

CITATION: *Canadian Broadcasting Corporation et al. v. The Attorney General of Canada*,
2026 ONSC 4049

COURT FILE NO.: CV-24-00732679-0000

DATE: 20260714

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: CANADIAN BROADCASTING CORPORATION, CTV NEWS, A DIVISION
OF BELL MEDIA INC., THE GLOBE AND MAIL INC. TORONTO STAR
NEWSPAPERS LIMITED and LA PRESSE, Applicants

AND:

THE ATTORNEY GENERAL OF CANADA, Respondent

BEFORE: Schabas J.

COUNSEL: Ryder Gilliland and Michael Robson, for the Applicants

Andrew Law, Katrina Longo and Adrian Zita-Bennett, for the Respondent

Deborah Krick and Emily Bala, for the Intervener the Attorney General of
Ontario

Candice Suter and Allie McMillan, for the Intervener Justice for Children and
Youth

Kevin Gray, for the Intervener M.J.

HEARD: February 9 and 10, 2026

REASONS FOR JUDGMENT

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Overview

- [1] This application by several major Canadian media companies seeks to strike down, as unconstitutional, ss. 119(1)(s) and 129 of the *Youth Criminal Justice Act*, S.C. 2002, c. 1 (the “YCJA” or the “Act”). These provisions, the applicants submit, unduly limit media access to youth court records and the media’s ability to report on their contents. The media argue that these sections infringe their “freedom of...expression, including freedom of the press and other media of communication”, protected by s. 2(b) of the *Canadian Charter of Rights and Freedoms*, and are not saved by s. 1 of the *Charter*.
- [2] The respondent, the Attorney General of Canada, concedes that s. 119(1)(s), in placing an onus on the media to satisfy the court that it should have access to youth court records, infringes s. 2(b), but submits that it constitutes a reasonable limit under s. 1 of the *Charter*. With respect to s. 129, which prohibits disclosure of any information in a youth court record other than when authorized under the Act, the respondent submits that it does not breach s. 2(b) of the *Charter* and, alternatively, is justified under s. 1. The interveners, which include the Attorney General of Ontario and the legal clinic, Justice for Children and Youth, support the respondent’s position.

- [3] For the reasons that follow, I find that both impugned provisions infringe s. 2(b) of the *Charter*. However, s. 119(1)(s) is a reasonable limit on freedom of expression saved by s. 1 of the *Charter*. Section 129 is not saved by s. 1 and is declared to be of no force and effect.

Factual context and earlier court decisions

The swarming case and proceedings involving it in youth court

- [4] This application arose after the media’s experiences in following youth court proceedings against eight teenage girls, all between 13 and 16 years old, who were charged with second degree murder after a man was swarmed and stabbed to death in downtown Toronto on December 18, 2022. The event shocked the city and attracted widespread public interest and media attention in Canada and around the world. The background is set out in the Court of Appeal’s decision in *R. v. Canadian Broadcasting Corporation*, 2024 ONCA 765, 443 C.C.C. (3d) 213 (“*CBC 2024*”), at paras. 19–38, a previous proceeding seeking court records regarding the swarming case that involved the same applicants, as well as *The New York Times*.
- [5] The media’s experience in that case raised a number of concerns. One is their inability to access records without judicial permission, required by operation of ss. 118 and 119 of the YCJA, and another is the inability to share information obtained from court records due to s. 129 of the YCJA.
- [6] The media submits that the YCJA prevents it from learning of court dates and hinders its ability to follow and report accurately on youth court proceedings. For example, in the swarming case, although the media attended the first court appearance of the accused on December 19, 2022, at which time matters were adjourned to December 29, the Crown agreed to move up the appearance for one of the accused to December 28, 2022, at which time a bail hearing was held for her. The media were not made aware of the change in date and did not attend on December 28.
- [7] Nor could the media have found out about the date change from the court office, which said it required the full name and date of birth of any young person in order to provide the next court date, which could only be known if the media had access to court records such as the Information (the formal charging document). Access to that court document, however, requires judicial permission pursuant to s. 119(1)(s).
- [8] On December 29, 2022, members of the media attended court, at which time the accused whose bail hearing had been held the previous day was released. When a CBC journalist went to the court office to ask for a copy of the court file so she could ascertain which young person had been released and how old she was, the journalist was advised that, pursuant to a “judicial directive”, only the *victim*’s name could be released. The CBC was told by the trial coordinator that obtaining any other information would require an application to the judge, on notice to the Crown.

