If the Independent Police Review Director is of the opinion that the conduct of the police officer constitutes misconduct or unsatisfactory work performance that is not of a serious nature, he or she, in referring the matter to the chief of police under subsection (3), shall so indicate. 2007, c. 5, s. 10.

Chief of police to hold hearing
(5) Subject to subsection (6), the chief of police shall hold a hearing into a matter referred to him or her under subsection (3) by the Independent Police Review Director. 2007, c. 5, s. 10.

O. Reg. 268/10: GENERAL

SCHEDULE
CODE OF CONDUCT

2. (1) Any chief of police or other police officer commits misconduct if he or she engages in,

...

(g) UNLAWFUL OR UNNECESSARY EXERCISE OF AUTHORITY, in that he or she,

(i) without good and sufficient cause makes an unlawful or unnecessary arrest,

(i.1) without good and sufficient cause makes an unlawful or unnecessary physical or psychological detention,

(ii) uses any unnecessary force against a prisoner or other person contacted in the execution of duty, or

(iii) collects or attempts to collect identifying information about an individual from the individual in the circumstances to which Ontario Regulation 58/16 (Collection of Identifying Information in Certain Circumstances – Prohibition and Duties) made under the Act applies, other than as permitted by that regulation;

YOUTH CRIMINAL JUSTICE ACT, SC 2003, C 1

PART 6

PUBLICATION, RECORDS AND INFORMATION

PROTECTION OF PRIVACY OF YOUNG PERSONS

Persons having access to records

119 (1) Subject to subsections (4) to (6), from the date that a record is created until the end of the applicable period set out in subsection (2), the following persons, on request, shall be given access to a record kept under section 114, and may be given access to a record kept under sections 115 and 116:

...

(r) a person or a member of a class of persons designated by order of the Governor in Council, or the lieutenant governor in council of the appropriate province, for a purpose and to the extent specified in the order; and

(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

(i) desirable in the public interest for research or statistical purposes, or

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

CHIEF OF POLICE
TORONTO POLICE SERVICE
Applicant

- and -

L.D
A young person
Respondent

- and -

STEVEN MIGNARDI

Respondent

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