Court File No: [redacted]

ONTARIO
ONTARIO COURT OF JUSTICE

B E T W E E N:

NICOLAS BOYER

Applicant

- and -

I-HSIU (JOHN) HUANG, RISHI JAITLEY, MY INSURANCE BROKER CORP.,
JOHN DOE 1, JOHN DOE 2, JOHN DOE 3, JOHN DOE 4,
JOHN DOE 5, AND JOHN DOE 6

Respondents

FACTUM OF THE RESPONDENT
W.K.

I. OVERVIEW OF RESPONDENT'S POSITION

[1] The Respondent, W.K., submits herein that:

i. Their privacy interest prevails over the Applicant's request for access and any subsequent disclosure; and

ii. The within Application for Access should be denied.

II. STATEMENT OF FACTS

[2] This Application arises in the following context:

a. "A civil proceeding has been commenced in Toronto (court file number CV-16-545545) as a result of a fire that allegedly occurred on July 31, 2014. The Statement of Claim was issued on January 26, 2016."

Factum of the Applicant, at para 1 [Factum 1]

b. At the time of the ... fire ... I-Hsiu (John) Huang ... owned the property at 14 Minto Street, and the Applicant owned the property located at 12 Minto Street.

Factum 1, *supra* para 2a at para 2

c. The Toronto Police Service investigated the fire. The Applicant states that the John Doe Respondents were charged under three separate provisions of the *Criminal Code*. However, the Respondent does not have knowledge of how many individuals may have been charged and what those charges might be.

Factum 1, *supra* para 2a at para 3

d. On July 20, 2016, the Applicant issued a Statement of Claim in the Superior Court of Justice as against the "John Doe Respondents," among others, for "extensive damages in relation to a fire set to the Applicant's home on July 31, 2014."

Supplemental Factum of the Applicant at para 14 [Factum 2]

e. The Applicant seeks access to any records with respect to the Respondent that may exist under sections 114, 115 or 116 of the *Youth Criminal Justice Act*.

III. LAW

1. THE CORRECT LEGAL FRAMEWORK

[3] The below will outline the correct legal framework to applied when access is sought to a young person's records. This analysis will address jurisdiction, the statutory framework outlined in the *Youth Criminal Justice Act* ["*YCJA*"], and the correct interpretive lens as outlined by the *YCJA*, principles of international law and case law. This section applies the tests to the Applicant's request for access and concludes that the Applicant has not met the statutory requirements for access.

A. The Legal Test for Access

i. Jurisdiction

[4] A youth justice court, as defined by section 13 of the *YCJA*, and by virtue of various provincial enactments and orders in council across the country, is a provincial or territorial court of justice. Applications for access to youth court records must be brought in a youth justice court. Only in limited circumstances is the Superior Court of Justice a youth justice court. The Superior Court will be constituted as a youth justice court only where the accused young person is charged with murder and/or the Crown is seeking an adult sentence.

> *Youth Criminal Justice Act*, SC 2002, c 1, s 13 [*YCJA*] **at** Tab 3 of WK's Book of Authorities
>
> *SL v NB* [2005] OJ No 1411 at paras 38 and 54-55 252 DLR (4th) 508 (Ont CA) [*SL v NB*] **at** Tab 5 of WK's Book of Authorities

ii. Statutory Framework

a) Types of Youth Records

[5] The word "record" is very broadly defined in section 2 of the *YCJA*. It includes:

> 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.

YCJA, *supra* para 4 at s 2(1) **at** Tab 2 of WK's Book of Authorities

[6] Three main categories of records are contemplated by the legislation, and helpfully outlined by Jones, Rhodes & Birdsell in *Prosecuting and Defending Youth Criminal Justice Cases: A Practitioner's Handbook*:

1. **Youth court records:** Section 114 permits a youth justice court, review board, or any court dealing with matters arising out of proceedings under the YCJA to keep a record of any case.
2. **Police records:** Section 115 permits a police force responsible for or participating in the investigation of an offence alleged to have been committed by a young person to keep that young person's records, including fingerprints and photographs.
3. **Government records:** Section 116 permits a department or an agency of any government in Canada to keep records containing information obtained by that department or agency
   a. for purposes of investigation of an offence alleged to have been committed by a young person;
   b. for use in proceedings against a young person under the Act;
   c. for the purpose of administering a youth sentence or an order of the youth justice court;
   d. for the purpose of considering whether to use extrajudicial measures; or
   e. as a result of the use of extrajudicial measures.