- [9] The media application for access to youth court records was heard on January 13, 2023, and was decided by O’Connell J., the youth court judge, in reasons released on January 19, 2023: *Canadian Broadcasting Corporation v. Ontario*, 2023 ONCJ 32, 165 O.R. (3d) 381 (“*CBC ONCJ*”). The court ordered the release of redacted versions of the criminal Informations including a list of the criminal charges against all the accused young persons, bail release orders including bail conditions and terms, and the court file number. The judge also established a protocol to ensure the media were told of all court dates. The judge did not authorize the release of any exhibits at the bail hearing, but nor did the media request them at the time as the information in them could not be reported due to the publication ban on the bail hearings under s. 517 of the *Criminal Code*, R.S.C. 1985, c. C-46.
- [10] The media’s application took about three weeks to determine. This was relatively quick, it seems. In a similar case involving a violent crime and youth offenders in 2023 it took ten weeks before the media’s application was heard, and the decision was reserved for over six months: *Canadian Broadcasting Corp. et al. v. His Majesty the King et al.* released February 29, 2024, an unreported decision of P.D. Tetley J., Ontario Court of Justice, Court File No. Toronto 4810-998-23-Y4810858-00 4815-998-23-Y4810852-01; -02; -03; -04; -05 (the “Kennedy Station case”).
- [11] O’Connell J. applied s. 119(1)(s) of the YCJA which, she noted, puts an onus on the media to demonstrate that they have a “valid interest” in the records and that access to the records is “desirable in the interest of the proper administration of justice”: at para. 66. It was not disputed, and the judge accepted, that the media applicants – all of which were well-known large media organizations – had a valid interest in the records and the proceedings.
- [12] In considering whether access to unredacted records was desirable in the interest of the proper administration of justice, the youth court judge balanced the importance of the open court principle against the harm that would be caused to the young persons through inadvertent disclosure of information. As the youth court judge put it: “if the media is granted complete and unredacted access to the entire youth court file at stage of the court process, which includes the names and dates of birth of all of the young persons involved, videos, surety declarations, including names and addresses of sureties and parents, there is a risk of inadvertent or accidental dissemination of any or all of this private information”: *CBC ONCJ*, at para. 73. She continued, noting that if any of this “private information” was disseminated, “then the damage will be irreversible and cause irreparable harm, both to the young persons’ constitutionally protected privacy rights and their rights to a fair trial”: at para. 74. This risk, O’Connell J. said, was “not speculative, but real, given the speed at which information travels in the digital age”: at para. 75.
- [13] The youth court judge also found, essentially, that the media’s interest in accessing the file was limited because information about the bail hearing, other than the terms and conditions of release, could not be reported at that time due to a publication ban issued pursuant to s. 517 of the *Criminal Code*. She also required the media to bring formal applications going forward, should they seek to access additional documents.

The Superior Court decision

- [14] The media sought review of the youth court judge’s decision by way of *certiorari*, which was dismissed: *Canadian Broadcasting Corporation v. Ontario*, 2023 ONSC 4348, 534 C.R.R. (2d) 88. Akhtar J. also declined to hear the media’s application challenging the constitutionality of ss. 119(1)(s) and 129, among others, of the YCJA, stating that such a challenge should be brought in the youth court. He noted, among other things, at para. 55 that “the Youth Court holds a special position in YCJA proceedings and has exclusive jurisdiction over access issues. It is more than desirable that the initial inquiry and decision on these matters be argued, heard and decided in the court that administers youth justice,” citing Doherty J.A. in *S.L. v. N.B.* (2005), 252 D.L.R. (4th) 508, 195 C.C.C. (3d) 481 (Ont. C.A.).

