Ontario Court of Justice

Her Majesty the Queen

- and -

V. Z.-W.

Shannon Connelly

Applicant

Justice for Children and Youth

Amicus Curiae

Factum of the *Amicus Curiae*

I. Overview

1. The *amicus curiae* submits herein that:

- Access to a Pre-Sentence Report ("PSR") record for use in civil litigation must be sought under either s. 119(1)(s) or s. 123 of the YCJA;
- Special privacy considerations must attach to any court ordered access to PSR records, and;
- The within Application for access to the PSR record should be denied.

II. Statement of Facts

A. Nature of the Application

2. This is an application (the "Application") for access to certain records related to a young person, V. Z.-W., (the "Young Person") pursuant to the provisions of the *Youth Criminal Justice Act* ("*YCJA*", the "*Act*"). The Applicant, Shannon Connelly (the "Applicant"), applied to this Court for access to various records concerning Occurrence # OP 12000718 – including police notes, memoranda, the Crown Brief, statements attributed to the Young Person, the contact information of the Young Person, and the contents of the police and Crown Attorney's files – for the purposes of a civil claim against the Young Person and her former residence, Terrace Youth Residential Services, the details of which are set out in the Application and appendices thereto.

3. By endorsement on or about November 13, 2015, the Honourable Justice Cohen granted Counsel for the Applicant access to police records concerning the Young Person subject to certain terms and conditions. It is our understanding that in a subsequent oral application, made on the same basis as the original application, an additional request was made for access to a Pre-Sentence Report ("PSR") that was said to have been prepared with respect to the Young Person.

4. Because Counsel had been unable to locate the Young Person for the purposes of service of the Application, Justice Cohen appointed Justice for Children and Youth as *amicus curiae* (the "*amicus*") and requested submissions concerning the privacy interests at stake with respect to the PSR. These are those submissions.

III. Issues

5. Has the Applicant satisfied the requirements of the *YCJA* such that she should be given access to the PSR concerning the Young Person?

IV. Law and Argument

A. Preliminary Issue: The Present Application

6. The Application as originally submitted appears to rely on section 119(d) as the basis on which to request the record. This section provides that, while a youth record is within the statutory access period, the victim of the offence to which the record relates shall have access to section 114 records.

Youth Criminal Justice Act, (S.C. 2002, c. 1) (*"YCJA"*), s. 119(d)

7. However, while the victim may access the record, her ability to use and disclose the record remains limited by section 129 of the *YCJA*, which prohibits a person who has been given access to a record from further disclosing it.

YCJA, s. 129

8. The Application, however, makes clear that the purpose of accessing the record is to use it in the course of civil proceedings wherein the report may be made available to others involved in the proceeding, in particular, other counsel, staff members, and the other litigants.

9. If the Application were regarding the victim's personal use of the record the Application might be properly brought under section 119(1)(d). However, as the access is sought for the purpose of providing access to the record to counsel for the purpose of using it in a civil proceeding, the Application must be brought under section 119(1)(s)(ii), and the corresponding legal test will be applied. "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."

> *G. (A.) (Litigation Guardian of) v. F. (S.)*, 2007 ONCJ 577 (OCJ) ("G. (A.) v. F. (S.)") at para 25

10. Accordingly, if the access period under section 119(2) has not expired, the proper provision under which to seek access is section 119(1)(s)(ii), an open category of persons who may be granted access if such access is in the interests of the proper administration of justice.

> *YCJA,* s. 119(1)(s)(ii)

11. It remains unclear, however, whether the access period per section 119(2) is in fact open. If the access period has passed, the more stringent test under section 123 applies to any person seeking access to the record for any purpose.

> *YCJA,* s. 123

12. The *amicus* submissions accordingly proceed on the basis that this is in fact an application pursuant to section 119(1)(s) or section 123, consistent with the approach

expressed in Justice Cohen's letter of November 13, 2015 and accompanying endorsement.

B. The Legal Framework

13. The *YCJA* is a comprehensive statutory code that creates a distinct youth justice system, one which recognizes the particular vulnerability of young persons, emphasizes reintegration and rehabilitation as key purposes of youth criminal justice, and establishes enhanced procedural protections to ensure the rights of young people are respected and protected. Specifically enumerated in this regard is the need to protect the privacy of young persons dealt with under the *Act*.

