CR-15-534612

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

TORONTO POLICE SERVICES

Applicant
(Appellant)

- and -

L.D., a young person

Respondent
(Respondent in Appeal)

- and -

STEVEN MIGNARDI

Respondent
(Respondent in Appeal)

- and -

CRIMINAL LAWYERS' ASSOCIATION
JUSTICE FOR CHILDREN AND YOUTH

Interveners

FACTUM OF THE INTERVENER
JUSTICE FOR CHILDREN AND YOUTH

PART I - OVERVIEW

1. This is an appeal from the decision of the youth court judge, the Honourable Justice Cohen, refusing to disclose certain records concerning L.D., then a young person within the meaning of the *Youth Criminal Justice Act* ("*YCJA*").

Youth Criminal Justice Act, S.C. 2002, c. 1 *("YCJA")*

2. This case concerns the extent to which youth records under the *YCJA* may be subject to access and disclosure for the purposes of police disciplinary proceedings, both

by the prosecuting police service, the Toronto Police Services, and the subject officer, PC Steven Mignardi.

3. At the heart of this appeal, however, are the principles animating the *YCJA* – including the diminished moral blameworthiness of young people and the attendant procedural and privacy protections afforded to them – and the appropriate analysis of these principles in deciding whether access to records is in the interests of the proper administration of justice. In this regard, this Court must have regard to the strict privacy provisions of the *YCJA* and the international and constitutional significance of the principles animating the Act.

PART II- THE FACTS

4. The Intervener relies on the facts as described by Her Honour Justice Cohen, in her decision dated August 6, 2015.

Toronto Police Service v. L.D, 2015 ONCJ 430, para. 1-19

5. Specifically, the Toronto Police Service ("TPS") applied to the Ontario Court of Justice, sitting as a youth court, for an order permitting access and disclosure of police records concerning a young person, L.D. in the course of police disciplinary proceedings under the *Police Services Act.*

6. The subject officer is PC Steven Mignardi ("PC Mignardi").

A. The Disciplinary Proceedings

7. These proceedings arose as a result of a complaint made on L.D.'s behalf by a youth

worker at an open detention facility at which the L.D. was detained. It is alleged that while L.D. was in custody following his arrest on December 18, 2012, he was assaulted by PC Mignardi, specifically, slapped, "stomped on", and struck in the ribs. His injuries were photographed and a signed statement from L.D. was obtained by the youth worker. L.D.'s injuries included bruising and scratching of L.D.'s ribs forearms, back, and face and the imprint of a shoe on the top of his left arm.

8. The youth worker commenced a complaint with the Office of the Independent Police Review Director ("OIPRD"), which investigated the complaint and referred it for prosecution by the Chief of Police of TPS. Given the nature of the alleged conduct, the TPS is required to hold a hearing.

B. **The Records Being Sought by the TPS and PC Mignardi**

9. The TPS and PC Mignardi applied for access to the youth records of L.D. on the basis that they were required for the purposes of the disciplinary hearing.

10. In its applications, the TPS requested an order that:

> the Toronto Police Service disclose to the Respondent [PC Mignardi], the record as defined in s. 2 of the Youth Criminal Justice Act SC 2002, c. 1 relating to the investigation, detention, arrest and/or prosecution of L.D. on December 18, 2012. . . .
>
> Chief of Police Draft Order, Appellant's Appeal Bok, Tab 8

11. PC Mignardi applied for a broader order that:

> the Toronto Police Service provide to the Respondent Steven Mignardi, the record as defined in s. 2 of the *Youth Criminal Justice Act*, SC 2002, c. 1 relating to the offenses, investigations, detentions, arrest, convictions, and/or prosecutions of L.D. on such dates as but not limited to May 1, 2012, May 19, 2012, November 29, 2012, December 13, 2012, and December 18, 2012.

Draft Order of Steven Mignardi, Appeal Book of Steven Mignardi, Tab 11

12. In the course of the application before the Ontario Court of Justice, Cohen J. examined the records being sought and provided a summary of the records to counsel for the purposes of argument. She further noted the operable access period at that time:

> On May 1, 2012, L.D. was charged with theft under. On May 19, 2012, he was charged with a related offence of trafficking in stolen goods. According to the CPIC record filed, LD was found guilty of theft under on May 21, 2013. He received a Conditional Discharge of 12 months (3 days pretrial custody)[5]. The access period expires May 21, 2016. While there is no record indicating the disposition of the trafficking charge, the most reasonable assumption, based on my review of all the records, is that this charge was withdrawn. The access period for this charge would have likely expired July 21, 2013;
>
> On November 29, 2012, LD was charged with possession of marijuana (1.23 g), possession of a controlled substance (Percocet - .35 g.), and possession of a prohibited weapon (flick knife). On January 25, 2013, all the charges were withdrawn, The access period expired March 25, 2013;
>
> On December 13, 2012, LD was charged with possession of marijuana (rolling a joint) and failing to comply with recognizance (abstain from possessing marijuana). On June 6, 2013, the fail to comply charge was withdrawn. On the same date L.D. was found guilty of possession of marijuana and received a judicial reprimand. The access period expired August 6, 2013;
>
> On December 18, 2012, LD was charged with failing to comply with recognizance (curfew), and three *Highway Traffic Act* charges. On May 21, 2013, he was found guilty of failing to comply with recognizance, and received a conditional discharge of 12 months and a 50 hour community service order. The *Highway Traffic Act* charges were withdrawn. Depending on whether the community service order was a stand-alone sentence or was made a condition of the conditional discharge (as commonly happens), the access period will expire May 21, 2016 or 2017.

Toronto Police Service v. L.D., supra, para. 19

13. The applicable access periods under s. 119(2) of the *YCJA*, with the possible exception of the December 18, 2012 records, have now expired. For these records, the applicable provision with respect to access is s. 123 of the *YCJA*. For the December 18, 2012 record, it remains unclear whether s. 119(1) or 123 would apply given the uncertainty

concerning the disposition of these charges.

C. **The Decision of the Court Below and the Appeal**

14. After reviewing the records and the submissions of the parties, Cohen J. determined that the parties had not established a valid or valid and substantial interest in the records and denied the applications of both the TPS and PC Mignardi. In particular, Cohen J. found that the applicants had failed to establish a nexus between the reason the records were sought and the events underlying the police disciplinary proceedings.

Toronto Police Service v. L.D., supra, paras. 69-70

15. In particular she noted:

> In this application I find no nexus between any of the records, and the events alleged in the complaint. I see no specific quality in the events alleged that would suggest the youth's records are material or relevant to the complaint. Of course the complaint presupposes the youth was in custody, which he was. The complaint presupposes there was contact between an officer and the youth. The transaction in question is what occurred between the officer and the youth in the interview room at the police division. The identity of the officer and the particulars of the contact will be the subject of the hearing. Where is the nexus to the youth records?

Toronto Police Service v. L.D., supra, para. 70

16. The TPS has accordingly appealed to this court. PC Mignardi has cross-appealed. Justice for Children and Youth and the Criminal Lawyers' Association were granted leave to intervene.

PART III - ISSUES AND THE LAW

A. **Issues**

17. This appeal raises issues concerning the correct interpretation of provisions of the *YCJA*, in particular, whether and to what extent ss. 119 and 123 of that *Act*:

a) allow a police service to access and disclose its own youth records for the purposes of disciplinary proceedings under the *Police Services Act*; and

b) allow a police officer to access and disclose youth records for the purpose of "making full answer and defence" in a disciplinary proceeding.

18. Justice for Children and Youth's submissions concern the correct interpretation of the relevant provisions of the *YCJA* and the appropriate analysis to be applied when considering access to youth records for these purposes.

B. **Law**

a. **The YCJA is a complete code with respect to the administration of youth criminal justice with specialized and enhanced privacy protections**

19. The *Youth Criminal Justice Act* is a comprehensive statutory code that establishes a separate, unique, and distinct youth criminal justice system in recognition of the special circumstances of young people who are arrested and charged with a criminal offence.

i. **The *YCJA* establishes a separate and distinct legislative scheme based on the unique characteristics of young people**

20. Canadian and international legal traditions recognize the inherent vulnerability of young people in the criminal justice system, occasioned by their evolving capacities and development, lack of sophistication, dependence on adults, and relative immaturity. Indeed, it is widely accepted as a matter of neuroscience that young people are simply physiologically unable to think, judge consequences, or make decisions like adults.

Roper v. Simmons, 543 US 551 (2005), paras. 569-570
R v. DB, 2008 SCC 25, [2008] 2 SCR 3, paras. 62-64
R. v. H.T.L., 2008 SCC 49, 59 CR (6th) 1 (SCC), para. 24

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

See also: 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

21. It is accordingly a matter of international and Canadian legal consensus that young people bear diminished moral blameworthiness and culpability for criminal conduct.

YCJA, supra, s. 3(1)

22. The *United Nations Convention on the Rights of the Child* (the "*UNCRC*") – to which Canada is a signatory, and which is incorporated into the *YCJA* by reference - requires that "special safeguards and care, including legal protection" be afforded to young people "by reason of their physical and mental immaturity". In the criminal justice context specifically, the *UNCRC* requires states parties to take into account the desirability of promoting the young person's reintegration and shall ensure that the young person's privacy is fully respected at all stages of the proceedings.

