2017 ONCJ 272
Ontario Court of Justice

Boyer v. Huang

2017 CarswellOnt 6469, 2017 ONCJ 272, [2017] O.J. No. 2188, 138 W.C.B. (2d) 638

IN THE MATTER OF an Application under section 119 and 123 of the Youth Criminal Justice Act for access to records of D.O., K.C-S., M.J.S., T.R., I.G., S.H. and W.K.

NICHOLAS BOYER (Applicant) and I-HSIU (JOHN) HUANG et. al., JOHN DOE 1, JOHN DOE 2, JOHN DOE 3, JOHN DOE 4, JOHN DOE 5, JOHN DOE 6, JOHN DOE 7 (Respondents) and HER MAJESTY THE QUEEN

Sheilagh O'Connell J.

Judgment: April 26, 2017
Docket: None given.

Counsel: Joseph Baldanza, for Applicant, Nicholas Boyer
Jenna Persaud, for W.K.
Raj Anand and S. Priya Morley, for T.R.
Ted Brook, for I.G.

***Sheilagh O'Connell J.*:**

Introduction:

1 The Applicant, Nicholas Boyer, ("Mr. Boyer") has brought an application under the *Youth Criminal Justice Act* seeking access to all youth records for seven youth (collectively known as the "John Doe Respondents") including the Toronto police records, the Crown Brief, and the youth court file involving the John Doe respondents in relation to a house fire that occurred on July 31, 2014.

2 In particular, in addition to the youth criminal court records, the Applicant seeks the following from the Toronto Police Services and the Crown:

> a) An order that the Toronto Police Services produce all unedited documentation in its possession regarding the fire giving rise to this action, including but not limited to any records, files, memoranda, photographs, reconstruction reports, officers' notes, witness statements, and supplementary police reports;
>
> b) An order for the unedited copy of the entire Crown Brief file regarding the fire giving rise to this action, including but not limited to, notes and records, made by the Ministry of the Attorney General, police notes and records, verbatim or otherwise, obtained from witnesses.

3 The young persons served with this application are opposed to Mr. Boyer's request for the release of any of their youth records.

4 The Ministry of the Attorney General (Crown Law Office -Civil) and Toronto Police Services were served with application but took no position regarding the relief sought.

5 Toronto Fire Services and the Office of the Fire Marshall were also served with the application and did not participate in this proceeding. I was advised by Applicant's counsel that the Fire Investigation Report and the Fire Marshall Report and all documents with Toronto Fire Services, including firefighter's notes had already been provided to the Applicant.

Background Facts:

6 Mr. Boyer is the owner of the property located at 12 Minto Street in Toronto. On July 31, 2014, a fire started at that address. The fire caused extensive damage to Mr. Boyer's property and to his neighbour's property at 14 Minto Street. At the time, the respondent, I-Hsiu (John) Huang owned the property at 14 Minto Street.

7 Toronto Police Services investigated the fire and charged the seven youth respondents in this application with breaking and entering a building, possession of property obtained by crime, and arson in relation to the fire.

8 Mr. Boyer is seeking access to the youth records for a civil law suit relating to the fire. Mr. Huang has sued Mr. Boyer for damages and Mr. Boyer has sued the young persons subject to this application, the Yonge Street Mission, Genesis Place Homes and the Children's Aid Society of Toronto for damages in relation to the fire.

Procedural History:

9 Mr. Boyer commenced this application in March of 2016. On April 15, 2016, Justice Brian Weagant ordered that Mr. Boyer serve all young persons against whom the records were being sought with a copy of the notice of application and supporting affidavits. At that time none of the youth had been served with the records application nor did they have any knowledge of the civil law suit.

10 Despite several attempts throughout the months of April and May 2016 as outlined in the affidavit materials, only three of the young person charged in relation to the fire were properly served with this application and the materials relating to the civil proceedings. The whereabouts of the remaining young persons are unknown.

11 The young persons served sought adjournments to retain counsel. All counsel had been retained by September of 2016.

12 Pursuant to subpoenas issued to the Crown and Toronto Police Services, the entire police records relating to the criminal investigation and Crown brief were brought before the court and remain in the custody of the court pending this ruling.

13 The application returned before the court until October 19, 2016. At that time, counsel agreed that the court would review the youth court records in order to advise the parties whether the access period for each youth's record is open or closed. This was necessary to determine which test for access under the *Youth Criminal Justice Act* would apply. The records application was adjourned to November 30, 2016.

