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ONTARIO COURT OF JUSTICE

VIA Fax Only

TO:

From: C/O JUSTICE E. MURRAY
this one)

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17 pages.

Date Sent: March 11, 2011

Re: R.M. v TPS cc:

RE: R.M. v TPS et. al.

Counsel:
Attached please find Justice E. B. Murray decision on the above noted court matter.

As a result, the **telephone conference call** scheduled for March 14, 2011 at 2:00 p.m. **is CANCELLED.**

If you have any questions, please do not hesitate to the Judicial Secretaries at 416-327-6891

THANK YOU.

WARNING

The court hearing this matter directs that the following notice should be attached to the file:

This is a case under the *Youth Criminal Justice Act* and is subject to subsections 110(1) and 111(1) and section 129 of the Act. These provisions read as follows:

> **110.**—(1) Subject to this section, no person shall publish the name of a young person, or any other information related to a young person, if it would identify the young person as a young person dealt with under this Act.
>
> . . .
>
> **111.**—(1) Subject to this section, no person shall publish the name of a child or young person, or any other information related to a child or a young person, if it would identify the child or young person as having been a victim of, or as having appeared as a witness in connection with, an offence committed or alleged to have been committed by a young person.
>
> . . .
>
> **129.**— No person who is given access to a record or to whom information is disclosed under this Act shall disclose that information to any person unless the disclosure is authorized under this Act.

Subsection 138(1) of the *Youth Criminal Justice Act,* which deals with the consequences of failure to comply with these provisions, states as follows:

> **138.**—(1) Every person who contravenes subsection 110(1) (identity of offender not to be published), 111(1) (identity of victim or witness not to be published) . . . or section 129 (no subsequent disclosure) . . .
>
> (*a*) is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years; or
>
> (*b*) is guilty of an offence punishable on summary conviction.

Toronto Region

ONTARIO COURT OF JUSTICE

sitting under the provisions of the *Youth Criminal Justice Act*, S.C. 2002, c. 1

B E T W E E N :

Her Majesty the Queen

— AND —

R. M.

(Applicant)

- AND –

Toronto Police Service, William Blair,

Police Constable Eckersall, Police Constable, Groff,

Police Constable Kellar

Attorney General of Ontario & Attorney General of Canada

(Respondents)

Before Justice Ellen B. Murray

Heard on March 1, 2011

Decision released on March 11, 2011

Ms. Debra Rosenberg..... for the Provincial Crown
Mr. Selwyn A. Pieters ..... counsel for the Applicant
Ms. Lisa Cable ..... for the Toronto Police Service
Mr. Roy Lee.....for the Departmen of Justice Canada

MURRAY, E. B. J.:

[1] R.M. has brought a claim before the Human Rights Tribunal, alleging that that he was a victim of racial profiling by the Toronto Police Service. He applies to this court under sections 119, 123 and 124 of the Youth Criminal Justice Act (YCJA), requesting access to his youth records relating to investigations and ar-

rests which occurred in 2007 and 2008. He asks that he and other parties in the Tribunal proceeding be permitted to use these records. In light of a decision which held that the provisions of section 119(4) of the YCJA constitute a complete prohibition against a young person's access or use of records of extrajudicial measures (other than extra-judicial sanctions)[1], R.M. asks the court to find that this provision is unconstitutional on the facts of this case, in that it infringes his rights under sections 7 and 15 of the Charter and cannot be sustained by virtue of section 1.

[2] An order was made by the Tribunal on November 26, 2010, which provided that the Tribunal will use initials to identify R.M. in its decisions and correspondence. The Tribunal in making the order took into account the provisions of the YCJA which protect the privacy of young persons.

[3] . My review of the YCJA records relating to R.M. indicates that there are records dealing with extrajudicial measures[2] related to R.M., as well as records of withdrawals of charges against him.

[4] This is my decision on R.M.'s application.