Brock Jones, Emma Rhodes & Mary Birdsell, *Prosecuting and Defending Youth Criminal Justice Cases: A Practitioner's Handbook*, vol 1 (Toronto: Emond Montgomery Publications, 2016) ch 12 at 321 **at** Tab 17 of WK's Book of Authorities

[7] Part VI of the *YCJA* (Publication, Records and Information) provides the statutory framework for access to and disclosure of youth court records. This section provides the *sole* route by which persons can obtain lawful access to these records.

[8] In keeping with the requirement that there be a separate criminal justice system for young people, 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. Specifically, "[s]ections 117 through 129 of the *YCJA* demonstrate, beyond peradventure, Parliament's intention to maintain tight control over access to records relating to proceedings under that Act."

SL v NB, supra para 4 at para 42 **at** Tab 5 of WK's Book of Authorities

b) No General Entitlement to Access the Records

[9] Access to youth records is presumptively denied by operation of section 118, which provides that "no person shall be given access to a record kept under sections 114 to 116" unless the *YCJA* specifically authorizes or requires it.

YCJA, supra para 4 at s 118(1) **at** Tab 4 of WK's Book of Authorities

[10] To obtain authorization to access the records, the Applicant must satisfy the requirements outlined by the *YCJA*. If the Applicant does not satisfy the requirements, prohibition against access remains unequivocal and unqualified.

YCJA, supra para 4 at s 118(1) **at** Tab 4 of WK's Book of Authorities
SL v NB, supra para 4 at para 45 **at** Tab 5 of WK's Book of Authorities

c) Where Period of Access is Open

[11] In circumstances when the access period is open, subsection 119(1) of the *YCJA* enumerates an exhaustive list of persons or classes of persons who may access records while the sought record is within the applicable time period ("access period") outlined in s. 119(2).

[12] In particular, section 119(1)(d) allows for a victim of an offence or alleged offence to be given access to a Youth Court Record arising from that offence. If the access period is open on the date the victim requests a youth court record, the record shall be provided. The victim may further seek police records or government records, but has no entitlement to these. Even upon request, police and government record-keepers have discretion to prohibit a victim's access to these records.

> *YCJA, supra* para 4 at s 119(1) **at** Tab 4 of WK's Book of Authorities
> *SL v NB, supra* para 4 at para 48 **at** Tab 5 of WK's Book of Authorities

[13] When a party seeks access records for a purpose that will expose those records, or their contents, to a broader audience, the Court is to consider the matter under section 119(1)(s), even where that party is also a victim. "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."

> *R v SF*, 2007 ONCJ 577 at para 25, 8 OR (3d) 304 [*SF*] (emphasis added) **at** Tab 6 of WK's Book of Authorities

[14] The Applicant seeks access to the records for a purpose which will expose the document or its contents to a broader audience. If the access period is open, the Applicant must demonstrate:

1. a valid interest in the record; and
2. that access is desirable in the interest of the proper administration of justice.

YCJA, supra para 4 at s 119(1)(s) **at** Tab 4 of WK's Book of Authorities

d) Where Period of Access is Closed

[15] After the close of an access period, records may only be accessed pursuant to section 123. This section establishes a different and more stringent test for access, which has been summarized by the youth justice court as follows:

> [T]he youth court judge must be satisfied, before any access may be ordered to all or part of a record kept under sections 114 - 116 of the YCJA or copy of the record or part provided to the applicant, that each of the following criteria have been met:
>
> 1. that those entitled to notice of the application under s.123(3) of the Act have been properly served with the application and the evidence in support of it and given the fair opportunity dictated by s. 123 to be heard in the application, unless the youth court judge has waived such notice applying the criteria of 123(4); and
> 2. that the applicant has "a valid and substantial interest in the record or part"; and
> 3. that it is necessary for access to be given to the record or part in the interest of the proper administration of justice; and
> 4. that 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.

