Court File: C62728

COURT OF APPEAL FOR ONTARIO

BETWEEN:

TORONTO POLICE SERVICE

Appellant

-and-

L.D. (a young person)

Respondent

-and-

STEVEN MIGNARDI

Respondent

-and-

CRIMINAL LAWYERS' ASSOCIATION

Intervenor

-and-

JUSTICE FOR CHILDREN AND YOUTH

Intervenor

-and-

OFFICE OF THE INDEPENDENT POLICE REVIEW DIRECTOR

Intervenor

FACTUM OF THE INTERVENOR: THE CRIMINAL LAWYERS' ASSOCIATION

Margaret Bojanowska
BARRISTER & SOLICITOR
180 Bloor Street West, Suite 1201
Toronto, ON M5H 2V6

Tel: (647) 272 5503
Fax: (416) 934-0006

Counsel for the Intervenor Criminal Lawyers' Association

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TO: **SHARON WILMOT**
Toronto Police Service
Legal Services
40 College Street
Toronto, ON M5G 2J3

Counsel for the Toronto Police Service

JOANNE MULCAHY
Barrister
301-90 Richmond Street East
Toronto, ON M5C 1P1

Counsel for Steven Mignardi

MARY BIRDSELL/JANE STEWART
55 University Avenue, Suite 1500
Toronto ON M5J 2H7

Counsel for the Intervener - Justice for Children and Youth

MIRIAM SAKSZNEJDER
655 Bay Street, 10th Floor
Toronto, ON M7A 2T4

Counsel for the Intervener – Office of the Independent Police Review Director

L.D.
c/o Sie-Wing Khow
Toronto Police Service

PART I. IDENTIFICATION OF THE INTERVENER – THE CRIMINAL LAWYERS' ASSOCIATION OF ONTARIO

1. On February 13, 2017, A.C.J.O. Hoy granted intervenor status to the Criminal Lawyers' Association [hereinafter CLA] as a friend of the court in the appeal launched by the Toronto Police Service from the decision of the Honourable Justice Morgan released August 31, 2016 overturning the decision of the Honourable Justice Cohen dated August 6, 2015.

2. By way of background, the CLA is a non-profit organization, which serves as the voice of criminal defence lawyers in Ontario. Its objects are to educate, promote and represent its membership on issues relating to criminal and constitutional law.

PART II: OVERVIEW

3. The question to be determined on this appeal is to what extent can youth criminal justice records be used by a third party outside the context of the youth criminal justice system and whether the youth records of the young person L.D. ought to have been ordered disclosed to the Toronto Police Service and to Police Constable Steven Mignardi. Justice Morgan overturned the decision of Cohen J. and ordered the records disclosed.

4. It is the position of the Criminal Lawyers Association that;

(1) access to youth criminal records is of fundamental importance to the proper and effective cross examination of young persons and that access to youth records is of great import to the proper administration of justice, and that;

(2) youth criminal records ought not to be out of bounds for cross examination by defence counsel.

5. The CLA and its members have a direct interest in the issue of access to the youth criminal records of young persons and what use can be made of such records in cross-examination and submissions. Increasingly, young persons are seen as important participants in the criminal justice system. Young persons participate in the criminal justice process before the Ontario courts not just as complainants but also as key witnesses for the Prosecution, and as in the instant case, they can be complainants or witnesses in various disciplinary proceedings across Ontario.

6. It is the position of the Criminal Lawyers Association there exists an inherent value in youth records for cross-examination purposes, in the event that a young person comes before the Court either as a complainant or as witness. The prior youth criminal records of young persons are highly relevant to myriad issues including (1) credibility, (2) reliability, (2) motive to fabricate, (3) defences, as well as (4) narrative/context, etc. The just determination of any legal issue should not occur in a vacuum. A denial of access to youth records results in a court or tribunal necessarily having to determine critical issues such as credibility, motive, reliability, animus, as well as attitudes and demeanour in the absence of critical and relevant information.

7. A pattern of youth convictions could lead a trier of fact to conclude that the young person's pattern of conduct reflects a disregard for the laws and rules of society, making it more likely that the young person who harbours such attitudes would lie. Convictions and/or admissions of guilt with respect to offences of dishonesty can impact upon the

credibility and reliability of a young complainant/witness in exactly the same manner as for an adult complainant/witness.

8. A pattern of criminal conduct which precedes and informs a charge of failing to comply with bail, as in the instant case, is critical to understanding not only narrative, the reason for the charge of failing to comply, the impact of the prior charges upon the likelihood of bail, the mindset and decision making of the young person in fleeing from police, and motive to fabricate to avoid going back into custody.