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

23. Moreover, the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*, a resolution of the United Nations General Assembly regarding the treatment of young people charged with criminal offences (the "Beijing Rules"), provide that

> 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 processing of labelling . . . in principle no information that may lead to the identification of a juvenile offender shall be published.

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

24. The *YCJA* expressly incorporates the *UNCRC*, enacting and fulfilling Canada's obligations under the *UNCRC* and Beijing Rules. To this end, the *YCJA* provides for enhanced procedural and privacy protections for young people.

25. The need for a separate criminal justice system and enhanced procedural and privacy protections for youth has furthermore been affirmed in the jurisprudence.

26. In *R. v. D.B.,* the Supreme Court of Canada remarked that is "widely acknowledged that age plays a role in the development of judgment and moral sophistication" and noted the heightened vulnerability and reduced maturity of young people. Consequently, the Court held that it is a principle of fundamental justice under s. 7 of the *Canadian Charter of Rights and Freedoms* that young persons are entitled to a presumption of diminished moral culpability and the recognition of such is essential to ensuring that young people are treated fairly within the criminal justice system.

R. v. DB, supra, para. 44

27. In *AC v. Bragg Communications,* in a civil action concerning cyberbullying, the Supreme Court further commented that:

> 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. As a result, in an application involving sexualized cyberbullying, there is no need for a particular

> child to demonstrate that she personally conforms to this legal paradigm. The law attributes the heightened vulnerability based on chronology, not temperament.
>
> *AB (Litigation Guardian of) v. Bragg Communications Inc.,* 2012 SCC 46, at para 17

28. The privacy protections therefore apply to young people as a class such that young persons are not put in the position of having to enforce their rights in any particular case.

29. Similarly in *R. v. L.T.H. ,* 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 unsophistication and the consequent need for greater procedural and evidentiary safeguards for young people.

R. v. L.T.H., supra, paras. 62-64

30. The Ontario Court of Appeal 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, para. 8

31. These cases reinforce Parliament's clear choice to enact a separate youth criminal justice system with enhanced procedural protections for young people. The *YCJA*'s Declaration of Principle stipulates that the criminal justice system for young persons must be separate from that of adults and must be based on the principle of diminished moral blameworthiness or culpability. The youth criminal justice must emphasize the rehabilitation and reintegration or young people, provide mechanisms for accountability

consistent with their increased dependency and reduced level of maturity, and ensuring that their rights – in particular their right to privacy – are protected.

32. These rights are to be broadly and liberally construed.

33. Moreover, the *UNCRC* provides that "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." Courts, tribunals, and public bodies must accordingly ensure that all proceedings or decisions prioritize and promote the best interests of affected young people. The provisions of the *YCJA,* and their practical application, must be interpreted through this lens.

UNCRC, Article 3, clause 1

ii. The *YCJA* establishes enhanced privacy protections for young people

34. Accordingly, the *YCJA* provides a complete code for access to and disclosure and publication of information concerning young people dealt with under the *YCJA,* codified as Part 6 – Publication, Records and Information. 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.

35. A "record" under the *YCJA* is defined broadly "any thing containing information regardless of form . . . 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".

YCJA, *supra*, s. 2

36. The *YCJA* specifically identifies three categories of records: records held by courts (s. 114), records held by the police (s. 115), and government – or Crown - records (s. 116).

37. Access to these records is presumptively denied by operation of s. 118, which provides that "no person shall be given access to a record kept under sections 114 to 116" unless the Act specifically authorizes or requires it. The prohibition against access except as permitted by the *Act* is "unequivocal and unqualified". In this way, the *YCJA* creates a distinct and separate regime for accessing youth records, as opposed to the first- and third-party disclosure regimes that exist for adult offenders.

SL v. NB, 252 DLR (4th) 508, [2005] OJ No 1411, para. 45

38. The persons to whom and purposes for which records may be disclosed are specifically delineated in sections 118 to 129. These purposes include disclosure by a peace officer to particular persons in the course of an investigation and to the young person him- or herself at any time.

39. 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 vary 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:

1. a valid interest in the record, and
2. that access is desirable in the public interest or for research purposes, or desirable in the interest of the proper administration of justice.

40. 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:

1. a valid and substantial interest in the records,
2. access is necessary in the interest of the administration of justice; and
3. disclosure is not prohibited by another Act of Parliament or a province. Alternatively, a person may establish that access to the record is desirable in the public interest or for research purposes.

41. Importantly, the *YCJA* also places stringent restrictions on the subsequent disclosure or publication of records concerning young persons. Section 110 prohibits publication of the name or any other information that would identify a young person as having been dealt with under the *YCJA*, except in limited circumstances not applicable here. "Publication" is a defined term under the *YCJA* meaning the communication of information by making it known or accessible to the general public through any means.

42. Section 129 further prevents anyone who accesses or to whom information is disclosed under the Act from disclosing it to any other person.