YCJA, supra para 4 at s 123(3) and 123(1)(a) **at** Tab 4 of WK's Book of Authorities

JD (Re), 2009 ONCJ 505 at para 35, 182 ACWS (3d) 57 [*JD*] (emphasis in original) **at** Tab 7 of WK's Book of Authorities

[16] An access order under section 123 is an exercise of judicial discretion. Even where the Applicant is a victim, there is no general entitlement to any part of the record once

the access period for that record has elapsed. The Applicant must successfully discharge his burden under the test outlined below.

e) The Tests Cannot be Conflated

[17] The tests outlined in sections 119(1)(s) and 123 are distinct. The test under section 119(1)(s) is only available when the access period is open. When the access period is closed, the application cannot be advanced under s. 119(1)(s).

2. APPLYING THE TEST

[18] The correct application of either test requires the use of broader principles of the *YCJA* as a lens. These principles are found in the *Preamble* to the *YCJA*, principles of international law, the application of international law principles to domestic law by the Supreme Court of Canada and the *YCJA*'s Declaration of Principle.

A. Correctly Interpreting the Provisions of the *YCJA*

i. The *Preamble* and International Law

[19] The significance of the *Preamble* to the *YCJA* cannot be ignored. It is well known that "[t]he preamble of an enactment shall be read as part of the enactment intended to assist in explaining its purport and object." The *Preamble* contains a clear statement of Parliament's intention in enacting the Act.

Interpretation Act, RSC 1985, c I-21, s 13 **at** Tab 1 of WK's Book of Authorities

[20] The *United Nations Convention on the Rights of the Child* ("UNCRC") is referenced in the *Preamble* to the *YCJA*. As a signatory to the UNCRC, Canada has pledged to conform

to certain international standards for the treatment of children. While Canada has not formally adopted the UNCRC into domestic law, the Supreme Court has determined that:

> [T]he values reflected in international human rights law may help inform the contextual approach to statutory interpretation[.] As stated in R. Sullivan, Driedger on the Construction of Statutes[:]
>
> > [T]he legislature is presumed to respect the values and principles enshrined in international law[.] These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred.

Baker v Canada (Minister of Citizenship and Immigration) [1999] 2 SCR 817 at para 70, SCJ No 39 **at** Tab 8 of WK's Book of Authorities

[21] The UNCRC thus assists as an interpretive tool when analyzing the body of the statue itself. Article 40 of the UNCRC specifically addresses penal law as it relates to young people. Article 40(2)(b) states:

> ***Article 40***
>
> ...
>
> 2. ... States Parties shall, in particular, ensure that:
>
> ...
>
> (b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:
>
> ...
>
> (vii) To have his or her privacy fully respected <u>at all stages</u> of the proceedings.

Convention on the Rights of the Child, 28 May 1990, 1577 UNTS 3 art 40(2)(b) (entered into force 2 September 1990, ratified by Canada 13 December 1991) (emphasis added) **at** Tab 14 of WK's Book of Authorities

[22] Similarly, the *United Nations Minimum Rules for the Administration of Juvenile Justice* ("Beijing Rules") have been used as an interpretive tool. These Rules were adopted by the General Assembly on November 29, 1985 and set out desirable principles and practices for the administration of juvenile justice systems. Further, the Rules represent international consensus on the minimum conditions for treatment of young people in criminal justice systems.

> *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*, GA Res 40/33, UNGAOR, 1985, UN Doc A/RES/40/33 ["Beijing Rules"] **at** Tab 15 of WK's Book of Authorities

[23] Rule 8 of the Beijing Rules addresses young persons' right to privacy in the context of criminal justice proceedings:

> **8. Protection of privacy**
>
> 8.1 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.
>
> 8.2 In principle, no information that may lead to the identification of a juvenile offender shall be published.
>
> Commentary
>
> Rule 8 stresses the importance of the protection of the juvenile's right to privacy. Young persons are particularly susceptible to stigmatization. Criminological research into labelling processes has provided evidence of the detrimental effects (of different kinds) resulting from the permanent identification of young persons as "delinquent" or "criminal". Rule 8 stresses the importance of protecting the juvenile from the adverse effects that may result from the publication in the mass media of information about the case (for example the names of young offenders, alleged or convicted). The interest of the individual should be protected and upheld, at least in principle.