9. Youth records ought to be available for purposes of cross-examination and triers of fact ought not to be deprived of such information. In such circumstances, access to the record is granted for the specific and focused purpose of cross-examination, intended to assist the proper and just determination of a complaint or allegation. Disclosure and access to a youth record for purposes of cross-examination of a complainant or witness with respect to the record serves to advance the fundamental principle of full answer and defence.

10. The CLA has a distinct perspective on the underlying legal issues that flow from its role as the voice of the criminal defence bar in Ontario. As direct participants in the criminal justice system, the CLA Membership has significant experience in dealing with young persons not only as clients who we defend on a daily basis but also as complainants/witnesses in the context of cases. Members of the CLA are in Court daily and know full well the importance of youth criminal records to issues regarding credibility and reliability.

PART III: THE FACTS

11. The Criminal Lawyer's Association accepts the facts as outlined by the Toronto Police and PC Mignardi in their facta. The Criminal Lawyer's Association raises no additional facts.

12. The CLA is a non-profit organization founded on November 1, 1971. The CLA has over 1000 members in Ontario and associate members across Canada and in the United States and works to represent and serve its membership in a variety of ways.

13. The CLA is routinely consulted by both Houses of Parliament and their Committees to offer submissions on proposed legislation pertaining to issues in criminal and constitutional law. Similarly, the CLA is often consulted by the Government of Ontario, and in particular the Attorney General of Ontario, on matters concerning provincial legislation, court management, Legal Aid and various other concerns that involve the administration of criminal justice in the Province of Ontario.

14. The CLA presents educational workshops and seminars throughout the year, culminating in its annual Fall Convention and Education Program, which often includes guest speakers or participants from the United States, and, on occasion, the United Kingdom. The Association also produces a Newsletter, which is published five times per year and circulated across Canada. It includes editorials, the President's report, feature articles, regular columns, book reviews, and case commentaries, all of which are directed to highlighting current developments in criminal and constitutional law.

PART IV: THE ISSUES AND THE LAW

15. The Criminal Lawyers' Association takes the position that Justice Morgan's decision on appeal was correct in law. Morgan J. did not err in the interpretation of the records provisions of the *Youth Criminal Justice Act*, nor did he misapply the concept of reduced moral culpability to expand the records provisions in the *YCJA* as alleged by the Appellant. Finally, the appeal court did no err in the instant case in failing to review the individual records.

16. It is the position of the Criminal Lawyers Association that this Honourable Court should take this opportunity to affirm Justice Morgan's decision and to delineate and refine for future access applications the proper analysis to be applied, and the appropriate factors to be considered by the Courts when determining applications under section 119 and 123 of the YCJA, including but not limited to;

(1) the importance of the record to the case at bar and specifically to issues raised in the case,

(2) the impact of the disclosure of the record on the young person, and

(3) the effect of the disclosure/non-disclosure of the record on the administration of justice.

JUSTICE MORGAN DID NOT ERR IN THE INTERPRETATION OF THE RECORDS PROVISIONS OF THE YCJA

17. The Appellant claims that the appeal court erred by equating a desire to cross examine on credibility generally with a wholesale right to disclosure of YCJA records in order to attack a young person's credibility. It is respectfully submitted that Justice Morgan was well aware of and adhered to the respective tests under sections 119 and 123 of the YCJA and his analysis did not equate the tests with "disclosure obligations generally" as claimed by the Appellant.

18. The Appellant further argues that Justice Morgan erred in the analysis of disclosure in a criminal proceeding by going well beyond established principles of disclosure in criminal law and conflating Crown disclosure obligations with the relevance analysis pursuant to third party records application. Justice Morgan committed no such error. His reasons are considered and reveal that he clearly understood the competing legal values: confidentiality for youthful offenders on the one hand and due process for persons facing regulatory/disciplinary proceedings on the other.

19. The Appellant's claim that "the entire analysis of the Judge in this case rests on a bald assertion that young people are necessarily less credible and therefore there is a higher need to put their evidence to the test of cross-examination" ignores the detailed analysis undertaken by Justice Morgan. Justice Morgan properly recognized that,

> [28] In terms of the disclosure sought here, it is a common understanding of legal process that, "prior convictions bear upon the credibility of a witness. Even crimes involving no dishonesty are relevant to credibility, since they evince contempt for the law": *R. v. C.M.,* 2010 ONSC 5303, at para 15. In the police discipline context, disclosure of information tending to show the bad character of a complainant or other witness is of critical importance, especially if the witness is motivated to make a deal for release from custody:

> *Stevenson v York Regional Police Service,* OPC #13-12 (2013), at para 137 (Ont. Civ. Police Comm.) L.D., of course, was in custody at the time of the alleged incident involving Mignardi, and so his motivation for making the statement which lead to the youth worker's complaint is a potential issue.
>
> [29] Given its relevance to cross-examination and witness credibility, "being denied access to materials that could be used by the defence to respond to and potentially undermine the evidence in the case against him could undermine [a person's] ability to make full answer and defence. That would be contrary to the interests of proper administration of justice": *R. v. JB,* 2008 ONCJ 1720, at para 7. The critical importance of such evidence is as accurate in the discipline context as it is in the criminal context. Moreover, testing a witness' credibility is not "victimization" of the witness: *R. v. Pickton*, 2007 BCSC 718, at para 28. This is the case regardless of the age of the witness at the time of the conduct on which he is being cross examined.
>
> *Reasons of Justice Morgan, August 31, 2016*, at paras 27-28

20. Justice Morgan clearly recognized the well-established principle that a complainant/witness' prior convictions, past charges, and even prior involvement in the justice system as a complainant or witness (i.e. recanted allegations or allegations proven to be demonstrably false) can be relevant in subsequent proceedings and form the subject of proper cross examination at a trial or hearing. In fact, a complainant or witness can properly be cross-examined with respect to any bad character, discreditable conduct, negative or anti-social associations or modes of life. This principle is equally applicable to both adult and youth witnesses.

> *R. v. Bottineau, [2005] O.J. No. 4034 (SCJ) at para 64*
> *R. v. Arcangioli, [1994] O.J. No. 129 (SCC) at para 26-27*
> *R. v. Charland*, (1996) 110 CCC (3d) 300 aff'd by [1997] 3 SCR 1006

21. The relevance of past charges and convictions is wide ranging in value. Without a doubt prior charges and convictions can be relevant to:

i) the issue of credibility at a trial or hearing;

ii) the general reliability of a witness or complainant;

iii) the credit or character of a witness or complainant;

iv) the complainant or witness' contempt or disregard for the law and the administration of justice;

v) regard for the affirmation or oath to tell the truth;

vi) motive generally as well as motive to fabricate;

vii) narrative and context of the subject matter being determined.

R. v. Knight, [2001] M.J. No. 114 at para 1,4,9
R. v. Grizzle, [2013] O.J. No. 477 at para 14 and 17
R. v. Keta, [1994] O.J. No. 2986 at para 6-8
R. v. Gassyt, [1998] O.J. No. 3232 at para 36-39
R. v. Lyons, [1991] O.J. No. 1514

22. Courts and tribunals across the province benefit when fulsome cross-examination is conducted with respect to past convictions and charges. Access to past convictions and charges is fundamental to the right to make full answer and defence in a variety of different proceedings including criminal trials and disciplinary hearings, not just because of the effect on credibility and reliability but for all of the reasons delineated above. The proper administration of justice requires that judges, disciplinary panels, Boards, and Tribunals have available to them all relevant information that could impact on their determination of the credibility and reliability of a complainant or witness.

23. As outlined above, prior criminal conduct can be relevant to myriad live issues in a proceeding. The prior charges incurred by *L.D.*, all within months of the December 18, 2012 arrest and subsequent complaint against PC Mignardi, are not only relevant to *L.D.*'s credibility and reliability, but also show a disregard for the administration of justice through repeated breaches of court orders. These charges would be relevant to a consideration of whether and to what extent *L.D.* would be bound by oath or affirmation taken prior to giving evidence.

24. Further, it is also relevant to consider whether the youth witness has incurred a large number of charges within a short time frame, as did *L.D.* in this case (a total of 8 *Criminal Code* charges between May and December 2012 and time in custody on three separate occasions before being released on bail). His pattern of behaviour informs his actions on December 18, 2012 in fleeing from police and his utterance that same date that he did not want to go to jail. The entirety of his records from May to December 2012 are in effect joined together and relevant to *L.D.'s* state of mind and motive to fabricate allegations against PC Mignardi.

25. There is an established procedure under the *Act* for access to records. Each request is to be considered on its facts and in the context of a specific case. The role of a justice on an application for access to records is not to keep the records safe, but to determine whether in the circumstances at hand an order for access should be made. Justice Morgan, having heard 4 days of argument on the issue, did exactly that and correctly held that the records in their entirety were relevant and to be disclosed to the parties. Where it has been established that there is a valid interest and it is desirable in the interest of the proper administration of justice (s.119) or a valid and substantial interest

and it is necessary in the interest of the proper administration of justice (s. 123) then an order for access is to issue.