43. The contravention of any of the above provisions by unauthorized disclosure of records or information concerning a young person dealt with under the *YCJA* is a criminal offence.

YCJA, *supra,* s. 138(1)

44. 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 only in limited and specified circumstances. As the Court held in *SL v. NB,* these protections "demonstrate beyond peradventure Parliament's intention to maintain tight control over access to records pertaining to young offender proceedings whether are made and kept by the court, the Crown, or the police."

SL v. NB, supra, para. 42

b. <u>The Applicants must meet the tests established in ss. 119(1)(s) and/or 123</u>

45. At issue in the case at bar is the extent to which police records, held pursuant to s. 115, may be accessed for the purpose of police disciplinary proceedings by a) the prosecuting police force and b) the subject officer.

46. Importantly, despite being the records-holder, a police force is in no different position than any other person under the *YCJA* with respect to accessing youth records; the Act sets out the particular circumstances in which a police service, or employee thereof, may access a record.

47. Under s. 119(g), the police may access their own records for the limited purposes of i) law enforcement or ii) any purpose related to the administration of the case to which the record relates during the course of proceedings against the young person or the term of the youth sentence. The present purposes for which the records are being sought fall outside the scope of this exception.

48. Section 118(2) also addresses access by police, permitting employees of a police service to share information with other employees. However, this section cannot be construed as extending rights to access and disclosure to the present context since use in the course of disciplinary proceedings undertaken by the OIPRD necessarily involves access and disclosure by persons who are not employed by the police service.

49. Moreover, s. 118(2) must be read consistently with the purpose and scheme of the *YCJA*, which is to be given a large and liberal construction in order to meaningfully protect the interests of young persons dealt with under the *YCJA*. The exception ought therefore to be read as applying only where access or disclosure by police officers of the police service's own records is required to carry out police duties, as set out in s. 42 of the *Police Services Act,* as held by Cohen J. in the court below. This avoids the absurd result that police officers would otherwise be unable to access, discuss, or share their own records in the ordinary course of their law enforcement and employment duties without the order of youth court.

Toronto Police Service v. L.D., supra, paras. 27-28

50. Therefore neither 119(1)(g) nor 118(2) permit the police to access or disclose records for the purposes in the case at bar.

51. Section 119(1)(q) additionally permits an accused person to access records while they remain open for the purposes of making full answer and defence. Importantly, however, PC Mignardi is not an accused person; he is not subject to criminal proceedings and there is no question of his innocence of criminal charges at stake. Rather, he is the

subject of an administrative proceeding concerning alleged misconduct under the *Police Services Act.* This provision accordingly cannot be construed to apply in the present circumstances.

52. Accordingly, the recourse of both the TPS and PC Mignardi must be to 119(1)(s) for records within the statutory access period and s. 123 for closed records, as described above.

c. <u>An applicant seeking to access and disclose a youth court record must demonstrate a valid interest or a valid and substantial interest</u>

53. It is submitted that the threshold question is whether the applicant seeking disclosure and use of youth court records has a valid interest under s. 119(s), or the higher standard of a valid and substantial interest under s. 123. If the applicants are able to demonstrate the relevant interest then they must proceed to additionally demonstrate that the disclosure of the record is in the interest of the proper administration of justice.

d. <u>The "proper interests of the administration of justice" require appropriate consideration of the privacy interest at stake</u>

54. While the tests under ss. 119(1)(s) and 123 are distinct – s. 119(1)(s) requiring an applicant to demonstrate desirability and s. 123 requiring necessity - both require an examination of the interests of the proper administration of justice.

55. This analysis must take account not only of the interests of the person seeking the records, but also of the young person to whom the records relate and the public interest.

56. An understanding of the nature and importance of protecting the privacy of young person is fundamental to the analysis of what is in the interests of the proper administration of justice. Indeed, the interests at stake ought not to be underestimated and should weigh heavily in any decision to allow access to youth records.

57. The protection of a young person's privacy has a significant constitutional dimension. The access to and disclosure of records under s. 119(s) should be cautiously restricted and the privacy of young people jealously guarded.