14 On October 26, 2016, the court released a schedule to counsel outlining the applicable access periods for each youth. The court reviewed all of the records carefully and also disclosed the following in the schedule delivered to counsel:

1. offence dates for each respondent young person;

2. disposition dates for each respondent young person;

3. the exact disposition or resolution for each respondent young person; and

4. the precise date of each access period.

15 Counsel for W.K. one of the respondent young persons, objected to the level of information disclosed by the court in determining the relevant access periods. The court reminded counsel that the document was delivered with the clear proviso that the information being released to counsel was for the purpose of argument only, so that the relevant access periods, and thus, the appropriate legal test to be applied could be determined.

16 The records application returned before the court on November 30, 2016. At that time, after hearing submissions, I waived the notice requirement for the three young persons who could not be served, as reasonable efforts had not been successful in finding the young persons, in accordance with section 123(4) of the *YCJA*. The application proceeded and counsel for W.K., T.R. and I.G., the three young persons who had been served, made comprehensive submissions for the benefit of all of the young persons involved.

The Law and Governing Principles:

17 The *YCJA* contains a comprehensive statutory scheme which governs the retention and access to youth records.

18 Part 6 of the *YCJA* protects the privacy of young persons dealt with under the *Act*. Under Part 6, publication of information that would identify a young person as having been dealt with under the *Act*, and access to records created or kept for the purposes of the *Act*, are strictly limited.

19 It is now well-settled law that the regime under Part 6 of the Act is the sole route through which access to a youth records can be gained. There is no separate scheme for access when the records are desired for civil litigation. See *L. (S.) v. B. (N.)*, 2005 CarswellOnt 1417, [2005] O.J. No. 1411, 12 C.P.C. (6th) 34, 196 O.A.C. 320 (Ont. C.A.), at paragraph 55 of that decision.

20 In *L. (S.) v. B. (N.)*, *supra*, above, Justice Doherty, writing on behalf of the Ontario Court of Appeal, stated the following at paragraph 54 of that decision:

> The access provisions of the Act are a comprehensive scheme designed to carefully control access to young offender records. The language of section 118 and the comprehensiveness of the scheme itself demonstrates that Parliament intended that access to the records should be gained only through the Act... Parliament in clear and unambiguous terms has placed the responsibility for determining access to records on the shoulders of the youth justice court judges.... Youth justice court judges are familiar with the principles and policies animating the Act. They are also familiar with the terms of the Act and the specific provisions sprinkled throughout the act that touch on access issues. Youth court judges also know what records are generated by the youth justice court system, and have daily experience in considering and balancing the competing interests which may clash on access applications.

21 The rationale for the protection of youth records is understandable. A primary goal of the *YCJA* is to limit the stigmatization that attaches to a young person who has committed or is accused of committing a criminal offence. This goal is consistent with the presumption of diminished moral blameworthiness and culpability that the Supreme Court of Canada identified as a principle of fundamental justice in *R. v. B. (D.)*. [1] Speaking for an unanimous court, Justice Abella states the following at paragraph of that decision:

> "...namely that because of their age, young people have heightened vulnerability, less maturity and a reduced capacity for moral judgment. This entitles them to a *presumption* of diminished moral blameworthiness or culpability. This presumption is the principle at issue here and it is a presumption that has resulted in the entire youth sentencing scheme, with its unique approach to punishment." [par. 41]

22 Further, in the Supreme Court of Canada's decision in *R. v. C. (R.)*, 2005 SCC 61 (S.C.C.) Justice Fish states the following in considering the rights of a young person charged:

> "In protecting the privacy interests of young persons convicted of criminal offences, Parliament has not seen itself as compromising, much less as sacrificing, the interests of the public. Rather, as Binnie J. noted in *F.N. (Re)*, [2000] 1 S.C.R. 880, 2000 SCC 35, protecting the privacy interests of young persons serves rehabilitative objectives and thereby contributes to the long-term protection of society."