> Beijing Rules, *supra* para 22 **at** Tab 15 of WK's Book of Authorities

[24] Further, Rule 21 of the Beijing Rules speaks specifically about youth records:

21. Records

21.1 Records of juvenile offenders shall be kept strictly confidential and closed to third parties. Access to such records shall be limited to persons directly concerned with the disposition of the case at hand or other duly authorized persons.

21.2 Records of juvenile offenders shall not be used in adult proceedings in subsequent cases involving the same offender.

Commentary

The rule attempts to achieve a balance between conflicting interests connected with records or files: those of the police, prosecution and other authorities in improving control versus the interests of the juvenile offender.

Beijing Rules, *supra* para 22 **at** Tab 15 of WK's Book of Authorities

[25] The Supreme Court of Canada ("SCC") has referenced the UNCRC and Beijing Rules to help resolve matters of statutory interpretation involving the *YCJA*. In particular, the SCC has noted the significance of the *Preamble*'s reference to the UNCRC and, in each instance, has used the UNCRC as an interpretive tool in its findings regarding the intent of the *YCJA*. For example:

a. Bastarache J turned to the UNCRC to inform his finding that Parliament intended to restrict the use of custody

R v CD; R v CDK, 2005 SCC 78 at para 35, 3 SCR 668 **at** Tab 9 of WK's Book of Authorities

b. Abella J found evidence of "diminished moral culpability" as a Canadian legal principle, and principle of fundamental justice, in the UNCRC.

R v DB, 2008 SCC 25 at para 60, 2 SCR 3 [*DB*] **at** Tab 10 of WK's Book of Authorities

c. Fish J turned to the UNCRC as support for his finding that Parliament has sought to provide enhanced procedural protections and minimally interfere with the personal freedom and privacy of young people.

R v RC, 2005 SCC 61 at para 41, 3 SCR 99 **at** Tab 11 of WK's Book of Authorities

[26] Just as the UNCRC has been referenced by the SCC to help resolve matters of statutory interpretation involving the *YCJA*, so too have the Beijing Rules. For example, Abella J cited the Beijing Rules when addressing the nature of the Act's privacy protections and ultimately decided that the onus to lift a publication ban of a young person's identity must always fall on the Crown as part of the rights guaranteed under section 7 of the *Charter of Rights and Freedoms*, even when that young person is subjected to an adult sentence.

DB, supra para 25b at para 85 **at** Tab 10 of WK's Book of Authorities

ii. <u>The Declaration of Principle of the *YCJA*</u>

[27] The Declaration of Principle is included in the body of the *YCJA*, thus has direct statutory effect. Subsection 3(2) requires that the contents of the Declaration of Principle be the interpretive lens for every other section and areas of the *YCJA*. This subsection is a "reminder from Parliament" that "instructs youth justice courts that in cases of ambiguity involving the interpretation of the Act's provisions, an interpretation that favours the fundamental principles found in section 3 is <u>always</u> to be given precedence."

YCJA, supra para 4 at s 3(1)(2) **at** Tab 2 of WK's Book of Authorities

Brock Jones, Emma Rhodes & Mary Birdsell, *Prosecuting and Defending Youth Criminal Justice Cases: A Practitioner's Handbook*, vol 1 (Toronto: Emond Montgomery Publications, 2016) ch 1 at 9 [Jones, Rhodes & Birdsell, "Chapter 1"] **at** Tab 16 of WK's Book of Authorities

B. Applying both Tests to the Applicant's Request for Access

i. Threshold Issues: The *Rules of Civil Procedure*, *DP v Wagg* and Cases decided under the *Young Offenders Act ("YOA")*

[28] In his Factum, the Applicant relies, in part, on Rule 30.10 of the *Rules of Civil Procedure* and the analysis in *DP v Wagg* ([2004] OJ No 2053 (Ont Ca)) to establish an entitlement to access the records. He states: "it would be unfair for the Applicant to proceed to trial without having discovery of police, fire and Crown records." Further, the analysis outlined in *DP v Wagg* does not apply with respect to determining whether the Applicant has met either of the *YCJA*'s tests for access.