58. As the Supreme Court recognized in *R. v. Dyment,* there is a significant privacy interest in information about oneself, based on the notion of dignity and integrity of the individual:

> As the Task Force put it, "This notion of privacy derives from the assumption that all information about a person is in a fundamental way his own, for him to communicate or retain for himself as he sees fit." In modern society, especially, retention of information about oneself is extremely important. We may, for one reason or another, wish or be compelled to reveal such information, but situations abound where the reasonable expectations of the individual that the information shall remain confidential to the persons to whom, and restricted to the purposes for which it is divulged, must be protected. Governments at all levels have in recent years recognized this and have devised rules and regulations to restrict the uses of information collected by them to those for which it was obtained.
>
> *R. v. Dyment,* [1988] SCJ No 82 at para 22

59. It is the concern for privacy against unauthorized intrusions by the state that underlies section 8 of the *Charter.*

> *Hunter v. Southam,* [1984] 2 SCR 145, pp 159-160

60. The Supreme Court of Canada has furthermore affirmed that considerations of

dignity, personal autonomy, and personal integrity apply equally if not more strongly in the case of young persons. Explaining the importance of the privacy interest in youth records for young people and citing Cohen J. in *Toronto Star v. Ontario,* with approval, the Court stated:

> The concern to avoid labeling and stigmatization is essential to an understanding of why the protection of privacy is such an important value in the *Act*. However it is not the only explanation. The value of the privacy of young persons under the *Act* has deeper roots than exclusively pragmatic considerations would suggest. We must also look to the Charter, because the protection of privacy of young persons has undoubted constitutional significance.
>
> Privacy is recognized in Canadian constitutional jurisprudence as implicating liberty and security interests. In *Dyment*, the court stated that privacy is worthy of constitutional protection because it is "grounded in man's physical and moral autonomy," is "essential for the well-being of the individual," and is "at the heart of liberty in a modern state" (para. 17). *These considerations apply equally if not more strongly in the case of young persons.* Furthermore, the constitutional protection of privacy embraces the privacy of young persons, not only as an aspect of their rights under section 7 and 8 of the Charter, but by virtue of the presumption of their diminished moral culpability, which has been found to be a principle of fundamental justice under the *Charter*.
>
> . . . the protection of the privacy of young persons fosters respect for dignity, personal integrity and autonomy of the young person.
>
> *AB v. Bragg Communications, supra, para. 18*
>
> *Toronto Star v. Ontario,* 2012 ONCJ 27 at paras 40-41, 44

61. Accordingly, there is a heavy onus on those who seek to displace the protections to which a young person is presumed to be entitled.

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

62. Furthermore, as well as the concern for the protection of the dignity, autonomy, and personal integrity of young people as vulnerable members of society, the protection of privacy is inextricably linked to the principles of rehabilitation and reintegration, which are paramount under the *YCJA*.

63. In *D.B.,* the Supreme Court of Canada expressly discussed the importance of the special protections of the *YCJA* to rehabilitation of young persons and, ultimately, the protection of the community:

> 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. B. (D.), supra,* para. 84

64. As Cohen J. held in *Toronto Star,*

> the proper administration of justice in this case embraces the protection of privacy of young people dealt with under the Act, and I so find. 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*. This pragmatic function is augmented by what I have found to be the constitutional dimension to the young persons' privacy interests, and the recognition of privacy as a human right of children.
>
> *Toronto Star, supra,* para. 77

65. The Quebec Court of Appeal has also held that "[t]he justice system for minor must limit the disclosure of the minor's identity so as to prevent stigmatization that can limit rehabilitation."

> *Quebec (Minister of Justice) v. Canada (Minister of Justice)* (2003), 175 CCC (3d) 321

66. Accordingly, the importance of the protection of a young person's privacy via the strict controls imposed by the *YCJA* has a dual character, embracing both the need to protect young people's dignity and autonomy as well as to promote their rehabilitation and reintegration and thereby promoting public safety. Indeed, the labelling and stigmatization of a young person caused by public access to information about them is

inimical to these objectives. These purposes furthermore have a significant constitutional dimension, protected under s. 7 of the *Charter*.

67. These interests must inform the Court's analysis when considering the "interests of the proper administration of justice" under ss. 119(1)(s) and 123. As the Court of Appeal held in *SL v. NB,* it consequently falls to an applicant to demonstrate a valid public interest "sufficiently strong to override the benefits of maintaining the privacy of young persons who have come into conflict with the law." Indeed, in establishing the protections under the *YCJA*, Parliament created a scheme that prioritizes the protection of young people's privacy over other pressing societal interests; a young person's privacy in their youth records may validly trump other countervailing interests.

SL v. NB, supra, at para. 43

e. <u>The Countervailing Interests in this Case</u>

68. The records being sought in this case relate to a series of youth records concerning L.D., some of which fall within the access periods in s. 119(2) and some of which do not and must therefore be considered under s. 123. These are correctly described in the judgment of Cohen J.

69. The Appellants in this case are seeking records in relation to the charges which brought L.D. into custody on December 18, 2012 and underlie the incident that is the subject of the police disciplinary proceedings. Depending on the resolution of these charges, they may still fall within the access period described in s. 119(2)(g), expiring May 21, 2017. However, that period may well be closed. The remaining records now also

appear to be closed and therefore fall within the ambit of s. 123 and are therefore subject to the higher test.