The Court of Appeal decision

- [15] The media’s appeal to the Court of Appeal was dismissed: *CBC 2024*. Among other things, the Court of Appeal considered the onus placed on the media under s. 119(1)(s) and concluded at para. 82 that:

...the *Dagenais-Mentuck* test and its affirmation in *Sherman Estate* does not supplant the statutory regime in ss. 118 and 119 of the YCJA. The open court principle is a relevant consideration that should be given weight in determining whether a person should have access under s. 119(1)(s). As correctly found by the YC judge and SC judge, however, it is not the only valid consideration.

- [16] The Court of Appeal also agreed with the youth court judge that anyone seeking access under s. 119(1)(s) must do so by way of application on notice to the Crown and to the young persons affected. The Court of Appeal dismissed the media’s concern that requiring a motion or application was “unduly burdensome”, relying on Doherty J.A.’s decision in *S.L.* in which he stated that such a requirement does not create “significant practical difficulties”: at para. 92. The Court of Appeal also found “concerns about delay are speculative and not borne out on the facts of this case”: at para. 92. Gomery J.A. stated that the media “obtained an order granting them partial access to the Records less than a month after the Young Persons’ first court appearance” and found that there was “no evidence that the application process prevented the appellants from reporting on these proceedings in a meaningful and timely way”: at paras. 93-94. She also observed that “[t]he YC judge mitigated against undue delay going forward by ensuring that the appellants were notified of all appearance dates and by allowing them to submit any further applications through the court office”: at para. 94.
- [17] Finally, the Court of Appeal agreed with Akhtar J.’s decision not to hear the constitutional challenge, emphasizing the desirability of obtaining input from youth court judges. Ironically, the current application seeking a declaration of unconstitutionality comes to me directly, as such relief can only be obtained from a Superior Court. Thus, I do not have the benefit of youth court input that seemed to drive the decisions of Akhtar J. and the Court of Appeal in deciding not to hear the constitutional application earlier.

This application

- [18] This application for declaratory relief was commenced in December 2024. The media relied on the evidence of Jennifer Pagliaro, an experienced journalist with the Toronto Star who has spent many years covering the courts, including youth courts. Her affidavit described the challenges in covering the swarming case, as well as systemic challenges in covering youth courts due to the lack of ready access to court records.
- [19] These challenges include not being able to know when cases are coming before the court, and the inability to provide accurate information because of the lack of timely access to charges and exhibits, even though the reporter is able to attend court. Ms. Pagliaro pointed out that journalists who attend youth court hear the evidence and learn the names of the accused but do not identify them in their articles and reports as that would breach the YCJA. However, the lack of ready access to youth court records, she said, “impedes our ability to report accurately on information that is available at law.” When covering the swarming case, for example, Ms. Pagliaro stated:
- ...the media was not permitted to see exhibits at the bail hearings relating to the alleged murder of Ken Lee. Although I was present when exhibits were shown in the courtroom, it is very difficult to see the exhibits from the body of the courtroom. I could not use any aids except what notes I was able to take while straining to see the exhibits. Although I understand details of the bail hearing cannot be reported now, there is value in their being reported once the publication bans have expired. However, when it is permitted to publish those details, doing so will be impeded by the fact that I was not able to clearly view the exhibits that were presented in court.
- [20] In response to the application, the respondent filed an affidavit from Dr. Lisa Kelly, an associate professor of law at Queen’s University, addressing the background to and aims of the YCJA, with particular emphasis on how youth justice differs from the adult system and the importance placed on the privacy of youths involved in the youth justice system.
- [21] The respondent also provided an affidavit from Dr. Teresa Grimbos, a clinical and forensic child and adolescent psychologist. She discussed, among other things, the negative impacts on youths that could result if they were publicly identified as being the subject of a proceeding under the YCJA.
- [22] The respondent also filed an affidavit from a court employee, Kristina Theoret, who has knowledge of how the Court Services Division (“CSD”) of the Ministry of the Attorney General (“MAG”) handles requests for court records. She referred to an Access Policy which states that court staff will provide information about courtroom locations and future court dates for youth matters, although young persons are only identified by their initials. She noted, however, that if a request for information is made about a case, the court staff may require details including the court file number, the last court date, the charges, and the date of birth of the accused. Of course, as Ms. Pagliaro points out, this information is often unavailable to the media, making access difficult. The Access Policy also states that “[i]f

an exclusion or sealing order has been made in the YCJA matter, disclosure of next court date information is not permitted.”