> Factum 1, *supra* para 2a at at para 12
> *SF, supra* para 13 at para 9 **at** Tab 6 of WK's Book of Authorities

[29] **Fairness is not the test.** Rule 30.10, or any other Rule of the *Rules of Civil Procedure*, do not apply and are not relevant on an Application for records protected by the *YCJA*. "The language of s. 118 and the comprehensiveness of the [records access] scheme itself demonstrate that Parliament intended that access to the records could be gained only through the [*YCJA*]."

> *SL v NB, supra* para 4 at para 52 **at** Tab 5 of WK's Book of Authorities

[30] Two of the four cases that the Applicant relies on (*MP* and *Saskatoon*) were adjudicated under the *Young Offender's Act* ("*YOA*"), the predecessor legislation to the *YCJA*. Cases that rely on the *YOA* must be read with caution. While the text of some provisions of the *YOA* may be similar or the same, youth court justices would not have been required to balance young persons' privacy rights to the extent contemplated by the *YCJA*. Further,

> Much criticism had been levelled at the predecessor statute ... for lacking a clear and guiding set of values and principles.
>
> Jones, Rhodes & Birdsell, "Chapter 1," *supra* para 27 at 3 **at** Tab 16 of WK's Book of Authorities

> Rather than reflecting a clear and consistent philosophy, with ranked priorities, the *YOA* attempted to address wide-ranging concerns that were sometimes inconsistent. Consequently, it's provisions would prove a challenge to interpret.
>
> Sherri Davis-Barron, *Canadian Youth & the Criminal Law: Once Hundred Years of Youth Justice Legislation in Canada*, (Toronto: LexisNexis Canada, 2009) ch 1 at 57 **at** Tab 18 of WK's Book of Authorities

[31] As a result, cases decided under the repealed legislation fail to reflect the important changes brought about by the enactment of the *YCJA*. It may be that if the interpretive lens outlined by the *YCJA* were applied to *MP* and *Saskatoon*, access may not have been granted.

ii. Applying the Tests

[32] The *YCJA* protects youth records, whether any such record is within or without of an access period. It is not known if any records corresponding to the Respondent are in or outside of an access period. Consequently, the analysis below will examine the Applicant's access request using both statutory frameworks.

iii. If the Period of Access is **Open**: Subsection 119(1)(s)

[33] While the Applicant states that he is a victim in relation to the July 31, 2014 fire, he admits that his purpose in seeking the records is to "provide factual details that would assist the Applicant in defending the civil claim." Additionally, he states that "without access ... there will virtually be no information or evidence to defend himself against the allegations made by I-Hsiu (John) Huang in relation to the civil action commenced as

against him" and "the same will be true with respect to the Applicant's action as against the young persons and their parents/guardians wherein he seeks to recover damages ..."

Factum 2, *supra* para 2d at para 1(f)
Factum 2, *supra* para 2d at paras 44, 46-47.

[34] When a party seeks access records for which the access period open and for a purpose that will expose those records, or their contents, to a broader audience, the Court is to consider the matter under section 119(1)(s). This is so even where the party seeking access is also a victim.

SF, supra para 13 at para 25 **at** Tab 6 of WK's Book of Authorities

[35] Consequently, the Applicant must demonstrate:

1. a valid interest in the record; and
2. that access is desirable in the interest of the proper administration of justice.

YCJA, supra para 4 at s 119(1)(s) **at** Tab 4 of WK's Book of Authorities

[36] The Applicant has not met the test for access under subsection 119(1)(s). It is the Applicant's position that "the jurisprudence is clear that victims of an offence who later institute civil proceedings in relation to the crime/alleged crime committed by the young person have a valid interest in records kept under sections 114, 115 and 116 of the *YCJA*."