26. Under section 119 the test requires an applicant to establish a "valid interest" in the record. *L.D.* admitted guilt with respect to an offence of dishonesty. The offence of dishonesty occurred just seven months prior to December 18, 2012, the date the alleged incident involving PC Mignardi is said to have occurred. It was not only proximate in time but highly relevant to the issue of credibility of *L.D.* back in 2012. Clearly the records in this case are relevant to the issues of credibility and reliability in addition to establishing a possible motive to fabricate.

27. The Appellant has made extensive written arguments with respect to the disclosure of various private records under the *O'Connor, Quesnelle, Batte,* and *McNeil* regimes. The Appellant's submits that the reasonable expectation of privacy analysis under section 119 and 123 of the YCJA should be even higher than that outlined by the Supreme Court in *Quesnelle*. The Appellant is asking this Honourable Court, for the first time on the within appeal, to impose an entirely different test/procedure for access of youth records, never intended by Parliament. It is respectfully submitted that the Appellant's argument and request is without foundation.

THE COURT DID NOT ERR WITH RESPECT TO THE PRINCIPLE OF DIMINISHED MORAL CULPABILITY

28. Justice Morgan correctly concluded that the sentencing principle of diminished moral culpability had no application in the determination of the issue of whether access to the records ought to be granted. He held as follows:

> [36] Contrary to the logic deployed by the youth court judge in the present case, the principle of diminished moral responsibility does not demand confidentiality in circumstances where the young person is effectively the accuser rather than the accused. Quite the contrary; the fact that 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", DB, at para 44, suggests that their accusatory evidence needs to be put to the test of cross-examination. The fact that a young person is held to a diminished standard of moral culpability when on trial, points to a need to disclose rather than to maintain the confidentiality of the youth record when the young person's evidence is deployed against another person.
>
> [37] A person in Mignardi's position needs to know, or at least have information which will help him discover, whether the testimony against him is a result of youthful impulsivity, misunderstanding, or thoughtlessness. The YCJA requires that we not hold a youth entirely responsible for his wrongs, but it does not demand that the young person's potential thoughtlessness be taken as thoughtfulness, or that his potential misunderstanding of a situation be taken as an accurate understanding of that situation. If the policy of diminished moral culpability acknowledges that a young person in committing an offense may tend to act impulsively rather than contemplatively, then it must equally acknowledge that a young person in testifying against another may speak impulsively rather than contemplatively.
>
> *Reasons of Justice Morgan, August 31, 2016*, at paras 36-37

29. Justice Morgan engaged in an extensive case-specific analysis to determine the relevance of the records in the instant case before he ordered disclosure of the records. Contrary to the Appellant's assertions, Justice Morgan did not make sweeping generalizations about the credibility of youth. This Honourable Court has repeatedly held that the reasons must be looked at as a whole.

30. Justice Morgan's reasons are based on reason and common sense and recognize that the principle of diminished moral culpability has no place within the regime designed for access to youth records under sections 119 and 123. Diminished moral

blameworthiness is strictly a consideration relevant to the sentencing of young offenders to allow for their rehabilitation and reintegration.

31. The regime developed by Parliament under sections 119 and 123 does not call for a consideration of the diminished moral blameworthiness of youth as a factor in the disclosure of records analysis. The Appellant's argument that disclosure of the records under section 119 and 123 will result in publication of a young person's name and thereby impede rehabilitation efforts fails to account for the ability of the Courts to impose conditions on the order of disclosure.

32. The Appellant submits that Justice Morgan's reasons lend themselves to the general conclusion that there should be reduced privacy protections governing youth records. This argument mischaracterizes the reasons and ignores the fact that Justice Morgan was well aware of the specific fact scenario in the instant case, the respective tests under section 119 and 123, and engaged in a proper balancing of privacy considerations versus the ability to make full answer and defence.

33. The Appellant submits that the privacy protections of the YCJA are intended to act as a shield for young persons, and should not be used as a sword to impede their ability to pursue various protections that are offered to other citizens. In the instant case, L.D. is not impeded from pursuing the complainant in question, to the contrary Justice Morgan's order allows the Toronto Police to proceed to a discipline hearing in which the validity L.D.'s complaint can be determined. Further, what is clear from sections 119 and 123 is that access to records has been legislated and the "shield" is clearly never intended to be absolute.

34. The Appellant argues that "the privacy protections of the YCJA have been used as a sword against L.D. by focusing solely on a generalized conclusion, based on a flawed logical premise, that by virtue of being a youth, he is *de facto* not credible as a witness". At no time did Justice Morgan come to such a conclusion in his reasons. The Appellant has either misread or misconstrued the reasons. Justice Morgan's reasons do not create a "presumption of access". This Honourable Court should not give effect to this ground of appeal.