YCJA, s. 3

i. The nature of the privacy interest at stake

14. The separate youth justice system established by the *YCJA* and its enhanced procedural and privacy protections are consistent with international consensus concerning the unique position of young persons involved in the criminal justice system, occasioned by their relative immaturity and vulnerability.

15. A separate youth justice system, with enhanced procedural protections and recognition of the unique place of young people in society, fulfills Canada's international law obligations as signatories to the *United Nations Convention on the Rights of the*

Child ("*Convention*"), and the *UN Standard Minimum Rules for the Administration of Juvenile Justice* ("*Beijing Rules*").

> U.N., Convention on the Rights of the Child, Can. T.S. 1992 No.3.
>
> U.N., G.A.. United Nations Standard Minimum Rules for the Administration of Juvenile Justice, A/RES/40/33, November 29,1985.

16. The *Convention* and the *Beijing Rules* both require that youth justice systems specially protect privacy. The *Convention* requires "special safeguards and care, including legal protection" be afforded to young people "by reason of their physical and mental immaturity". And in the criminal justice context, the *Convention* requires States parties to take into account the "...desirability of promoting the child's reintegration...", and requires that States parties shall in particular ensure that young people's "privacy is fully respected at all stages of the proceedings".

> *Convention*, Preamble, Article 40, clause 1 and clause 2(b)(vii)

17. The *Beijing Rules* provide at Rule 8, "Protection of Privacy", 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 process of labelling ...
>
> In principle, no information that may lead to the identification of a juvenile offender shall be published.

18. The *YCJA* expressly incorporates the *Convention*, codifying Canada's international law obligations to a separate youth justice system.

> *YCJA*, Preamble

19. The protection of privacy is inextricably linked to the principles of rehabilitation and reintegration, which are paramount under the *Act.* Privacy of young people's most personal information must be carefully guarded. Indeed, the labelling and stigmatization of a young person caused by their public identification as an offender is inimical to these objectives, as recognized by the Supreme Court of Canada.

20. In *R. v. D.B.,* the Supreme Court recognized the international consensus that dissemination of youth records "increases a youth's self-perception as an offender, disrupts the family's ability to provide support, and negatively affects interaction with peers, teachers, and the surrounding community." The Court further noted that the impact of stigmatizing and labelling young persons can damage the offender's developing self-image and sense of self-worth and in turn negatively impact their rehabilitation.

R. v. D.B., [2008] SCJ No 25 ("*R. v. D.B.")* at paras 76, 84

21. In this way, the protection of a young person's privacy serves the protection of public safety by facilitating their rehabilitation and reintegration.

22. Broadly speaking, even in the context of civil litigation, the Supreme Court affirmed in *A.B. v. Bragg Communications Inc.,* that considerations of dignity, personal autonomy, and personal integrity apply equally if not more strongly in the case of young persons.

A.B. v. Bragg Communications Inc. [2012] 2 SCR 567 ("*A.B.*") at para 18

23. Furthermore, as this Court stated, "the protection of privacy of young persons fosters respect for dignity, personal integrity and autonomy of the young person" derived 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."

> *Toronto Star Newspaper Ltd. v. Ontario*, 2012 ONCJ 27 ("*Toronto Star*") at para 44
>
> *R. v. Dyment* [1988] S.C.J. No. 82 at para 22

24. The protection of young persons' privacy also has a significant constitutional dimension. Indeed, the Supreme Court has affirmed that it is principle of fundamental justice under section 7 of the *Charter* that young persons are entitled to presumption of diminished moral culpability throughout any proceedings, including sentencing. There is accordingly a heavy onus on those who seek to displace the protections – particularly privacy – to which a young person is presumed to be entitled.

> *R. v. D.B.*, at para 87
>
> *Toronto Star,* at para 41-44

25. Moreover, the protection of privacy itself has a constitutional component. It is the concern for an individual's privacy that underlies the protection afforded by section 8 of the *Charter*. As in *Hunter v. Southam*, the primary purpose of section 8 is "to protect individuals from unjustified state intrusions upon their privacy". The right to privacy has furthermore been recognized as a human right of children.