Issues

[23] Although the parties frame the issues slightly differently, there are effectively two issues before the Court on this application:

- (1) Whether s. 119(1)(s) of the YCJA infringes s. 2(b) of the *Charter* and, if so, whether it is justified under s. 1; and
- (2) Whether s. 129 of the YCJA infringes s. 2(b) of the *Charter* and, if so, whether it is justified under s. 1.

The openness principle and section 2(b) of the *Charter*

[24] There is a strong presumption that court proceedings are public and transparent. Indeed, the presumption is of such importance that it may be described as a fundamental principle of our judicial system. Dickson J. (as he then was) stated in *A.G. (Nova Scotia) v. MacIntyre*, [1982] 1 S.C.R. 175 at p. 185:

It is now well established...that covertness is the exception and openness the rule. Public confidence in the integrity of the court system and understanding of the administration of justice are thereby fostered. As a general rule the sensibilities of the individuals involved are no basis for exclusion of the public from judicial proceedings.

[25] The “openness principle”, as it has become known, serves several purposes. They include ensuring an effective evidentiary process, and that courts and parties behave fairly, appropriately and with integrity. Public proceedings also permit the community to learn about the law and the justice system so that people can make informed comment about them. The openness principle ensures that courts and litigants are accountable and can be evaluated. Openness enhances justice and, hopefully, confidence in the administration of justice. In *Vancouver Sun (Re)*, 2004 SCC 43, [2004] 2 S.C.R. 332, at para. 24, Iacobucci and Arbour JJ. quoted Jeremy Bentham with approval: “Publicity is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against improbity” (citation omitted).

[26] The openness principle is also now well-recognized as an aspect of freedom of expression. Section 2(b) of the *Charter* protects “freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication” as “fundamental freedoms.” As the Supreme Court observed in *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, at para. 23:

The principle of open courts is inextricably tied to the rights guaranteed by s. 2(b). Openness permits public access to information about the courts, which in turn permits the public to discuss and put forward opinions and criticisms of court practices and proceedings. While the freedom to express ideas and opinions about

the operation of the courts is clearly within the ambit of the freedom guaranteed by s. 2(b), so too is the right of members of the public to obtain information about the courts in the first place

[27] In an earlier decision, the Supreme Court stated that “freedom of expression ‘protects listeners as well as speakers’. That is to say as listeners and readers, members of the public have a right to information pertaining to public institutions and particularly the courts”: *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, at p. 1339.

[28] The importance of the open court principle cannot be understated. As Fish J. stated in the opening sentence of *Toronto Star Newspapers Ltd. v. Ontario*, 2005 SCC 41, [2005] 2 S.C.R. 188 (“*Toronto Star 2005*”) at para. 1: “In any constitutional climate, the administration of justice thrives on exposure to light – and withers under a cloud of secrecy.” In that case the Court also confirmed that the openness principle applies at every stage of judicial proceedings and to “all discretionary court orders that limit freedom of expression and freedom of the press in relation to legal proceedings”: at para. 7. This includes court records such as exhibits, Informations, Indictments, and other documents relied on by courts when acting judicially: *Toronto Star 2005*, at paras. 5-7.

[29] More recently, the Supreme Court has stated that “[w]hen it comes to the social and democratic functions of the open court principle, the key role played by the news media cannot be overemphasized”: *Canadian Broadcasting Corp. v. Named Person*, 2024 SCC 21, 492 D.L.R. (4th) 573, at para. 31. The media have often been referred to as the “eyes and ears” of the public. As the Court of Appeal observed in the swarming case at para. 45:

Media participation is critical to the exercise of the open court principle. Although most court proceedings are open to the public, most people necessarily depend on media reports to understand what matters are being heard and how they are decided. The freedom of press to report on judicial proceedings is protected under s. 2(b) of the Charter: *Vancouver Sun*, at para. 26, and *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 at pp. 1339-40.