> Stigmatization or premature labeling of a young offender still in his or her formative years is well understood as a problem in the juvenile justice system. A young person once stigmatized as a lawbreaker may, unless given help in redirection, rendered the stigma a self-fulfilling prophecy." [par.42]

23 As well, in accordance with Canada's international obligations, the *YCJA* affords young people special guarantees in recognition of their diminished moral blameworthiness or culpability. (See s. 3 of the Act). The UN Convention on the Rights of the Child recognizes the "physical and mental immaturity" of young people and their need for "special safeguards in care, including legal protection". Rule 8 of the UN Standard Minimum Rules for the Administration of Juvenile Justice provides:

> The juvenile's right to privacy shall be respected at all stages in order to avoid harm being caused to her or him by undue publicity or by the process of labeling. In principle, no information that may lead to the identification of the juvenile offender shall be published.

The Meaning of 'Youth Records':

24 Section 2 of the *YCJA* defines "record" as including:

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

25 There are three categories of records that are set out at sections 114 to 116 under Part 6 of the Act. Section 114 are the records kept by the youth justice court and can include the charging information, findings of guilt, sentencing transcripts, any presentence reports and exhibits. The exhibits can contain medical records and mental health assessments as defined under the *Mental Health Act*.

26 Part 115 deals with records that may be kept by the police, including documentation of extra judicial measures, occurrence reports, police notes of an investigation into an alleged offence, and records kept by the RCMP.

27 Part 116 refers to records that may be kept by government departments, including the Attorney General and the Crown. It reads in part as follows:

> A department or an agency of any government in Canada may keep records containing information obtained by the department or agency
>
> a) for the purposes of an investigation of an offence alleged to have been committed by a young person;
>
> b) for use in proceedings against the young person under this Act;
>
> c) for the purposes of administering the youth sentence or an order of the youth justice court.

Access to Youth Records: Sections 118, 119 and 123 of the YCJA:

28 Section 118(1) is central to the statutory scheme controlling access to youth records and reads as follows:

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

29 As Justice Doherty states at paragraph 45 of *L. (S.) v. B. (N.)*, *supra*, "Section 118 announces an unequivocal and unqualified prohibition against access to records kept by the court, police, or crown *except as required or authorized under the Act*. This prohibition is made all the more emphatic by section 138 which makes it an offense to violate section 118." [Emphasis added.]

30 Even when access is permitted, Parliament seeks to protect young person's privacy interests by limiting dissemination of the information in the records after access is granted. Section 129 of the Act reads that no person who is given access to a record or to whom information is disclosed under this Act shall disclose that information to any other person unless the disclosure is authorized under this Act. See *L. (S.) v. B. (N.)*, *supra* at paragraph 43.

31 Section 119 and section 123 of the Act permit access to youth records in specific circumstances.

32 Section 119 of the Act provides that certain classes of persons, including victims, are entitled to access to records kept under section 114 (youth court records) if the request is made *within* the access period defined in section 119 (2) of the Act.

33 Section 119 (1) (s), provides that a person or any member of a class of persons that a youth court judge considers has a valid interest the youth record may be given access to records if the youth court judge considers that the victim 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 "desirable in the interest of the proper administration of justice."

34 The length of the access period to a youth record under section 119(2) depends on the date and the nature of the disposition of the criminal charge. For example, if a charge against the youth has been withdrawn, then the access period ends only two months after the withdrawal of the charge (s. 119(2) c). If the young person has been acquitted then the access period is two months ending after the time allowed for the taking of an appeal (s. 119(2) b). If the young person has been found guilty of the offense and the youth sentence is a conditional discharge, then the access period ends three years after the young person is found guilty (s. 119 (2) g). If the young person is found guilty of an indictable offence, then the access period ends five years after the sentence imposed has been completed (s. 119(2) h)).

35 If the application for access to a youth's record is brought after an access period has expired, then section 123 applies. Unlike an application under section 119, section 123 requires notice to the young person. Further, the test under section 123 is more onerous. [2]

36 Section 123 (1) provides the following:

> 123(1) a youth justice court judge may, on application by a person after the end of the applicable period set out in subsection 119 (2), order that the person be given access to all or part of a record kept under sections 114 to 116 or that a copy of the record or part be given to that person,
>
> (a) if the youth court judge is satisfied that:
>
> i. the person has a valid *and substantial* interest in the record or part,
>
> ii. it is *necessary* for access to be given to the record or part in the interest of the proper administration of justice, and
>
> iii. *disclosure of the record or part or the information in it is not prohibited under any other Act of Parliament or the legislature of a province*.
>
> [Emphasis added].