Factum 2, *supra* para 2d at para 45

[37] As mentioned, the Applicant relies on four cases to establish this position: *ZW*, *SF*, *MP* and *Saskatoon*. *SF* is distinguishable as the Respondent in that case consented to the

applicant's access request. *MP* and *Saskatoon* are not of assistance as they were determined under the *YOA*.

[38] With respect to *ZW*, it is the Respondent's position that the Applicant mischaracterizes the law which flows from *ZW*. The initiation of a civil proceeding subsequent to a youth criminal justice proceeding does not create a presumption that there is a valid interest in any related records kept under sections 114, 115 and 116. . Rather, the Superior Court of Justice has remarked that *ZW* stands as an example where "the privacy concerns of a young person under the YCJA were found to limit the evidentiary rights of a litigant involved in ordinary civil litigation."

> *Toronto (City) Police Service v LD*, 2016 ONSC 5500 at para 25, OJ No 4547 (emphasis added) **at** Tab 12 of WK's Book of Authorities

[39] While a "valid interest" has been held to include civil proceedings, the Court must be satisfied that the records contain information that would assist the specific applicant with their specific litigation.

> *R v ZW*, 2016 ONCJ 490 at para 65, OJ No 4254 [*ZW*] **at** Tab 13 of WK's Book of Authorities

[40] As stated by Katarynych J in *JD (Re)* 2009 ONCJ 505 ("*JD*"):

> **84** It is plain from a careful read of Part VI of the YCJA set in the context of the Act as a whole that access to records protected by Part VI cannot be given for the purpose of fishing expeditions. To permit that would be to eviscerate the protection of privacy and anonymity that is central to the Part VI scheme for records access.

> *JD, supra* para 15 at para 84 **at** Tab 7 of WK's Book of Authorities

[41] Further, a valid interest does not alone satisfy the test. "The fact that the record may be useful in some way in the litigation is not sufficient to dispose of the question."

When determining whether access is desirable in the interest of the proper administration of justice, "the court must begin with the analytical context."

ZW, supra para 39 at para 41 **at** Tab 13 of WK's Book of Authorities

[42] In *ZW*, the Court weighed the young person's privacy interest by making reference to the Declaration of Principle in the *YCJA*, as well as *Preamble*'s reference of the UNCRC, and concluded that the "proper administration of justice includes protecting the privacy of young persons."

ZW, supra para 39 at para 55 **at** Tab 13 of WK's Book of Authorities

[43] In *ZW*, the applicant had particularized her access request. By doing so, she established the existence of a direct link, or nexus, between the information sought and a specific issue relevant in the civil litigation. As outlined by Cohen J:

> **15** ... In particular, the applicant seeks access to information contained in the report which relates to the young person's "propensity for violence." She proposes that other portions of the report not relating to that issue may be redacted.
>
> ...
>
> **66** The applicant is suing the operators of a group home for youth. The defendant in the lawsuit pleads that
>
> > At all times this defendant had no knowledge, actual or constructive, of any possible physical harm occurring to the plaintiff from the co--defendant.
>
> **67** The plaintiff/applicant, for her part, pleads that
>
> > "[T]he defendant had the Plaintiff transport [Z-W] pursuant to its obligations under a service agreement whereby it provided contract services to third parties unknown to the Plaintiff."

> **68** From these pleadings it would appear one issue in the litigation is the defendant's knowledge of the background of the young person, and whether the defendant did know, or should have known, that the young person's behavior might pose a risk to by anyone in authority transporting her.
>
> **69** The pre-sentence report can provide the applicant with information relating to the identities of possible third parties who may have had relevant information at the material time. Access to this information will assist the process of discovery, and serve the truth-seeking function of the litigation.

ZW, supra para 39 at paras 66-69 **at** Tab 13 of WK's Book of Authorities

[44] The applicant's particularization of the information sought and demonstration of a nexus between that information and an issue live in her civil proceeding allowed Cohen J to find that "the applicant in this case has a strong but limited interest." There was no conjecture or speculation with respect to what the sought record might offer.