[5] The Crown, the Toronto Police Service, and the Attorney General of Canada responded to R.M.'s application. All parties agree that :

- R.M. should have access to all records he requests, including records of extrajudicial measures (which I shall refer to as EJMs).
- R.M. should have the right to disclose these records in the Tribunal proceeding.
- Other parties to the Tribunal proceeding should also have the right to access and disclose those records in that proceeding.

[6] The parties disagree on the basis for an order allowing R.M. the right to access and disclose records of EJMs. The disagreement will be more easily understood after I describe the relevant statutory provisions and competing judicial views about the issue of authority under the Act to allow a young person to access and to disclose the records of EJMs applying to him.

[7] First, some context. The YCJA provides young people with a number of protections not accorded to adults. One of those protections are provisions which severely restrict access to a young person's youth record. In S.L. v. N.B., (2005) O.J. 1411, Justice Doherty, speaking for the Court of Appeal, observed that the provisions dealing with access to and use of youth records clearly demonstrate an

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[1] Ontario (Human Rights Commission) v. Toronto Police Services Board, (2008) O.J. 4546 (C.J.)

[2] Under the Act, the term "extrajudicial measures" includes extrajudicial sanctions. Records of extrajudicial measures other than extrajudicial sanctions receive a different treatment than records of extrajudicial sanctions alone. In this decision, when I refer to extrajudicial measures or EJMs, I mean extrajudicial measures other than extrajudicial sanctions.

intention to "maintain a tight control" over all such records, whether they were kept by the court, the Crown or the police. Justice Doherty stated: "Generally speaking, access to those records is limited to circumstances where the efficient operation of the young offender system, or some other 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.

[8] In R v. R.L., 2008 ONCJ 29, Justice Cohen emphasized the particular importance of protecting records of EJMs from unauthorized access. The Act defines extrajudicial measures as "measures other than judicial proceedings... used to deal with a young person alleged to have committed an offence". A police caution or a warning to a young person detained during an investigation is an extrajudicial measure. Justice Cohen pointed out that records of EJMs are records of mere allegations, allegations that have never been tested in court and for which a young person has not accepted responsibility. As Justice Cohen observed, records of EJMs are "inherently unreliable".

THE LEGISLATION

[9] Part 6 of the Act deals with "Publication, Records and Information" in sections 110-128. I set out or describe the provisions of this part that are relevant to the issue below.

[10] A "record" is defined as "anything containing information" in any form form "that is created or kept for the purposes of this Act or for the investigation of an offence that is or could be prosecuted under this Act".

[11] S. 114-116 set out the records that may be kept. They are comprised of youth court records (s. 114), police records (s. 115), and other government records (s. 116— e.g., records created for the purpose of administering a youth sentence).

[12] S. 118 (1) provides that:

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

[13] S. 119 (2) creates "access periods" of varying lengths to records, from 2 months to five years. The length of the access period increases with the seriousness of the young person's encounter with the justice system. For example, the access period for the record of a young person who is found guilty but merely reprimanded is two months, while the access period for a finding of guilt on an indict-

able offence is 5 years.

[14] S. 119(2) does not create an access period to records of EJMs; no mention is made of EJMs in this subsection.

[15] S. 119(1) sets out 19 categories of persons who *shall* be given access to youth court records, and who *may* be given access to records of police and other government agencies. However, access under this section may only be given if the request is made within the access period set out in s. 119(2) that governs the record in question.

[16] The first category of person who is allowed access pursuant to s. 119(1) is "the young person to whom the record relates". The last category of recipient is described in s. 119(1)(s):

- any person or member of a class of persons that a youth justice court judge considers 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
  - (i) desirable in the public interest for research or statistical purposes, or
  - (ii) desirable in the interest of the proper administration of justice.

[17] S. 119(4), set out below, deals with access to records of EJMs:

4) Access to a record kept under section 115 or 116 in respect of extrajudicial measures, other than extrajudicial sanctions, used in respect of a young person shall be given only to the following persons for the following purposes:

- (a) a peace officer or the Attorney General, in order to make a decision whether to again use extrajudicial measures in respect of the young person;
- (b) a person participating in a conference, in order to decide on the appropriate extrajudicial measure;
- (c) a peace officer, the Attorney General or a person participating in a conference, if access is required for the administration of the case to which the record relates; and
- (d) a peace officer for the purpose of investigating an offence.