JUSTICE MORGAN DID NOT ERR IN FAILING TO REVIEW THE INDIVIDUAL RECORDS

35. The Appellant submits that Justice Morgan erred in failing to determine whether specific records had any relevance in the circumstance of the case. Counsel for officer Mignardi laid a sufficient foundation as to the relevance of the records by filing with the Court the affidavit of Harry G. Black setting out the nature of the records. Section 119 and 123 of the YCJA do not require the judge to conduct a specific review of the records before ordering disclosure. Justice Morgan had the benefit of the above affidavit, Justice Cohen's lower decision summarizing and outlining in detail the nature of the records, extensive materials and summaries of the case filed by the Toronto Police Service, counsel for officer Mignardi, and the Intervenors (CLA and JFCY), as well as four days of argument with respect to the issue.

36. The relevance of the record is important. Relevance of a record can be determined by the Court without a review of the specific record at hand, if information before the Court is complete enough to inform the relevance analysis. Each case must be looked at on its own facts.

37. It is respectfully submitted that the assessment of the relevance of the youth records under section 119 and 123 must be performed on the *Stinchcombe* basis of relevance – whether it is possible that the record may be reasonably useful to the defence. If the record is deemed less relevant the privacy rights of the young person will prevail. If however the record is deemed relevant, if it is found to be reasonably useful to the defence, the privacy rights of the young person will have to yield to the right of the applicant to make full answer and defence.

R. v. M.D. , [2015] O.J. No. 2150, (OCJ) at para 51
R. v. Stinchcombe, [1991] 3 S.C.R. 326 (S.C.C.

38. The case of R. v. J.B., 2008 ONCJ 209, relied upon by the Appellant does not stand for the proposition that a judge is required to review the records prior to ordering their disclosure under either section 119 or 123. Further, the decision is not binding on this Honourable Court. It is the position of the CLA that while in certain cases a review of the records may be required for a proper assessment to be conducted, this is certainly not required in every case. Justice Morgan had before him extensive information with respect to the content of the records and was entitled to come to his decision without a specific review of the records.

39. It is respectfully submitted that the Appellant's arguments are based entirely on a piecemeal analysis of Justice Morgan's reasons. This Honourable Court has repeatedly reaffirmed that this type of approach is inappropriate and that instead the reasons must be looked at as a whole. When Justice Morgan's reasons are read as a whole, they reveal a thoughtful and considered analysis properly conducted under section 119 and 123 of the YCJA.

40. The decision of Justice Cohen of the Ontario Court of Justice was an error and created a significant concern for the membership of the Criminal Lawyer's Association. Access to records is imperative to the proper administration of justice and the effective defence of our clients, whether they face criminal allegations or disciplinary proceedings. The decision of Justice Morgan ought to be upheld by this Court.

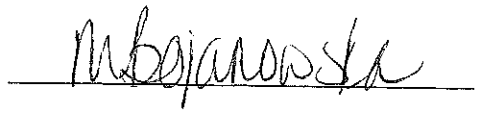
PART V: ORDER REQUESTED

41. It is requested that the appeal by the Toronto Police Service be dismissed;

42. It is further requested that this Honourable Court affirm Justice Morgan's reasons which properly delineate the considerations that are properly to be taken into account as part of applications for access to records under section 119 and 123 of the *YCJA*.

ALL OF WHICH IS RESPECTFULY SUBMITTED

DATED at Toronto, this 18th day of April, 2017.



Margaret Bojanowska
BARRISTER AND SOLICITOR

Counsel for the Intervener – Criminal Lawyers Association

TO: **SHARON WILMOT**
Toronto Police Service
Legal Services
40 College Street
Toronto, ON M5G 2J3

Counsel for the Toronto Police Service

JOANNE MULCAHY
Barrister
301-90 Richmond Street East
Toronto, ON M5C 1P1

Counsel for Steven Mignardi

MARY BIRDSELL/JANE STEWART
55 University Avenue, Suite 1500
Toronto ON M5J 2H7

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MIRIAM SAKSZNEJDER
655 Bay Street, 10th Floor
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FACTUM OF THE INTERVENOR: THE CRIMINAL LAWYERS' ASSOCIATION

MARGARET BOJANOWSKA
Barrister
180 Bloor Street West
Suite 1201
Toronto, Ontario
M5S 2V6

T: (647) 352 3500
F: (416) 934-0006

Of Counsel for the Applicant/Appellant