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

R. v. Dyment, [1988] 2 SCR 417, para 15

Convention on the Rights of the Child, Can. T.S. 1992 No.3.

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

26. This Court has specifically adopted this approach, recognizing that "the proper administration of justice . . . embraces the protection of privacy of young people dealt with under the Act ... The protection of privacy is a cornerstone of the Act, and ...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, at para 77

ii. The privacy protections of the *YCJA*

27. The *YCJA* provides for the enhanced privacy protection for young people by limiting who can access records, prohibiting disclosure of records and identifying information contained therein, and prohibiting publication of identifying information.

28. "Records" under the *YCJA* are defined broadly to include: "any thing containing information, regardless of its physical form or characteristics . . . 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". A PSR comes within the meaning of a record of a youth court under section 114.

*YCJA, s*s. 2(1), 114

29. Access to such records is strictly limited by section 118, which presumptively denies access to such records:

> 118. (1) Except as authorized or required by this Act, **no person shall be given access to a record** kept under sections 114 to 116 . . ..

30. Sections 118 through 129 set out the limited circumstances in which these records may be accessed and disclosed. Section 119(1) enumerates an exhaustive list of people or classes of people who can access records during a time-limited period in which the record remains open.

31. As discussed above, under section 119(1)(d), a victim of an offence or an alleged offence is permitted to access a record while the record remains open. If the access period has expired, then section 123 governs all access, which is at the discretion of the Court. Regardless, section 129 prevents her from disclosing that information unless otherwise authorized by the *YCJA.*

32. The *amicus* submits that section 119(1)(d) ought not to entitle a victim to unfettered access to PSR records. Rather, such specific access remains in the discretion of the court, informed by the purposes and principles enumerated in section 3 of the *Act,* in particular the privacy of the young person. As the Court noted in *Re J.D.,*

> Nothing in the *YCJA* declaration of principles dictates that victims are entitled to records. What is plain from a reading of the Act as a whole is that victims are given a measure of participation in judicial process taken against an accused, a measure of participation in sentencing hearing when an accused is found guilty of crime, and a measure of access to

portions of information compiled about the youth for the purposes of the prosecution, if - and only if, - the victim is able to satisfy the criteria for production of information.

Re J.D., 2009 ONCJ 505, p. 4

33. While *Re J.D.* concerned an application under section 123, the *amicus* submits that similar considerations ought to apply to an application under section 119(1)(d). This Court remains the gatekeeper of access and may prevent it where, as here, the request for access impermissibly trenches on the young person's right to have her personal information – such as the deeply personal information contained in a PSR (described more fully below) remain private.

34. In any event, where, as here, the Applicant seeks the record not for her private use, but wishes to use it for the purposes of civil litigation, she must seek access pursuant to section 119(1)(s). This provision requires the person to demonstrate a valid interest in the record and that access to the record is desirable in the interest of the proper administration of justice. And the analysis in *Re J.D.* is directly applicable.

G. (A.) v. F. (S.) at para 25

Re J.D. supra

35. For the purposes of the present application, however, it remains unclear whether the statutory access period remains open. If the access period is in fact closed, then the Applicant must apply to the Court under section 123 for access to the record, which sets out a more stringent test, that is, that the person seeking the record demonstrate a <u>valid</u>

and substantial interest in the record and that disclosure of the record is necessary in the interest of the proper administration of justice.

YCJA, s. 123

36. Under either section 119 or section 123, the Court of Appeal has made clear in *S.L. v. N.B.*, these protections "demonstrate beyond peradventure Parliament's intention to maintain tight control over access to records pertaining to young offender proceedings whether those records are made and kept by the court, the Crown, or the police."

S.L. v. N.B., 252 DLR (4th) 508, [2005] OJ No 1411 at para 42

37. Access to those records is accordingly limited to circumstances where some valid public interest is "sufficiently strong to override the benefits of maintaining the privacy of young persons who have come into conflict with the law".