ZW, supra para 39 at para 65 (emphasis added) **at** Tab 13 of WK's Book of Authorities

[45] In the case at bar, the Applicant seeks the records below on the grounds that he requires this documentation due to "his commencement of civil proceedings, as well as his defence of civil proceedings commenced against him in relation to the July 31, 2014 fire." He further pleads that "but for the acts and omissions of one of the defendants, or all of the defendants, or some combination of the defendants, the fire would not have occurred or, if ignited, could have been contained."

Factum 2, *supra* para 2d at paras 44 and 47
Statement of Claim, para 13 at Tab 2A of the Applicant's Supplemental Application Record

[46] The records sought are as follows:

1. Access to Youth Criminal Court Records that arise as a result of fire giving rise to the actions herein.

2. All unedited documentation in the possession of the Toronto Fire Services and Office of the Fire Marshal regarding the fire giving rise to the actions herein.

3. All unedited documentation in the possession of the Toronto Police Service giving rise to the actions herein.

4. An unedited copy of the entire Crown Brief regarding the fire giving rise to the actions herein.

Fresh as Amended Notice of Application, at paras 1(a)-1(d) at Tab 1 of Applicant's Supplemental Application Record (emphasis added).

[47] However, the Applicant has failed established a precise nexus between any specific record and specific issues arising in the context of his civil proceedings. He has not particularized his access request beyond the blanket statements outlined in paragraph 45 of this factum. Importantly, there is no evidence that the Applicant's interest sufficiently displaces the Respondent's privacy right.

[48] It is the Respondent's position that the Applicant fails to meet the test under section 119(1)(s) of the *YCJA*. Even if his interest in the records is valid, the Applicant has not established that access is desirable in proper administration of justice. The Application for any records corresponding to the Respondent that are within an open access period should, therefore, be denied.

iv. If the Period of Access is **Closed**: Section 123

[49] As stated above, the test outlined in section 123 are distinct from that outlined in subsection 119(1)(s). After the close of an access period, records may only be accessed by meeting the test established under section 123. As summarized by Katarynych J in *JD*:

> **39** ... Access to a record that is "desirable" in the interest of the proper administration of justice is not synonym for access that is "necessary". Section 123 rests nothing in "desirability". Access to a record because the interest in it is shown to be valid is not enough under s. 123 of the Act. An interest in a record that is "valid" may or may not rise to the level of an interest that is both "valid" and "substantial. Moreover, the task in an application under s. 123 is to show that it is "necessary" for access to be given to the record or part of it in the interest of the proper administration of justice.

JD, supra para 15 at para 84 (emphasis in original) **at** Tab 7 of WK's Book of Authorities

[50] In addition to establishing that his interest in access is valid, an Applicant must show that it is also substantial, and necessary for the proper administration of justice in order to benefit from an exception to the Respondent's privacy rights. Whether the interest is substantial and necessary depends on the Applicant's evidence.

JD, supra para 15 at para 40 (emphasis in original) **at** Tab 7 of WK's Book of Authorities

[51] The Applicant has not established necessity. The Applicant does not provide any evidence other than a Subpoena to Witness, a Toronto Fire Services Emergency Incident Report, and four affidavits. None of these documents demonstrate that the records sought are the sole means by which the Applicant can obtain information that is relevant for the civil litigations. The Respondent is a party in those litigations, and may be compelled to testify during the discovery process. The Applicant has provided no evidence which establishes that access to the Respondent's records is the only way to defend the claim made against him, or advance the claim he is bringing.

[52] The broad nature of this request lends itself to scrutiny as the type of "fishing expedition" prohibited by Katarynych J in *JD*.