[18] S.123 deals with applications for access to records "after the end" of the access period set out in s. 119(2). It allows access

if the youth justice 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

[19] s. 123 (5) goes on to provide:

In any order under subsection (1), the youth justice court judge shall set out the purposes for which the record may be used.

[20] s. 124 provides:

"A young person to whom a record relates and his or her counsel may have access to the record at any time."

[21] Sections 125 and 127 deal with the right to of persons who have access to records to disclose the information in those records.[3] The Act provides that "disclosure means the communication of information other than by way of publication", and that "publication means the communication of information by making it known or accessible to the general public through any means, including print, radio, or televisions broadcast, telecommunication or electronic means".

[22] Sections 125 and 127 only apply to disclosure of records that still fall within the applicable access period. S. 125 identifies 6 specific categories of record recipients who may disclose for specified purposes. S. 127 deals with disclosure by court order made after application by the Crown, police or the provincial director, an application made in extreme circumstances to avoid risk that a young person may pose to others. No disclosure made be made after the access period.

[23] S. 129 provides:

"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."

[24] Part 6 of the Act also deals with "publication". Sections 110-113 deal with restrictions on publication of any information that would identify a young person as having been dealt with under the Act.

[25] S. 110(1) provides:

"Subject to this section, no person shall publish the name of a young person, or any other information related to a young person, if it would identify the young person as a young person dealt with under this Act."

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[3] I omit reference to s. 126, which deals with disclosure by archivists or librarians of non-identifying information.

Publication is permitted in some circumstances.

[26] S. 110(6) provides:

"The youth justice court may, on the application of a young person referred to in subsection (1), make an order permitting the young person to publish information that would identify him or her as having been dealt with under this Act or the Young Offenders Act, chapter Y-1 of the Revised Statutes of Canada, 1985, if the court is satisfied that the publication would not be contrary to the young person's best interests or the public interest."

[27] S. 110(3) provides.

"A young person referred to in subsection (1) may, after he or she attains the age of eighteen years, publish or cause to be published information that would identify him or her as having been dealt with under this Act or the Young Offenders Act, chapter Y-1 of the Revised Statutes of Canada, 1985, provided that he or she is not in custody pursuant to either Act at the time of the publication."

[28] Once publication takes place under the authority of these provisions, the protection that the Act provides for the information revealed vanishes. (S. 112)

RECORDS IN THIS CASE

[29] None of the records in this case are records within the records within the access period created by s. 119(2).

[30] Access to and use of the records of the withdrawn charges is governed by s. 123(1) and (5). I am satisfied and all parties agree that the application meets the test set out in s. 123(1) with respect to the records of withdrawn charges..

[31] The problem arises as to the authority to grant R.M. the right to access and to disclose the records of EJMs applying to him.

ACCESS BY A YOUNG PERSON TO EJM RECORDS

[32] S. 124 states that "A young person to whom a record relates and his or her counsel may have access to the record at any time".

[33] However, s. 119(4) on its face prohibits access to these records by the

young person. The section states that access "shall be given *only* [4]to the following persons for the following purposes." The young person who is the subject of the record is not one of the listed categories of persons.

[34] Two cases have dealt with this dilemma, and resolved the issue of access by the young person to his EJM record in different ways. Both cases concern young persons like R.M. who wished to access these records for use in complaints to the Human Rights Tribunal about their treatment by police. Both justices agreed that s. 123 does not provide an avenue for access, as that section only dealt with records which have an access period which has expired; EJMs have no access period specified.

[35] Justice James Blacklock in K.F. v. Peel Police Services Board, (2008) O.J. 3178, held that the provisions of s. 124 were more specific than s. 119(4), in that s. 124 " focuses on the precise situation of the circumstances that arise when the young person himself might initiate an access request for any document relating to him". He found that s. 124 creates a discretion for the court to allow access by a young person to the record, and held that discretion should be exercised in that case to allow access, in the interests of the 'proper administration of justice'. Justice Blacklock went on to find that s. 124 provided sufficient authority for him to allow disclosure by K.F. to other parties in the Tribunal proceeding, and to allow those parties to use the records in that proceeding.