S.L. v. N.B., at para 43

iii. The nature of the records sought

38. While these above-noted privacy interests and associated protections apply to all records under the *YCJA*, the nature of the records sought in the present application – a PSR - render the need for such protections particularly acute.

39. PSRs are designed and intended to assist the court to fashion sentences that are responsive to young people's individual and specific rehabilitation needs. They are

intended to provide the Court with the most complete picture possible of the young person who is to be sentenced. The details included in the information provided in a PSR typically go well beyond information about the incident and the facts surrounding the young person's participation in the events that lead to the offence in question.

40. These records are designed, and in fact are legally required, to be highly personal and private. They will often also involve information about third parties, for instance the young person's family and extended family members, and peers. The *YCJA* mandates that PSRs shall contain interviews with the young person, the victim, the young person's parents and extended family, history of criminal and non-criminal behaviour in the community, information about relationships, family history and dynamics, possible family deficits, the young persons future plans, information about maturity, character, school, health, mental health and development. PSRs may also contain information about community and faith group involvement, immigration information, and even information about a mother's pregnancy.

YCJA, s. 40

41. As this Court noted in *Toronto Star,* the contents can include: personal and family background, course of mother's pregnancy, the youth's behaviour growing up, his behaviour now, peers, substance use, mental health issues, family trauma, sick family member, family history of criminal involvement, education and employment of the parents and the youth, school records, involvement with community agencies, child welfare history, school issues, counselling, religion and religious activities, recreational

activities, plans, comments by collateral sources including counsellors, therapists, agencies, their personal information, their intimate details, their secrets, and their feelings about things that have happened in their families, as well as information from the victim.

Toronto Star, at para 63

42. As the Court noted, "this information is in some sense volunteered and in some sense compelled by the state. Accordingly, there can be no doubt that privacy of these reports touches upon the liberty and security interests of young persons." Citing *R. v. O'Connor,* the Court held:

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

Toronto Star, para 48

R. v. O'Connor, [1995] 4 SCR 411 at para 119

43. The nature of the information, and the circumstances under which it is provided, also engages a young person's interests under section 8 of the *Charter.* Indeed, the information – much of it touching a young person's personal dignity and integrity - will attract a reasonable expectation of privacy.

Hunter v. Southam, [1984] 2 S.C.R. 145

R. v. Dyment, [1988] 2 SCR 417, para 15

44. To the extent that a young person may be seen to have waived her privacy interest by disclosing certain information, information pertaining to medical, psychiatric, therapeutic or counselling services, education, employment, child welfare, adoption and social services remains protected by other Acts of Parliament or a provincial legislature and, in addition to the expectation of privacy created by those Acts, continues to attracts a constitutionally protected reasonable expectation of privacy.

45. PSRs will typically contain information from all of these sources.

46. PSRs, by their very nature, are therefore replete with personal and private information of the most sensitive nature. They are intended exclusively to ensure meaningful rehabilitation and reintegration. They are intended exclusively to be read by those administering to a young person's rehabilitation. They therefore require the most restrictive level of privacy protection afforded by the *YCJA*.

47. PSRs are provided with additional privacy protections. Under section 40(7), PSRs are to be withheld from a private prosecutor if it is not necessary for the prosecution of the case, evidencing Parliament's intention to maintain the strict privacy of PSRs. It is to be noted that a private prosecutor is generally the complainant or the victim in a criminal justice system matter, and as such is akin to the Applicant in this matter. The *YCJA* intends for PSRs to be for the exclusive use of the court and those responsible for the young person's rehabilitation. Accordingly, they ought not to be generally available to an applicant.

YCJA, s. 40(7)

48. Under section 40(10), any statement made by a young person is not admissible in civil or criminal proceedings. They should therefore not generally be made available for this purpose.

YCJA, s. 40(1))

49. There is also a public interest at stake, in the context of sentencing, in ensuring accountability. Accurate and useful PSRs require candour and completeness, which will only be possible if the private nature of these documents is protected. Young people, families and third parties may limit their participation in providing information for PSRs if they do not view them as being confidential.

Toronto Star, para 48

50. The information contained in a PSR therefore engages international legal, constitutional, and statutory protection, and protecting privacy is a cornerstone of the principles and provisions of the *YCJA.* These interests may not be lightly set aside nor interfered with and requests to do so must be subject to the closest scrutiny.