37 Section 123(2) states the following:

> (2) Paragraph 1(a) applies in respect of a record relating to a particular young person or to a record relating to a class of young persons only if the identity of young persons in the class at the time of the making of the application referred to in that paragraph cannot reasonably be ascertained and the disclosure of the record is necessary for the purpose of investigating any offence that a person is suspected on reasonable grounds of having committed against the young person while the young person is, or was, serving a sentence.

38 In *R. v. W. (Z.)*, [2016] O.J. No. 4254 (Ont. C.J.), Justice Marion Cohen explains the rationale for the access period at paragraph 25 of her decision,

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

The Relevant Access Periods for the Youth Records in this Case:

39 It is not disputed that the statutory access periods under section 119 (2) of the *Youth Court Justice Act* are now closed for six of the seven young persons that were charged in relation to the fire and that are named in this application.

40 All charges were withdrawn or dismissed with respect to six of the seven youth in 2015, a number of months before Mr. Boyer brought this application. Section 119 (2) (c) of the Act provides that if a charge is withdrawn or dismissed, then the access periods end two months after the withdrawal or dismissal of the charge.

41 An Extra Judicial Sanction (EJS) was used to deal with K.C.-S., the remaining young person, and the charges against that person were also withdrawn. According to section 119(2) (a), if an Extrajudicial Sanction is used, then the access period remains open for two years after the charges are withdrawn and the young person consents to the extra judicial sanction. In this case, the access period therefore remains open for the remaining young person in this application until January 8, 2018.

42 Therefore, the test under section 123 applies to six of the seven youth, and the test under section 119 applies to the remaining youth in determining whether to order the access requested by Mr. Boyer.

The Applicant's Position:

43 Mr. Boyer submits that he has a valid and substantial interest in the records requested or parts thereof. He submits that his valid and substantial interest is based on his commencement of the civil lawsuit. He requires the records to assist in his action against the young persons and their guardians as he seeks to recover damages caused by the fire. Mr. Boyer submits that a central issue in the civil proceeding is liability. In order to conduct the civil litigation the parties need to have access to documents that are relevant to material issues in the action.

44 Mr. Boyer further submits that it is necessary for access to be given to the requested records in the interest of the proper administration of justice. He submits that the documents will be used solely for the purpose of the civil court proceedings and that without access to at least to the police and Crown records, there will virtually be no information or evidence to defend himself against the allegations made by Mr. Huang in relation to the civil action commenced against him.

The Position of T.R., W.K. and I.G.:

45 The three young persons who are served with this application submit that the applicant does not have a valid and substantial interest in any of the youth records. They submit that the applicant has not established a sufficient evidentiary basis for his access request and is essentially engaged in a fishing expedition. It is their position that a "valid" interest in a youth record is not the same as a "relevant" interest in the record.

46 Counsel on behalf of W.K. submits that in addition to establishing that his interest in access is valid and substantial, the applicant must also show that it is necessary for the proper administration of justice in order to benefit from an exception of W.K.'s privacy rights. Mr. Boyer has not established necessity as he has provided no evidence to demonstrate that access to W.K.'s records is the only way to obtain the information necessary to advance the law suit. Counsel submits that the information can be obtained through Toronto Fire Services and the discovery process.

47 Counsel on behalf of T.R. submits that his charges were withdrawn in Aboriginal Youth Court ("AYC") on September 5, 2015 and that records relating to AYC court may require even greater protection than those relating to the youth criminal justice system generally. The use of culturally and individually appropriate programming in the AYC results in young people being more engaged with their culture than they had been before their involvement with the AYC. This connection is central to the success of the AYC and therefore maintaining the privacy of young persons in AYC is especially necessary in the interest of the proper administration of justice.

48 Counsel on behalf of I.G. also submits that the applicant has failed to prove that his access to I.G.'s youth court records meets both prongs of the test under section 123 of the YCJA. In particular, I.G. submits that Parliament intended for section 123 (2) to restrict the availability of 123(1) to a delineated set of circumstances. Those circumstances clearly do not apply here and therefore, the applicant cannot avail himself of section 123(1) (a) to obtain access to I.G.'s youth court records.

49 Finally, all counsel submit that the protection afforded to records under the *YCJA* should be significantly higher where the charges against the young person were completely withdrawn and the access period has been closed.