70. As above, under s. 119(1)(s), an applicant must demonstrate a valid interest in the record and that disclosure is desirable in the interests of the proper administration of justice. Where the period of access has expired, and the record is presumptively sealed, an applicant must demonstrate a valid and substantial interest and that disclosure is necessary in the interests of the proper administration of justice.

i. Access by the TPS

71. The Toronto Police Service has pointed to a number of cases in which access to records has been granted for the purposes of commencing or continuing civil litigation and for the purposes of disciplinary proceedings under the *PSA*.

72. The legislature of Ontario, pursuant to s. 119(1)(r) has also recently authorized the OIPRD to access certain records without the need for a youth court application, on consent of the young person involved. Notably, the young person in the case at bar has not consented to release of the records at issue. The Court must accordingly carefully safeguard the extent to which the records may be released, if any.

73. These legislative provisions and decisions demonstrate that there are indeed cases in which it may be considered desirable or necessary in the interests of justice that persons are able to vindicate their legal rights through ancillary legal proceedings and that police officers are held to public account.

74. However, the stringent privacy protections under the *YCJA* require more of an application than the mere identification of an important purpose. Rather, a youth court must consider and carefully weigh the effect on the privacy interests of the young person. As above, the adverse effect on the privacy interests are presumed and need not be proven in a specific case.

AB v. Bragg Communications, supra, para.17

75. An applicant, it is submitted, must establish as a threshold question that the specific records sought in a particular case are relevant to the purpose for which they are sought. This analysis must be undertaken with respect to each record sought so as to impair the young person's right to privacy as little as possible.

76. A police service ought not to be given unfettered access to records merely because it commences disciplinary proceedings that purport to be in the young person's and the public's interest. An application ought to identify with a high degree of specificity the particular records sought and the intended use of them in order to allow a court to adequately weigh the interests involved. Indeed, different types of records have been recognized as attracting different levels of privacy. Access to particular records for particular purposes ought not to permit an applicant *carte blanche* to inquire into a young person's entire history within the criminal justice system.

77. The boundaries of access ought to be tightly drawn, allowing only as much access is necessary to accomplish the stated purpose. Furthermore, the Court ought to consider whether reasonable alternatives to disclosure of youth records are available and have been

pursued.

78. There may well be a significant public interest in ensuring that police are held to high standards of conduct and public accountability and that public complaints against a police officer or service may therefore proceed. However, a Court may still scrutinize the extent to which particular youth records are required to accomplish this objective.

79. In the present case, the Court must carefully inquire into the scope of records being sought, the use of those records in the proposed disciplinary proceedings, whether those proceedings can reasonably proceed without the records in question, and the probable effect on the young person's privacy and other interests of releasing the records, particularly where the proceedings were not commenced at his instance.

80. The Toronto Police Service ("TPS") may be seen to have a valid interest in the youth records of L.D. as they relate to the specific incident that gives rise to the complaint which forms the subject of the discipline proceeding – that is, the record relating to L.D.'s arrest on December 18, 2012. The actions of PC Mignardi during the arrest of L.D. on that date form the basis of the disciplinary proceeding. Arguably, it may be the case that without these specific records the discipline proceeding cannot proceed.

ii. Access by PC Mignardi for the purposes of "full answer and defence"

81. Similarly PC Mignardi may be seen to have a valid interest in the specific records that relate to the arrest on December 18, 2012. If he is to be able to meaningfully respond to the discipline proceedings, he must also have reasonable access to the same records

relied upon by the TPS for the purpose of the discipline proceeding.

82. However, where broad access to all of a young person's youth records, including records unrelated to a specific incident, is sought, the Court ought to carefully scrutinize whether this constitutes a "valid interest" capable of satisfying the relevant legal test. In the case at bar, the parties must establish that records of any and all of a young person's involvement with a police service and the youth criminal justice system are relevant to the discipline proceeding, which concerns only one interaction between the subject officer and the young person. The Court ought to hold the parties to strict compliance with the legal test and may validly question the extent to which records that on their face bear no relevance to the isolated incident that is the subject of the disciplinary proceedings would be of any probative value. Where the records sought fall outside the s.119(2) access period, any application for use and disclosure would require the demonstration of a valid and substantial interest under s. 123. Where an applicant fails to meet the test under s. 119(1)(s), she cannot succeed on the more stringent test under s. 123.

83. The matter before the Court also raises the issue of records being sought on the basis that the records are required to permit someone to make full answer and defence in a disciplinary proceeding. A disciplinary proceeding is, as a matter of law, fundamentally different than a criminal proceeding and that this difference must form part of the Court's analysis in answering the question of whether an access request is in the interests of the proper administration of justice. Where the records sought are related not only to the incident that led to the disciplinary proceedings, but a youth's records in their entirety,

including the details of a young person's history of contact with a police service and the youth criminal justice system the request may well have exceeded what is in the interests of the proper administration of justice.