C. The Applicant has not satisfied the appropriate legal test for access

51. Given the nature of the interest at stake, the *amicus* submits that the Applicant and her Counsel have failed to meet either statutory test for access to a PSR. Specifically, they have not established that access is desirable or necessary in the

interest of the proper administration of justice, nor have they established a sufficiently strong public interest justifying the displacement of the presumption of privacy.

i. The *Dagenais/Mentuck* test is inappropriate

52. The *amicus* submits that the *Dagenais/Mentuck* analysis is inappropriate to the present Application.

53. The Application for access to a PSR record to be used in civil litigation ought not to be treated as though it is a publication ban sought by the young person. Indeed, courts have acknowledged that the youth context is distinctive and therefore demands a distinctive approach. In *F.N. (Re),* in analysing "the need for confidentiality" in the youth justice context, the Supreme Court specifically noted that the *Dagenais* discussion of non-publication is a "different context".

> *F.N. (Re)*, [2000] 1 S.C.R. 880, 2000 SCC 35, para 14, ("F.N.")

54. Indeed, the *Dagenais/Mentuck* test was developed in the context of a publication ban where a publication ban was being sought to prevent the media from accessing and publishing certain information that, pursuant to the open court principle, was presumptively available to the public.

> *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 ("Dagenais")
>
> *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442 ("*Mentuck*")
>
> *CBC v. The Queen,* 2011 SCC 3, [2011] 1 S.C.R. 65

R. v. Canadian Broadcasting Corp., 2010 ONCA 726, 102 O.R. (3d) 673

55. Under the *YCJA,* however, there is no such presumption of access; indeed, the presumption is reversed such that access to the information sought is presumptively denied unless otherwise made available under the *Act.* Sections 110 through 129 provide a complete legislative scheme for access to youth records. The applicable test to be met by a person seeking access is set out in sections 119(1)(s) and 123. Indeed, the Ontario Court of Appeal in *S.L. v. N.B.,* stated that the provisions of the *YCJA* create an unequivocal and unqualified prohibition against access. Section 138 reinforces the significance of the privacy sections, 118, 119, 129, 110, and 111, by making their violation an offence.

YCJA, ss. 110-129

S.L. v. N.B., paras. 44 and 45

56. This is accordingly not a matter of the exercise of judicial discretion to limit the openness of judicial proceedings; rather, the *YCJA* itself imposes these limits and mandates certain conditions precedent to access.

57. The *Dagenais/Mentuck* test is therefore inapt in the context of an application for PSR records.

58. Parliament must be seen to have intended to oust the common law in this regard. The principles of statutory interpretation provide that statute can oust the common law, and that resort to a common law test, such as *Dagenais/ Mentuck*, is considered

inappropriate when the legislation to be applied is broad and detailed enough to offer a comprehensive regulation of the matter.

> Ruth Sullivan, Sullivan and Driedger on the Construction of Statutes – 4th ed., (Canada: Butterworths, December 2002) at p 350, ("Sullivan & Driedger")

59. Parliament will be seen to have intended to oust the common law especially where the statute, or part thereof, provides a comprehensive code. A comprehensive code can be identified when the legislation to be applied is broad and detailed enough to offer a comprehensive regulation of the legal issue in question. In this case the question of access to, disclosure of, and publication of youth records is regulated in a complete manner by the *YCJA*. Where, in a case such as this, the "adjudicative machinery" exists in the statute, resort to the common law test will be seen to be duplicative.[1]

> Sullivan & Driedger, Ibid., at 350
>
> *Gendron v. Supply & Services Union of the Public Service Alliance of Canada*, Loc. 50057, [1990] 1 S.C.R. 1298, at 1317, [1990] SCJ No. 55

60. The ousting of the common law will be particularly clear where the language of the statute approximates the language the courts have used in the common law interpretation of the issue.