[36] Justice Brian Weagant considered the issue in one application heard in two stages, Ontario (Human Rights Commission) v. Toronto Police Services Board, (2008) O.J. 4546, and Toronto Police Service Board et al v. S.M., Ontario Human Rights Commission, et al , an unreported decision delivered on December 23, 2009. In the first case, Justice Weagant held that although a young person has "an absolute right" to access his records under s. 124, that s. 118(1) and related sections of the Act would not authorize the disclosure of those records further, as would be required for participation in the Human Rights Tribunal proceeding.

[37] Justice Weagant found that there was a statutory gap as regards the right of a young person to gain access to and disclose records of EJMs relating to him.

[38] In the second case, the young person, S.M., brought a Charter application alleging that this impediment to access violated his s. 15 Charter rights, in that an adult would be able to access his records of his dealings with the criminal justice system for use in a hearing before the Human Rights Tribunal. Justice Weagant agreed that s. 119(4) was unconstitutional, on the facts of the case before him. Finding that he was not bound by s. 119(4), Justice Weagant ordered that S.M. and

[4] My emphasis

other parties be given access to the records, and permission to use the records in the Tribunal hearing, with further disclosure of those records being prohibited.

[39] Both Justice Blacklock and Justice Weagant agreed that it was perverse to believe that Parliament, in enacting the privacy provisions of the Act intended to protect young persons, had intended to disadvantage those same young persons in proceedings before the Human Rights Tribunal, proceedings intended to protect their rights. Justice Blacklock observed in the K.F. case:

> "To turn the concern for privacy, which was used as a shield for the young person, into a sword to be used against him in a way that limits the effectiveness of various protections that are provided to other citizens of this province makes no sense to me."

POSITIONS OF THE PARTIES

[40] R.M. relies upon the reasoning in the two cases of Justice Weagant. He argues that a finding of unconstitutionality of s. 119(4) should be made on the facts of the case before me, and that an order should issue allowing him access to all the records requested, including records of EJM's, and the right to disclose this information in the proceeding before the Tribunal. R.M. takes the position that the other parties to the Tribunal hearing should receive access to the records, and have the right to use them in the Tribunal hearing.

[41] The Toronto Police Service supports R.M.'s application. Counsel submitted that the route used by Justice Weagant— a finding of unconstitutionality and order for access and use by all parties—seems the only route which would allow the police to access and use the records in the Tribunal proceeding.

[42] The Crown submits that:

- S. 124 provides an absolute right of access by a young person to "the record" relating to him.
- No provision of the YCJA, including s. 119(4), states that access to "a record kept under s. 115 or 116 of extrajudicial measures, other than extrajudicial sanctions, used in respect of a young person " cannot be provided to the young person pursuant to s. 124.
- The court should follow the path of Justice Blacklock, and employ s. 124 to craft the appropriate order for access and use of the records by R.M. and other parties to the Tribunal hearing.
- In the alternative, if the court finds that s. 124 deals with access to but not disclosure of these records, then the court should rely upon s. 110(6). Crown counsel submitted, however, that this route was not to be preferred, as it gave the court no authority to place restrictions upon further disclosure of the records by anyone outside the Tribunal proceeding.
- As there is no statutory gap that prohibits disclosure of records of his EJMs

to a young person, there is no reason to consider the constitutional arguments advanced.

[43] Counsel for the Attorney General of Canada supports the argument of the provincial Crown as far as the proper use of either s. 124 or s. 110 to release the records. He requests that if the court does not see fit to make an order under either of these sections, that the constitutional argument be deferred so that the Attorney General can submit evidence.

ANALYSIS

[44] In order to address the problem presented by this case , one has to deal with the provisions of the Act governing both access to and the disclosure of records, including records of EJMs.