The Specific Records in Question in this Application:

50 In order to properly conduct the analysis required, the court carefully reviewed the youth court file, the Crown Brief and the Toronto Police Service records that were delivered to the court's custody pending this application in response to the subpoenas issued. The records contained the following:

a. Videotaped statement of W.K., one of the young persons subject to this application, to the police during the course of the police investigation (on a DVD);

b. Videotaped statement of a witness (also a young person, but not subject to this application) to the police during the course of the investigation (on a DVD);

c. Surveillance video of some individuals, possibly young persons, apparently going into (or towards) the property and out of the property on the night of the fire, although visibility is somewhat limited (on two DVDs);

d. Multiple photos of the property at 12 and 14 Minto Street taken by the police after the fire depicting the damage, items that were found on the scene or elsewhere, and of some of the young persons taken after their arrest (on a DVD);

e. Approximately 800 pages of officers' notes regarding the fire, witness statements and statements from some of the young persons (on a DVD);

f. Names and addresses of witnesses and a DVD of the 911 calls.

51 The youth court file contained very little information beyond the charging information, including the names and dates of the youth, and this application. There were no transcripts, reports under the *Mental Health Act* or otherwise, or any other documents in the youth court file.

Analysis:

The Section 119 Records:

52 As indicated, the access period remains open for only one youth in this application, namely K.C.-S. The charges against K.C.S. were resolved by way of withdrawal and Extra Judicial Sanctions (EJS) on January 8, 2016. As such, the access period therefore remains open until January 8, 2018, pursuant to section 119(2) (a). The test under section 119 therefore applies.

53 Mr. Boyer is the victim of the fire that occurred on July 31, 2014. Therefore, under section 119(1) (d) of the Act, he is entitled to access to K.C.S.'s court records related to the offence or the alleged offence.

54 However, although as a victim Mr. Boyer has a statutory right to access the K.C.S's court records, section 129 limits the use that Mr. Boyer can make of those records as follows:

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

55 To succeed under section 119(1) (s), the onus is on Mr. Boyer to persuade the court that he has a "valid interest" in the records being sought and that access to the records is "desirable in the interest of the proper administration of justice".

56 In *G. (A.) (Litigation Guardian of) v. F. (S.)* [2007 CarswellOnt 9355 (Ont. C.J.)], Justice Blacklock states the following regarding parties that have a statutory right to access of youth court records in the context of civil litigation at paragraph 25 of his decision:

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

57 The Act provides no express guidance on what the court should take into account when determining whether the criteria under section 119 (1) (s) has been satisfied.

58 Contrary to W.K.'s submissions, a "valid interest" in a record is an interest in the record which is legitimate and relevant to the purpose for which the record is sought. In this case access is sought to assist in a civil law suit. [3] As Binnie, J. pointed out in *N. (F.), Re*, [2000] 1 S.C.R. 880 (S.C.C.),

> A "valid interest" has been held to include institution of civil proceedings: Re Smith and Clerk of Youth Court, 1986 CanLII 2858 (ON SC), 31 C.C.C. (3d) 27 (Ont. U.F. Ct.) (par 34)

59 In order to determine whether he has a valid interest in the records, Mr. Boyer must articulate a factual and legal connection (nexus) between the material issues to be litigated in the lawsuit and the records being sought. I agree with counsel that it cannot be a fishing expedition. The court must be satisfied that the records contain information that would assist the specific applicant with a specific purpose for their litigation. See *R. v. W. (Z.)*, 2016 ONCJ 490 (Ont. C.J.) per Cohen, J.; *D. (J.), Re*, 2009 CarswellOnt 6729, 2009 ONCJ 505, [2009] O.J. No. 6384 (Ont. C.J.), per Katarynych, J.

60 Here, it is not disputed that the material issue in the lawsuit is liability. Mr. Boyer must establish the existence of a direct link or nexus between the information that he is seeking and the specific issue of liability.

61 However, finding that Mr. Boyer has a valid interest in the record does not dispose of the application regarding K.C.S.'s records. Mr. Boyer must also satisfy the court that access to the record is desirable in the interest of the proper administration of justice. This test is a limiting factor. See

62 The requirement that access be desirable in the interest of the proper administration of justice brings us to the balancing of interests required under Part 6 of the *Act*. See

63 In *L. (S.) v. B. (N.)*, [2005] O.J. No. 1411 (Ont. C.A.), Doherty, J. said

> As Cory J.A. observed in Cook, [1985] O.J. No. 2653, Parliament and provincial legislatures can validly limit access by civil litigants to documents in the possession of entities that are not parties to that litigation. While such legislation places

some restraint on the ability of litigants to obtain relevant information, it serves other equally valid public policy concerns: see *Babcock v. Canada (Attorney General)*, 2002 SCC 57 (CanLII), [2002] 3 S.C.R. 3 at paras. 58-60 (my emphasis)

64 In applications for access to *YCJA* records, the public policy concern in the legislation is the "premium placed on the privacy interests of all young persons" involved in proceedings under the YCJA. See *L. (S.) v. B. (N.)*, paragraph 36.