84. While an accused's right to make full answer and defence and trial fairness are unquestionably important societal values, a disciplinary proceeding is not a criminal trial. The attendant disclosure obligations therefore do not apply with the same force in this context. As the Supreme Court of Canada held in *May v. Ferndale Institution*:

> The requirements of procedural fairness must be assessed contextually in every circumstance: Ruby v. Canada (Solicitor General), [2002] 4 S.C.R. 3, 2002 SCC 75 (CanLII), at para. 39; Knight v. Indian Head School Division No. 19, 1990 CanLII 138 (SCC), [1990] 1 S.C.R. 653, at p. 682; Baker v. Canada (Minister of Citizenship and Immigration), 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817, at para. 21; Chiarelli v. Canada (Minister of Employment and Immigration), 1992 CanLII 87 (SCC), [1992] 1 S.C.R. 711, at p. 743; Therrien (Re), [2001] 2 S.C.R. 3, 2001 SCC 35 (CanLII), at para. 82.
>
> It is important to bear in mind that the Stinchcombe principles were enunciated in the particular context of criminal proceedings where the innocence of the accused was at stake. Given the severity of the potential consequences the appropriate level of disclosure was quite high. In these cases, the impugned decisions are purely administrative. These cases do not involve a criminal trial and innocence is not at stake. The Stinchcombe principles do not apply in the administrative context.
>
> In the administrative context, the duty of procedural fairness generally requires that the decision-maker discloses the information he or she relied upon.
>
> *May v. Ferndale Institution,* [2005] 3 SCR 809, 2005 SCC 82, para 90-92

85. The Supreme Court of Canada has further noted that while an administrative process must be fair, procedural fairness does not entitle an applicant to "the most favourable procedures that could be imagined." In other words, fair access does not entail complete access.

> *Ruby v Canada (Solicitor General),* 2002 SCC 75, [2002] 4 SCR 3 at para. 46

86. As mentioned above, s. 119(1)(q) is of no assistance to an applicant where the records are sought for use outside criminal proceedings, where one's innocence is at stake.

87. In any event, the mere bald assertion that records are required to make full answer and defence ought not to be a sufficient basis on which to obtain access to a young person's entire history of involvement with the police and the criminal justice system. The *YCJA*, as the guardian of a young person's privacy, demands greater specificity in order to justify the intrusion into the young person's privacy.

88. In an administrative proceeding disclosure obligations on the participants are established by the relevant statutes. In the present case, these are established by the *Statutory Powers and Procedures Act* ("*SPPA*") and the *Police Services Act*.

89. Pursuant to s. 8 of the *SPPA*, "where the good character, propriety of conduct or competence of a party is an issue in a proceeding, the party is entitled to be furnished prior to the hearing with reasonable information of any allegations with respect thereto. "

Statutory Powers and Procedures Act, R.S.O. 1990, c. S.22, s. 8

90. Section 83(5) Before the hearing, the police officer and the complainant, if any, shall each be given an opportunity to examine any physical or documentary evidence that will be produced or any report whose contents will be given in evidence.

Police Services Act, R.S.O. 1990, c. P.15, s. 83(5)

91. Contrary to the characterization of *Penner* and *Jacobs* offered by the Applicant, the

same procedural rights that operate in criminal proceedings – such as the presumption of innocence – do not exist in administrative proceedings, including professional disciplinary proceedings, and these cases do not stand for this proposition. While the onus is on the police to prove their case against an officer on the basis of "clear and convincing evidence", this does not import the procedural guarantees of a criminal trial into the administrative context.

92. In the present matter therefore, to the extent that the TPS is permitted to and in fact relies on records of L.D., PC Mignardi is similarly entitled to review these documents and is entitled to know the allegations against him.

93. This, however, does not entail unfettered access to all youth records concerning a young person for the purposes of discrediting the young person. Indeed, it would be a surprising result if any witness in professional disciplinary proceedings would be entitled to access and cross-examine a witness with respect to the entirety of their police and criminal justice system records. As above, a disciplinary proceeding is not a trial.

94. It is furthermore important for the Court to consider the specific context of the records application, and the public policy considerations related to the administrative proceeding in question in its consideration of the proper administration of justice. It is appropriate that the Court inquire into the effect on young person's participation in proceedings ancillary to their youth criminal justice matters if their history of contact with the criminal justice system will be subject to such scrutiny. Indeed, the Court should consider whether such access and disclosure would have an undue chilling effect on the

pursuit of legal remedies, including complaints of police misconduct, with attendant consequences for public accountability and transparency of police services. By contrast, the records may be required to allow a young person to pursue legal remedies to which they are entitled.