[30] Nevertheless, it is also well-recognized that there must be exceptions to the openness principle. Some exceptions are mandated by statute. The *Criminal Code* contains many limitations on openness. These include the mandatory publication ban on bail hearings when the ban is requested by the accused: *Criminal Code*, s. 517; *Toronto Star Newspapers Ltd. v. Canada* 2010 SCC 21, [2010] 1 S.C.R. 721 (“*Toronto Star 2010*”), at para. 38. The issuance of search warrants are held *in camera* to ensure their effectiveness, although access to search warrant records is presumed after the warrant is executed: *Criminal Code*, s. 487.3. Wiretap authorizations are conducted *in camera* and records are sealed: *Criminal Code*, ss. 184.2(2), 184.3(2), 185(1); *Ruby v. Canada (Solicitor General)*, 2002 SCC 75, [2002] 4 S.C.R. 3 at para. 26. Proceedings dealing with access to third party records and prior sexual conduct under s. 278.3 are held *in camera*: *Criminal Code*, s. 278.4. Those under s. 278.5, relating to the review of a record where a judge has ordered its production, may be held *in camera*: *Criminal Code*, s. 278.6(2).

[31] In a related context, child protection proceedings are presumptively closed to the public, although two media representatives may be permitted to be present: *Child, Youth and Family Services Act, 2017*, S.O. 2017, c. 14, Sch. 1, s. 87.

[32] Identifying parties or witnesses where they are vulnerable and privacy considerations favour anonymity may also be an exception to the openness principle. This frequently arises in sexual assault cases. Although such bans used to be mandatory, there is now discretion, as some complainants may not wish to have publication of their name banned: *Criminal Code*, s. 486.4(3.1).

[33] Where a limit on openness is not required by statute, a party seeking a limitation must meet the strict test set out in *Sherman Estate v. Donovan*, 2021 SCC 25, [2021] 2 S.C.R. 75, which confirmed and reformulated the test previously established in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, and *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442, known as the “*Dagenais/Mentuck* test. Kasirer J. stated in *Sherman Estate* as follows, at para. 38:

The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order. Upon examination, however, this test rests upon three core principles that a person seeking such a limit must show. Recasting the test around these three prerequisites, without altering its essence, helps to clarify the burden on an applicant seeking an exception to the open court principle. In order to succeed, the person asking the court to exercise discretion in a way that limits the open court presumption must establish that:

- (1) court openness poses a serious risk to an important public interest;
- (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and
- (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.

Only where all three of these prerequisites have been met can a discretionary limit on openness — for example, a sealing order, a publication ban, an order excluding the public from the hearing, or a redaction order — properly be ordered. This test applies to all discretionary limits on court openness, subject only to valid legislative enactments. [Citations omitted.]

[34] The party seeking to limit court openness must show that there is a competing important public interest at stake that warrants limiting court openness. It must be demonstrated that court openness would pose a risk to that important public interest and that the risk is “serious” and “well grounded in the evidence”: *Sherman Estate*, at para. 102. In *Mentuck*, at para. 34, the Court emphasized that limits on openness are not to be granted as matters of convenience or solely to provide a benefit to a party because, for example, maintaining the secrecy of those proceedings would give the police an advantage in the conduct of their investigation: “it is a serious danger sought to be avoided that is required, not a substantial benefit or advantage to the administration

of justice sought to be obtained.” Doherty J.A. put this more bluntly in *R. v. Toronto Star Newspapers Ltd.* (2003), 67 O.R. (3d) 577, 232 D.L.R. (4th) 217 (C.A.), aff’d 2005 SCC 41, [2005] 2 S.C.R. 188, stating at para. 27: “Fundamental freedoms, like the freedom of expression and freedom of the press, cannot, however, be sacrificed to give the police a ‘leg up’ on an investigation.”

[35] Embarrassment or “the sensibilities of the individuals involved are no basis for the exclusion of the public from judicial proceedings”: *MacIntyre* at p. 185. Only when highly personal, intimate information revealing “core aspects of individuals’ personal lives that bear on their dignity is at serious risk” is the first part of the *Sherman Estate* test met: *Sherman Estate*, at para. 33.