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[1] This was the approach adopted by L'Heureux-Dube J. in the case of *Gendron* v. *Supply & Services Union of the Public Service Alliance of Canada, Loc. 50057* at [1990] 1 S.C.R. 1298 at 1317 where the Court held that because the common law duty of fair representation had been incorporated into the *Canada Labour Code*, an employee could not bring an action against his union for breach of the common law duty of fair representation. The *Canada Labour Code* was held to be a comprehensive, exclusive code for this purpose.

61. The language in sections 119(s)(ii) and 123 are a very close approximation of the language the courts have used in cases where the *Dagenais / Mentuk* test was applicable. As such, the appropriate test to be applied is the statutory test set out in these provisions.

62. This is furthermore not a case where competing *Charter* rights have been identified, as in *Dagenais* and *Mentuck*. Indeed, it is not the Applicant's constitutionally protected expressive rights that are at stake, but rather her purported ability to pursue a private civil claim and recover damages against the Young Person and her caregiver.

63. Accordingly, there is no need to import that *Dagenais/Mentuck* analysis, which concerns competing claims of trial fairness and the administration of justice against freedom of expression, into the consideration of this Application.

ii. In the alternative, Dagenais/*Mentuck* should be applied flexibly

64. This *amicus* is nonetheless aware that this and other Courts have applied the *Dagenais/Mentuck* in the youth records context.

Toronto Star, at para 8-21

65. To the extent that this Court considers the test to be appropriate in the present circumstances, this *amicus* submits that the test should be applied flexibly and that the Applicant must bear the onus of demonstrating that this is a fit case to displace the presumption of privacy mandated by the *YCJA.*

66. Indeed, other courts have noted that the test as conventionally stated is ill-suited to the youth records context. *R. v. A.Y.D.* where the Applicant's argument was identical to the Application at bar, the Court stated:

> I am not convinced that the *Dagenais Mentuk* test applies to an application under the *YCJA* in the manner suggested by the Applicants. The *YCJA* enacts a distinct framework for dealing with proceedings involving young persons. This framework must be interpreted in light of the Declaration of Principle set out in s. 3, which expressly emphasizes the young person's right to privacy. Accordingly, the *Dagenais Mentuk* test must be considered in the unique context of youth criminal justice, taking into account the protections afforded to young persons.
>
> *R. v. A.Y.D.*, [2011] A.J. No. 103 (ABQB), at para 23

67. In its typical formulation, the *Dagenais/Mentuck* test provides that a publication ban should only be ordered when:

> a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
>
> b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.
>
> *Mentuck*, at para 32

68. In the context of the *YCJA,* however, the presumption ought to operate in favour of the young person, such that the person seeking access must demonstrate that access is necessary in order to prevent a serious risk to the proper administration of justice and no alternative measures will prevent the risk and that that the salutary

effects of access are not outweighed by the deleterious effect on the rights and interests of the young person and the public. Put another way, an applicant must be required to show that the salutary effects of protecting the privacy rights and interests of the young person and his or her rehabilitation, are not outweighed by the deleterious effects of permitting access.

iii. The onus properly rests with the Applicant

69. Regardless of the formulation of the test applied – whether the statutory tests set out in sections 119 and 123 or the modified *Dagenais/Mentuck* test – the onus of demonstrating that access ought to be ordered properly rests with the Applicant. In other words, a young person ought not to be required to demonstrate that restriction of access is in the interests of the administration of justice, notwithstanding the principle of open courts.

70. Indeed, the *YCJA* begins with a presumption that privacy and identity will be protected, and that no person shall be given access to records. It is not the other way around.

71. While recognizing the significance of the open court principle and the jurisprudence on which it is based, other youth courts in other provinces have recognized that the *YCJA* creates a unique and separate system, as well as a requirement for a different approach when addressing the question of access to youth records.

See for example:

R. v. B.J., [2009] A.J. No. 905, 479 A.R. 248, para 31, ("*B.J.*")

R.v. Telegraph Journal, [2010] N.B.J. No. 227, 257 C.C.C. (3d) 125, paras 29 – 31, ("*Tel.Journal*")

R. v. A.A.B., [2006] N.S.J. No. 226, 244 N.S.R. (2d) 90, paras 10-11, ("*A.A.B.*")

R. v. A.Y.D., [2011] A.J. No. 1031, 2011 ABQB 590 ("*A.Y.D.*")

R. v. G.D.S., [2007] N.S.J. No. 390, 226 C.C.C. (3d) 196, paras 35-38, ("*G.D.S.*")

72. The cases generally conclude that the youth justice context is unique, that young people should be treated differently than adults in the criminal justice context, and that the *YCJA* requires a restrictive approach to access to records.