JD, supra para 15 at para 84 **at** Tab 7 of WK's Book of Authorities

[53] It is the Respondent's submission that the Applicant fails to meet the test under section 123 of the *YCJA*. The Applicant has not provided the evidentiary basis required by *JD*, has not demonstrated that his interest is valid and substantial, and that access is necessary for the proper administration of justice. The Application for records corresponding to the Respondent that are within a closed access period should, therefore, be denied.

v. The Issue of Prejudice or Harm

[54] The Applicant states that the "John Doe Respondents have not demonstrated that access to the requested records would result in any prejudice to them in relation to the civil actions commenced as against them as a result of the July 31, 2014 arson."

Factum 2, *supra* para 2d at paras 44, 46-47.

[55] The law does not require the Applicant to demonstrate prejudice. The separate criminal justice system for young people is founded upon the principle that young people possess diminished moral culpability relative to their adult counterparts. As such, young people dealt with under the *YCJA* are entitled to enhanced procedural protections, which include the right to privacy. The presumptive, unequivocal and unqualified privacy right finds its basis in the fact that violations of privacy with respect to a young person's involvement in a criminal justice system hinders rehabilitation and reintegration. The Applicant must show his interest as sufficiently valid, or valid and substantial, that it displaces the Respondent's pre-existing privacy interest.

YCJA, *supra* para 4 at s. 3(1)(b)(iii) **at** Tab 2 of WK's Book of Authorities

3. IF ACCESS ORDERED

A. Disclosure Distinct from Access

[56] Even if this Honourable Court finds a basis upon which to order access, it will recall that Section 129 of the *YCJA* states:

> 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.

YCJA, supra para 4 at s129 **at** Tab 4 of WK's Book of Authorities

[57] This provision demonstrates Parliament's intent to "protect young persons' privacy interests by limiting dissemination of the information in the records even after access is granted." Even if the Applicant were to meet the test for access, this does not mean that "they are entitled to reveal the [documents'] content to others in the context of civil litigation[.]"

SL v NB, supra para 4 at para 43 **at** Tab 5 of WK's Book of Authorities
SF, supra para 13 at para 25 **at** Tab 6 of WK's Book of Authorities

B. Disclosure Under s. 119(1)(s)

[58] If the access period is open, and the Applicant has met the test under section 119(1)(s), access may be granted "to the extent directed by the judge." The "extent" to which the youth justice court orders disclosure is specific to the nature of the particular record sought, and the nature of the content within. In *ZW*, for example, Cohen J was required to consider the extent to which information "almost entirely derived" from a child protection file can be disclosed in the context of an order for access under section 119(1)(s). She found that the youth justice court did not have jurisdiction to order

access to child protection records, and limited access to portions of the record that were not based on information from child protection files.

YCJA, supra para 4 at s 119(1)(s) **at** Tab 6 of WK's Book of Authorities
ZW, supra para 39 at para 65 **at** Tab 13 of WK's Book of Authorities

C. Disclosure Under s. 123

[59] If the access period is closed, and the Applicant has met the test under section 123, the Act requires that the Court set out the purposes for which the record may be used. In determining the purposes of disclosure, the youth justice court may consider whether it should first release the records to the Crown first, solely for the purpose of allowing the Crown to review them and assess what, if any, concerns it has about their release.

YCJA, supra para 4 at s123(5) **at** Tab 4 of WK's Book of Authorities
Andrea E. E. Tuck-Jackson, "Accessing Police Records Under the Youth Criminal Justice Act" (2015) 19 Can Crim L Rev 83 at 92-93 (WL Can) **at** Tab 19 of WK's Book of Authorities

D. Opportunity to Make Submissions Required

[60] Should this Honourable court determine that access should be provided, the Respondent will request access to their record under section 124 of the *YCJA* to review the same and allow counsel to prepare submissions with respect to:

1. The extent or purpose for disclosure, depending on whether access is ordered under section 119(10(s) or 123; and

2. Any redactions to be made.

YCJA, supra para 4 at s 124 **at** Tab 4 of WK's Book of Authorities
SL v NB, supra para 4 at para 62 **at** Tab 5 of WK's Book of Authorities

IV. COSTS

[61] The Respondent does not seek costs and requests that none be awarded against them.

V. ORDER REQUESTED

[62] The Respondent requests that the Applicant's Application access to their records be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 28th day of September, 2016

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