Access to records of EJMs

[45] Although Justice Weagant believed that s. 124 gives a young person the "absolute right" to access his records, Justice Blacklock identified a potential inconsistency between s. 119(4) and 124 as regards a young person's access to the record of EJMs applying to him.

[46] S. 124 says that a young person or his counsel *may* have "access to *the* record *at any time*"[5]. I consider the use of the term "may" here with the language of s. 119(1)(a), which provides that a young person *shall* have access to youth court records and *may* have access to police and other government records. I conclude that s. 124 gives a court discretion to allow a young person access to the record.

[47] It is notable that the provision does not prohibit a court from granting access to any part of "the record", including records of EJMs.

[48] The reference to access "at any time" I take to mean that access may be given whether the request is made within or outside the access periods prescribed by s. 119(2). The term access "at any time" is in contrast to the wording of s. 123(1), which allows access after the end of the access period only. That difference suggests that access may be permitted by a young person to a record even if there is no access period prescribed (as is the case with records of EJMs).

[49] However, it must be acknowledged that s.119(4) can be interpreted to

[5] My emphasis

deny young persons access to the records of EJMs. On its face, the section states that access to records of EJMs shall be given *only* to certain categories of persons for stipulated purposes. In R. v. R.L., (2008) O.J. 366, an application by an accused for access to the complainant's youth records, Justice Marion Cohen held that the section restricted access to records of EJMs to those persons specified in the section.

[50] Justice Blacklock employed the implied exception rule to find that there was no conflict between s. 124 and s. 119(4) . That rule holds that when two provisions are in conflict, and one deals specifically with the matter in question while the other has a more general application, then the conflict may be resolved by applying the more specific provision to the exclusion of the general provision.

[51] I agree with the latter approach.

[52] I start with the presumption that Parliament intended to draft legislation that is coherent, legislation that does not contain inconsistent provisions[6]. Justice Sopinka commented on this interpretive assumption in Willick v. Willick[7]: "With respect to the application of the contextualized approach...the objective is to interpret statutory provisions to harmonize with the components of legislation inasmuch as is possible, in order to minimize internal inconsistency." .

[53] Another related principle of statutory interpretation, noted by Professor Ruth Sullivan in Sullivan on the Construction of Statutes , dictates that a court, if possible, should employ an interpretation that does not involve absurd consequences[8]. Professor Sullivan states that traditionally "contradiction and internal inconsistency have been treated as forms of absurdity....Interpretations that produce confusion or inconsistency or undermine the efficient operation of a scheme may appropriately be labeled as absurd." Thus, an approach that avoids internal inconsistency is to be preferred, if available.

[54] Professor Sullivan explores different methods a court may employ to avoid inconsistencies, including the implied exception rule[9]. She acknowledges that a court may have to employ a "strained interpretation" of the words in the legislative text in attempting to avoid the absurdity of an internal inconsistency in legislation.[10]

[55] The key to the use of the implied exception rule is identification of which

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[6] The "principle of coherence" is discussed in Sullivan on the Construction of Statutes, Ruth Sullivan, LexisNexis ,2008, at p. 325 and following

[7] (1994) S.C.J. 94

[8] Ruth Sullivan, LexisNexis 2008, at p. 313

[9] Ibid, p. 343

[10] Ibid, p. 338

legislative provision is more specific and which is more general with respect to the issue in the case. Whether one finds that s. 119(4) or s. 124 the more specific provisions depends on the lens employed to view the issue. Is this case about access to EJMs? Or is it about access by a young person to "the record" in general, including records of EJMs?

[56] I prefer the lens used by Justice Blacklock. This approach allows both provisions to work together, and avoids an inconsistent interpretation.

[57] Such an approach is consistent with an important objective of the Act, the preservation of the privacy rights of a young person. It restricts access to these "inherently unreliable" records by individuals other than the young person himself to those individuals specified in s. 119(4).

[58] Such an approach also allows a court to grant young persons access to these records at any time, and is consistent with the values set out in the preamble to the Act, which acknowledge that young people have "rights and freedoms". As both Justices Blacklock and Weagant observed, it is inconceivable that Parliament intended a provision meant to protect a young person's privacy to handicap him in the defence of his rights in another forum such as the Human Rights Tribunal. There is no legitimate legislative goal that would be accomplished by such a restriction.