73. According to a number of these cases, the *YCJA* enacts "a valid exception to the broad application of the openness principle" which appropriately balances competing interests in favour of restricting access and prohibiting publication of the identity of young persons, because protecting such information assists rehabilitation.

Tel.Journal, at paras 29 – 31

A.A.B., at paras 10-11

See also, *A.Y.D.*, and *G.D.S.*

74. The Nova Scotia Provincial Court in *A.A.B.* stated:

> In respect of criminal cases involving young persons there is recognition by the courts that there is a valid exception to the broad application of the openness principle. While youth courts are courts that are open to the public there are provisions dealing with non-disclosure of identifying information and the provisions restricting access to the records.

A.A.B., para 10

75. By creating a scheme that differs from the normal adult context, the *YCJA* recognizes that public access to, disclosure of, and publication of youth records inhibit rehabilitation and so are presumptively restricted.

76. Given the unique characteristics of young people and their place in society, the *YCJA* specifically provides that the privacy interests of young people are to trump other important societal interests in access to information. The basic premise of this *YCJA* regime, as interpreted by these various courts, is clear: where privacy is protected and stigmatization is limited, the rehabilitation and reintegration process is encouraged and made meaningful.

77. Therefore, notwithstanding a general public interest in open courts, when considering section 119 and 123 applications for access to youth records, the court must prioritize these important youth justice principles and protections, which ultimately militate in favour of society's long term well-being. To do otherwise not only runs afoul of Parliament's intention as expressed by the *YCJA,* but is a violation of the constitutional protections afforded to young persons by sections 7 and 8 of the *Charter.*

R. v. D.B., para 88, 95

78. Further, young persons should not bear the burden of establishing harm or prejudice to themselves personally or to their rehabilitation resulting from an access

order. Requiring young people to bring such evidence, in effect, leaves potentially unrepresented and highly vulnerable people, as young as 12 years old, to argue for the application of protections that are automatically afforded to them through the *YCJA*. Such an approach would be totally inconsistent with the entire youth justice scheme as enacted in the *YCJA* and, indeed, constitutional and international legal norms.

79. The Supreme Court of Canada has held that the harm of disclosure is objectively discernable based on the inherent vulnerability of young people, a concept with deep roots in Canadian law. As the Supreme Court noted in *A.B.,* the law attributes heightened vulnerability to a young person, based on chronology, not temperament.

A.B., at para 17

80. The harm to the administration of justice and to young persons whose records are sought must be recognized, even without specific evidence of personal or societal harm. To allow otherwise would leave vulnerable, unsophisticated, and generally unrepresented young people to enforce their privacy rights against media organizations, or other well-resourced entities. It is exactly that sort of power imbalance that the *YCJA* specifically addresses and seeks to eliminate.

81. Accordingly, the onus of demonstrating that access should be granted properly rests with the Applicant.

iv. The Applicant has not demonstrated a sufficient basis on which to overcome the privacy protections afforded by the *YCJA*

82. No matter which test is applied, the onus is on the Applicant to demonstrate a sufficient basis on which to set aside the presumption of privacy enacted by the *YCJA*.

83. As noted above PSRs are themselves unique within the legislative scheme, containing deeply personal information well beyond the context of the offence and attracting additional protections, such as those under section 40 preventing their disclosure to private prosecutors or in the context of civil proceedings.

84. The information contained in a PSR specifically attracts an especially high degree of privacy protection. Indeed, much of the information provided may well be protected by federal or provincial privacy legislation. By permitting the Applicant access to personal information in PSRs protected by other legislative schemes, a back door encroachment on section 8 guarantees of a reasonable expectation of privacy is sanctioned. The privacy and confidentially normally afforded the deeply personal and often statutorily protected information contained in a PSR ought not to be lost for young people because of criminal justice system involvement.