95. Moreover, it is submitted, the right to cross-examine witnesses with respect to prior bad acts is appropriately curtailed in the case of youth records, consistent with the principle of the reduced moral blameworthiness of youthful offenders animating the privacy and procedural protections of the *YCJA*. Indeed, each of the cases on which the Applicant relies concerning cross-examination of a young person occur in the criminal context and the scope of the records is narrow.

96. Indeed, given the consensus concerning the diminished culpability of young persons, youth records as a class are likely less probative of bad character and a moral disposition to lie. Showing that a young person is generally of bad character is precisely the use that the *YCJA* is intended to guard against given its emphasis on rehabilitation and reintegration. The very purpose of the *YCJA* is to generally prevent a young person from being answerable for youthful offending years later in unrelated proceedings, except in exceptional circumstances.

97. Indeed, where a court considers releasing such records for the purposes of cross-examination on discreditable conduct, the request for those records should clearly delineate the expected use of the records. Mere speculation as to the contents of the records is insufficient to ground an application for access. Applicants must not be allowed

to embark on a "fishing expedition" at the expense of the privacy, dignity, autonomy, and rehabilitation, of the young person. Indeed, the fact of prior police involvement and/or criminal justice system involvement cannot be sufficient justification for access to the entirety of a young person's records for the purpose of discovering discreditable conduct; on this basis it is difficult to imagine what would be excluded from access.

Re JD, 2009 ONCJ 505, pp 7-8

98. It is appropriate that an applicant be held to a more demanding evidentiary standard to justify access, given the purpose and scheme of the *YCJA*.

99. Moreover, this Court ought to reject the suggestion that the privacy interest in youth records diminishes once a young person becomes an adult. Such an interpretation is contrary to the scheme and purpose of the *YCJA*. Indeed, the mere passage of time does not diminish privacy interest in youth records. Rather, the *YCJA* is structured such that the opposite is true. The test for access becomes more stringent upon the close of a statutory access period and records are eventually subject to destruction, except in the narrow circumstances set out in s. 119(9) which are not applicable here. Moreover, upon completion of a youth sentence, s. 82 of the *YCJA* deems the young person to never have been found guilty of the offence.

f. <u>Conclusion on Proper Administration of Justice</u>

100. It is acknowledged that, as in the case at bar, in the circumstances of a police disciplinary proceeding related to police officer conduct during an arrest, a sufficient nexus may be established regarding the youth records of the arrest in question. The notes,

videos, and witness statements regarding the arrest may be relied upon by the disciplinary decision maker and may provide important evidence to the disciplinary proceeding.

101. As above, it is submitted Cohen J. was correct in her conclusion that a sufficient nexus between the police disciplinary proceedings and the records being sought, justifying the intrusion into the young person's privacy, must be made out before records can be accessed and disclosed. This is an appropriate threshold under ss. 119 and 123.

102. In the present case in particular, Cohen J. found that any of L.D.'s youth records unrelated to the events giving rise to the professional disciplinary proceeding fail to meet the threshold requirements in either of sections 119(s) or 123.

103. Even where a nexus is established, it remains open to a court to refuse to order access on the basis that the deleterious effects on the privacy and dignity of the young person are not outweighed by the other interests at stake. This is content of the test as to what is in the interests of the proper administration of justice under ss. 119 and 123.

104. In particular, the specific circumstances of individual applications, must consider the context in which they are being sought, the appropriate and relevant legal and policy considerations in each case, the significance of the enhanced procedural and privacy protections mandated by the *YCJA*, and the constitutional dimension of these protections. Adverse effects on young people's interests given their inherently vulnerable status in society, and in the context of legal proceedings, must be given very significant weight.

PART IV - ORDER SOUGHT

105. The Intervener Justice for Children and Youth takes no position on the appeal and underlying records application. However, it is submitted that the Court ought to make a carefully tailored order that minimally impacts the privacy interest of L.D.. For example, it may be appropriate to make an order allowing the TPS and their legal counsel, and PC Mignardi and his legal counsel may have access to L.D.'s record relating to his arrest on December 18, 2012, and to use that record for the purposes of the disciplinary proceeding in question, but restricting access to the remaining records on the basis that a valid and substantial interest has not been demonstrated sufficient to overcome the privacy interest, should the Court so be satisfied.

106. Additionally, should this Court order the above-noted records be disclosed, Justice for Children and Youth requests an Order that:

1. no person who may access these records as a result of the Court's Order be permitted to disclose the information in the record to any other persons;
2. all copies of the youth record be destroyed after the conclusion of the proceeding and all relevant appeal periods have expired; and
3. all information used at the disciplinary hearing be anonymized such that no information that would identify L.D. as having been dealt with under the *YCJA* is disclosed.

All of which is respectfully submitted this 15th day of July, 2016.

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