65 After carefully reviewing the records being sought by Mr. Boyer, I have determined that he has met the test for access to the records in question under section 119, subject to strict limitations, for the following reasons:

a. Mr. Boyer is the victim of the fire which destroyed his property and substantially damaged the adjacent property. Although the criminal charges were withdrawn against the young person and there has been no judicial finding of any criminal responsibility, the determination of liability and the standard of proof required are substantially different in a civil lawsuit;

b. Mr. Boyer is also being sued for negligence for causing the fire and the extensive damage to his neighbour's property, or by allowing the fire to be caused;

c. Under section 119(d) of the Act, as a victim, Mr. Boyer has a statutory entitlement to a copy of the records;

d. The records contain information that are relevant or potentially relevant to the issue of civil liability;

e. The records will assist in the proper administration of justice and are desirable for the conduct of the civil litigation, in particular the discovery process necessary for the proper conduct of the civil litigation.

Section 123 Records:

66 As the access period is now closed for the remaining young persons subject to this application, the test under section 123 is understandably more onerous for Mr. Boyer to meet.

67 While Mr. Boyer must establish a valid interest in the records under section 119, under section 123(1) he must establish a "valid and substantial interest". Further, while Mr. Boyer must show that the interest in the proper administration "makes it desirable to have access to the records" under section 119(1) (s), under section 123(1), Mr. Boyer must establish that the interest in the proper administration of justice "renders it necessary that access to the records be granted" under section 123.

68 Further, section 123(1) requires that Mr. Boyer show that no other statute prohibits disclosure of the impugned record and that the youth court judge must set out the purpose for which the record may be used. No such requirements are imposed under paragraph 119.

69 Again, the Act provides no express guidance as to what the court should consider in determining whether the criteria under section 123(1) has been satisfied. However, in my view, the following factors[4] should be considered by the court in determining whether access to the records should be granted in the context of civil litigation under this more stringent test:

a. the person seeking the record and whether that person is a victim seeking damages or defending against damages in the civil lawsuit;

b. the probative value of the record to the material issue in the civil litigation and in particular the precise nexus between any specific record and the specific issues arising in the context of the civil litigation;

c. the extent to which the record is necessary for the proper administration of justice and in particular, whether records being sought are necessary for the applicant in determining the material issues in the civil litigation and in advancing the civil litigation;

d. the nature of the disposition for each of the young person's records being sought and the amount of time that has passed since the expiry of the access period. The access period is clearly a function of the outcome of the charge, which is relevant to the youth's privacy interests in balancing competing policy concerns. Further, the longer the access period has remained closed, the greater the protection of that privacy;

e. the young person's reasonable expectation of privacy in the particular information being sought.

f. the potential impact of the production of the records on the specific young person;

g. the potential impact of production on the integrity of Part Six of the *YCJA*, as informed by the principles set out in section 3 of the Act.

70 The importance of the privacy interests of the young persons under section 123 analysis cannot be overstated and should be given great weight. Under section 123 analysis, the applicant must show that his interest in the records is sufficiently valid and substantial that it displaces the young person's pre-existing privacy interests.

71 Here, as previously stated, all of the charges against the five young persons were completely withdrawn or dismissed without any extrajudicial sanctions. The access period with respect to all of the young persons had been closed for a number of months prior to the commencement of the civil litigation and the application.

72 After careful consideration, in applying the factors set out under paragraph 68 above, Mr. Boyer has met the more onerous test under section 123 for access to the records that I reviewed. Mr. Boyer has a valid and substantial interest in these records as they contain information relevant or potentially relevant to the central and material issue of liability for the fire and damage caused. The records that I reviewed contained information that was probative or potentially probative to the material issue in the civil law suit launched. It is further not disputed that Mr. Boyer was a victim of the fire that caused significant damage to his home.