85. It would therefore run contrary to the proper administration of justice to allow others to access a PSR, without demonstrating some pressing and substantial basis for so doing.

86. Indeed, the Supreme Court of Canada has recognized that public access, disclosure and publication is detrimental to rehabilitation and to the long-term protection of the public, and should only be given where there is a greater, more pressing administration of justice interest involved.

R. v. R.C., [2005] 3 S.C.R. 99, 2005 SCC 61, para 45

87. Similarly, in *S.L. v. N.B.,* the Ontario Court of Appeal stated that in order to overcome the presumption of privacy created by the *YCJA* and the benefits to the young person and to society at large of maintaining their privacy, a person seeking access must demonstrate a sufficiently strong public interest favouring access.

S.L. v. N.B., para 42

88. The Applicant has demonstrated no such interest.

89. The Application is based on the Applicant's desire to view the PSR based on the speculative notion that it may contain information pertaining to the Young Person's proclivity for violence or anger management issues which would assist the Applicant in establishing the Young Person's civil liability.

90. While the information contained in the PSR may or may not be probative of these issues, this is not the test. Rather, on any formulation of the test, the Applicant must show that access is in the interests of the administration of justice to such a degree that it overcomes the high degree of privacy afforded to a young person both statutorily and

constitutionally. The mere belief that a record may contain relevant information is an insufficient basis on which to ground an application for access. Applicants ought not to be allowed to go on a 'fishing expedition' at the expense of the privacy, dignity, and autonomy of a young person.

Re J.D., 2009 ONCJ 505 at pp. 7-8

91. This is particularly so given the nature of the information presented in and the purpose of a PSR. Allowing statements and information contained in a PSR to be used for the purposes of establishing a young person's liability in civil proceedings is antithetical to the rehabilitative and reintegrative purpose of this document. Young people, families and third parties may limit their participation in providing information for PSRs if such information could later be used to establish their liability in other proceedings, undermining the information available to a court in crafting a fit sentence and the rehabilitative function of PSRs. This is ultimately detrimental not only to the persons involved in a particular case, but in society's interest in the rehabilitation and reintegration of young persons.

92. Indeed, as above, Parliament's intention that this information not be used in this way is reflected in section 40(10) of the *YCJA*, which provides that no statement made by a young person in the course of the preparation of a PSR is admissible in evidence against any young person in civil or criminal proceedings, except in limited specified circumstances under the *Act*.

YCJA, s. 40(10)

93. Moreover, in addition to the relevant information purportedly contained in the record sought, assuming for the sake of argument that it is indeed contained therein, the record sought also likely contains deeply personal and historical information of no relevance to the civil case, information that the Young Person is entitled to keep private. It is difficult to see how the information sought could be redacted or otherwise severable from the whole of the record, mandating that the entirety of the PSR be withheld.

94. To the extent that the interests of the administration of justice favour the fair apportionment of liability in a civil proceeding, the Applicant is not without recourse in this regard. Indeed, the Applicant has already been provided with numerous police, Crown, and court records which may well contain the information sought. In the course of civil proceedings, the Applicant will be entitled to examine the Young Person for discovery and may have access to the records of Terrace Youth with respect to the Young Person, which may provide the desired information without the attendant risk of exposing her intensely personal and sensitive information to the observation and scrutiny of persons who are strangers to her life, trenching on this protected sphere of privacy.

95. In sum, while it may be expedient for the Applicant to have access to the information in the record, this Court cannot countenance the risk to the privacy and dignity of the Young Person and to the public interest in maintaining her privacy for the

mere convenience of the Applicant, particularly on the basis of vague assumptions regarding the contents of the requested records.

96. The Applicant is not without other means of accessing the information she desires; the consequent deleterious effects on the administration of justice in her civil claims are accordingly small. When compared with the significant intrusion into the privacy of the Young Person proposed by the Applicant, and the attendant consequences for the public interest in maintaining that privacy as set out in the principles and purposes of the *YCJA*, the interests of the administration of justice militate in favour of denying access to the Young Person's PSR.

V. Order Sought

97. The *amicus* requests that the Applicant's Application for access to V. Z.-W.'s PSR be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26th day of January, 2016

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