Disclosure of records of EJMs

[59] If I grant R.M. access to records of EJMs relating to him, do I have authority to allow disclosure of those records by him in the course of the Tribunal proceeding?

[60] The Act makes a distinction between access to a record and disclosure of a record to others. There are separate provisions dealing with access and with disclosure. The use of these records by R.M in the Tribunal proceeding requires that he have the right to disclose those records to the Tribunal as well as to the other parties to that proceeding. Due to the order made by the Tribunal, the documents and information, if disclosed for this purpose, would not identify R.M to the general public.

[61] Justice Weagant found nothing in s. 124 or elsewhere that authorized disclosure. He found that the restrictions imposed by s. 118 and related provisions prevented a young person who might gain access to the record under s. 124 from any use of that record that would involve disclosure. Justice Weagant observed that

there would be "no need to give the young person the exclusive, supplementary right to publish his own records once he turns 18" if s. 124 allowed him the right to disclose the record while under the age of 18.

[62] Justice Blacklock in essence found that, once access to the records was granted, that there was an implied power to control disclosure of the records and use by any parties of the records so disclosed.

[63] It is apparent that the Act does not deal with authorization of disclosure in a comprehensive fashion.

- The only provisions of the Act that explicitly deal with disclosure are ss. 125 and 127.[11] These provisions deal with disclosure of records only within the access period (s. 119(1) records) , and only to a small number of the many potential recipients of access to records referred to in s. 119(1).
- S. 119(1) itself contains no specific provision regarding disclosure of information obtained from a record by a person who may be given access. For some categories of recipient, the Act refers to purpose for which the recipient may gain access; for other categories, no purpose of access is identified.
- There is no provision with respect to the disclosure of records of EJMs by the persons entitled to access under s. 119(4). The purpose of access to those individuals is identified.
- S. 123, which deals with access to records with specified access periods after the end of that period, does not specify that an order allowing "disclosure" may be made. However, a court authorizing access may under s. 123(5) set out the permitted "use" of such records. The term "use" is not defined.
- S. 124 contains no provision dealing with disclosure.

[64] The issue of disclosure must be considered in the light of s. 129 and s. 118, which have the combined effect of prohibiting disclosure by the recipient of a record to any other person of the record or information in the record unless authorized under the Act.

[65] The term "disclose" is broadly defined in the Act: "communication of information other than by way of publication". Many forms of use of a record entail some disclosure.

[66] Many of the persons [12]allowed access to a record under s. 119(1) and 123

[11] Except for s. 126, which deals with non-identifying disclosure by librarians and archivists.
[12] By my count, 13 of the 19 categories of access recipients.

of the Act are not dealt with in the disclosure provisions (ss. 125 and 127) of the Act. Does this mean that a court may not permit these recipients to disclose the contents of the record further, and make an order structuring that disclosure?

[67] I do not think so.

[68] In my view, courts allowing access under s. 119(1) (in cases in which ss. 125 and 127 are inapplicable) and s. 123 rely on an implied necessary power to control and restrict disclosure of youth records.

[69] The doctrine of jurisdiction by necessary implication was addressed by Justice Bastarache in ATCO Gas Pipelines Ltd. V. Alberta (Energy & Utilities Board: [13] "the powers conferred by an enabling statute are construed to include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime created by the legislature".

[70] Courts dealing with applications under s. 119(1) and s. 123 for access to and use involving disclosure of records , in fact, routinely make orders setting out to whom records may be further disclosed and for what purpose, even in instances where there is no explicit authority for disclosure under s. 125 or127 of the Act. [14]

[71] Such disclosure orders are tailored to the specific purpose for which access and disclosure is granted.

[72] Sometimes that purpose may have been specified in the Act. For example, s. 119(1)(o) allows access to a person "for the purpose of carrying out a criminal record check required by the Government of Canada or the government of a province or a municipality for the purposes of employment or the performance of services". That provision anticipates disclosure of the information received, and an implied restriction on disclosure for other purposes.