73 I also find that the records are necessary for the proper administration of justice. As counsel submit, it is certainly true that the young persons are compellable witnesses in the civil law suit launched against them and subject to the discovery mechanisms under the Rules of Civil Procedure. However, I fail to see how the discovery process could be effective or even possible without access to information regarding the police investigation contained in the youth records. In my view, the records in question are more than desirable, and in fact necessary for the proper administration of the civil litigation.

74 Further, as all of the charges were withdrawn or dismissed against the youth in question, there were no pre-sentence reports, section 34 assessments under the *YCJA*, mental health reports or assessments, or any confidential information about the youth or their family that would attract a much greater expectation of privacy. It is very unlikely the court would have permitted access to any of these records should they have existed or been produced, unless greatly redacted.

75 As well, none of the transcripts of the youth's criminal proceedings were produced and provided for the court's review, so no confidential information regarding AYC court or otherwise were contained in the records reviewed by the court. I am not prepared to grant access to any transcripts unless first produced for the court's review to determine whether access should be granted.

Arguments Regarding Section 123 (2) of the Act:

76 Despite counsel's very able argument, I am not persuaded that section 123 (2) limits section 123(1) to situations where a youth court determines that the disclosure of the youth court record is necessary for the purpose of investigating an offence that a person is suspected on reasonable grounds of having committed against the young person while the young person is, or was serving a sentence.

77 Although section 123(2) is not clearly drafted, I do not agree that the combined effect of sections 123(1) and 123(2) limits disclosure to the single and very narrow category of young persons described in section 123(2). This section appears to simply state that section 123(1) applies to this category of persons as well.

78 To interpret section 123(2) in the way that counsel submits would lead to an almost absolute prohibition on access to youth records after the access period has closed, except for this one category of young persons. It cannot have been Parliament's intention to so narrowly define access to this one situation. I agree with the *obiter* observations made by Justice Katarynych in *D. (J.), Re*, 2009 CarswellOnt 6729, 2009 ONCJ 505, [2009] O.J. No. 6384 (Ont. C.J.) at paragraph 145 of that decision, wherein she states that if this was Parliament's intention, "then the reach of section 123 is excruciatingly narrow."

Conclusion:

79 Accordingly, I make the following order:

1. The applicant is granted access to the Toronto Police Service records and the Crown brief produced to the court in this proceeding and in particular the following records:

    a. The six DVDs produced by the Toronto Police Services containing the videotaped witness statement, W.K.'s videotaped statement, surveillance videos, photos of the investigation, officers' notes and supplementary reports;

    b. The Crown Brief, including the charging information and the DVD of the 911 calls.

2. The applicant shall provide copies of the records to the youth respondents immediately upon receipt;

3. The records may only be used in the civil lawsuit before the Ontario Superior Court of Justice and for purposes connected with those proceedings;

4. The young persons shall be identified by initials only and any Litigation Guardians appointed will also only be identified by initials on all documents produced to the respondents or any other persons, and at the hearing(s) in the civil litigation if found to be admissible and admitted into evidence;

5. The young person witness who was not charged but gave a videotaped statement will also be identified by initials only;

6. The records shall be destroyed by all parties at the expiry of the appeal period from any final order of the Superior Court of Justice in the civil lawsuit or upon any final settlement of the civil lawsuit;

7. The records are to be maintained in conditions of strict confidentiality and shall not be reproduced, disclosed or published in any way except as may be required for the purposes of the civil proceeding.

80 Finally, I wish to thank counsel for their excellent submissions and the facta, case law, and secondary sources provided.

Application granted.

Footnotes

1 See *R. v. B. (D.)*, 2008 CarswellOnt 2709, 2008 SCC 25, [2008] 2 S.C.R. 3 (S.C.C.), at paragraph 41.

2 See *R. v. B. (J.)*, 2008 ONCJ 208, 2008 CarswellOnt 2494 (Ont. C.J.) at paragraph 21; Justice Andrea Tuck-Jackson, "Accessing Police Records Under the Youth Criminal Justice Act," 19 *Canadian Criminal Law Review* 83.

3 See *R. v. W. (Z.)*, 2016 ONCJ 490 (Ont. C.J.) per Cohen, J. at paragraph 39.

4 See Justice Andrea Tuck-Jackson, "Accessing Police Records Under the Youth Criminal Justice Act," 19 Canadian Criminal Law Review 83 at pages 9 to 10. A number of the factors above are taken from this excellent article.