[73] In other instances, the Act does not specify the purpose for which access to a record may be granted. S. 119(1)(a), which allows access to the young person is such an instance. So is s. 119 (1)(s) , which allows access to the persons referred to any person whom the court accepts has "a valid interest in the record" if access is "desirable in the interest of the proper administration of justice".

[74] In some situations, the purpose for which access is granted under s. 119 (1) may not require further disclosure. In others— for example, in cases in which a party to a civil action for negligence wishes to access a youth court record for use

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[13] (2006) S.C.J. 4

[14] E.g., R. v. S.F., 88 O.R. (3d) 304 (C.J.)

in that proceeding— the purpose for which access may be granted does require further disclosure. My view is that in such situations, the Act by implication authorizes the youth court, when allowing access, to make a further order structuring disclosure of the records.

[75] I am also of the view that s. 123(5), in allowing a court to make an order covering the "use" of records to which access is granted, by implication authorizes the court to allow and restrict disclosure of those records to other persons. In fact, courts allowing access to records under s. 123 routinely make such orders. [15]

[76] I do not read s. 110(3) as an indication that Parliament did not intend to allow a court to have the discretion to authorize a young person to disclose his record in appropriate circumstances. S. 110(3) grants a young person who has reached adulthood the absolute right to "publish" identifying information; s. 124 gives the court discretion to control not only access to but disclosure of the record in the case of a young person under 18 years of age.

[77] If a court grants a young person and his lawyer access to the young person's record of EJMs under s.124, I see no reason to find that s. 124 does not contains the same implied power to allow disclosure, if the purpose for granting access requires disclosure, and to structure that disclosure.

[78] The Crown in its response to the application submitted that s. 110(6) would also allow the court to permit further disclosure by R.M. of any records released to him, but that it was preferable to employ s. 124. This is because a s. 110(6) order does not allow the court to place any restrictions on subsequent disclosure or use of the records, while s. 124 does. I agree with the Crown's position.

[79] Given my view of the implied authority of the Court under s. 124 to give directions about use of the record, there is no need to consider the constitutional arguments raised by the Applicant.

[80] I direct that R.M. shall have access to the records produced, including records of EJMs, for use in Tribunal proceedings. These records shall be redacted to remove identifying information with respect to witnesses interviewed or third parties who are also the subject of the investigations concerned. All parties agree that disclosure by R.M. to other parties to the Tribunal hearing is a necessary correlative of his use of these records, and such further disclosure by him is authorized.

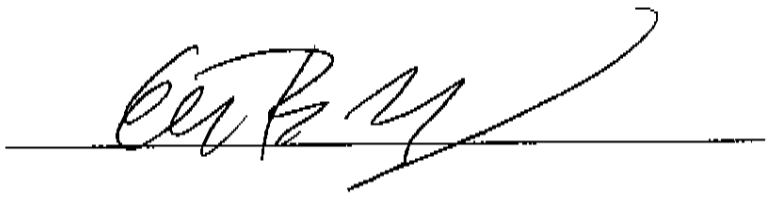
[81] This order authorizes R.M. and other parties to the Tribunal hearing to use these records in the hearing before the Tribunal. The officers of the Toronto Police

[15] Eg., Access to Youth Court Records(re), (2007) 161 A.C.W.S. (3d) 220 (Ont. C.J.)

Service identified in the records as having been involved in the investigation, arrest, or charging of R.M. are authorized in giving evidence before the Tribunal to disclose information in these records. [16]

[82] Counsel for the Applicant shall contact the court office to obtain copies of the redacted records.

Released : March 11, 2011



Signed: JUSTICE E. B. MURRAY

[16] A postscript: During the course of argument, it became apparent that R.M. might have attained the age of 18 years at the time of his application to this court. His counsel could not confirm this. If that was the case, under s. 110(3) of the Act, R.M. has an unfettered right to "publish" information that would identify him as having been dealt with under the YCJA. I chose not to follow this route, as I was not certain that R.M. had reached 18 at the applicable time.