[36] Further, the order must be necessary to prevent the serious risk, having canvassed the availability of reasonable alternatives to a sealing order. I emphasize the word “necessary”, as it was also given emphasis by Lamer C.J.C. in first establishing the test in *Dagenais*, at p. 878. It is also well-established that any limit on openness must be narrowly tailored and no more than necessary to protect the important public interest. As stated in *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 S.C.R. 522, at para. 57, “the phrase ‘reasonable alternative measures’ requires the judge to consider not only whether reasonable alternatives to a confidentiality order are available, but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question.”

[37] Even when the first two parts of the test have been satisfied, the court must engage in a balancing of interests and must be satisfied that the benefits of limiting public access outweigh the negative effects on the open court principle and its objectives.

The openness principle and the YCJA

[38] Historically, youth court proceedings were private and not subject to the openness principle. Under s. 12 of the *Juvenile Delinquents Act*, R.S.C. 1970, c. J-3 (“JDA”), which was in force from 1908 to 1984, youth court proceedings were required to be held “without publicity”, which meant *in camera*. The public had no access to them. Although the mandatory *in camera* provision was struck down in one of the first *Charter* decisions to recognize openness as an aspect of s. 2(b) of the *Charter*, the identification of young persons accused of crimes or who testified remained protected, and access to records was restricted: *Re Southam Inc. and The Queen (No.1)*, (1983), 41 O.R. (2d) 113, 146 D.L.R. (3d) 408 (C.A.).

[39] Parliament enacted the *Young Offenders Act*, R.S.C. 1985, c. Y-1 (“YOA”) in 1984. Like the current YCJA, the YOA prohibited the publication of the name of any young person as well as information that would identify them. This was upheld as constitutional in *Re Southam Inc. and The Queen* (1984), 48 O.R. (2d) 678 (H.C.), aff’d (1986), 53 O.R. (2d) 663 (C.A.), leave to appeal to the Supreme Court of Canada refused, [1986] 1 S.C.R. xiv. There, Holland J., whose reasons were approved by the Court of Appeal, stated at p. 698:

Section 38(1) does not contain an absolute ban.... The press is entitled to be present (subject to s. 39(1)(a)) and can publish everything except the identity of a young person

involved. Admittedly, there may be other information which the press cannot publish because it may tend to reveal the identity of a young person, but the essence of the provision is that the press is entitled to publish all details except one. Counsel for the Attorney General of Canada termed the identification of the young person a “sliver of information”, and submitted that this is not an essential detail for the making of responsible judgment by a democratic electorate....

[40] The YOA barred access to records generated in YOA proceedings, subject to exceptions set out in s. 44.1 of the YOA. Section 44.1(1)(k) of the YOA gave access to youth records in similar terms to what is now found in s. 119(1)(s) of the YCJA:

(k) any other person who is deemed, or any person within a class of persons that is deemed, by a youth court judge to have a valid interest in the record, to the extent directed by the judge, if the judge is satisfied that the disclosure is

(i) desirable in the public interest for research or statistical purposes, or

(ii) desirable in the interest of the proper administration of justice.

[41] The YCJA replaced the YOA in 2002.

[42] The Declaration of Principle in s. 3 of the YCJA recognizes the need for “enhanced procedural protection to ensure that young persons are treated fairly and that their rights, including their right to privacy, are protected.” The United Nations *Convention on the Rights of the Child*, Can. T.S. 1992 No. 3 – referred to in the preamble of the YCJA and to which Canada is a party – requires the protection of children's right to privacy during “all stages” of criminal justice proceedings. Part 6 of the YCJA (ss. 110 to 129), titled “Protection of Privacy of Young Persons”, sets out a comprehensive regime addressing access to youth court records and the protection of privacy of young persons.

[43] Sections 110(1) and 111(1) of the YCJA prohibit publishing the names, or other information that would identify, a young person dealt with under the Act or young persons who are victims of, or witnesses to, offences committed or alleged to have been committed by a young person. Those sections state:

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

[44] A “child” is defined in s. 2(1) of the Act as a person who is or appears to be less than twelve years old. A “young person” is an individual “who is or, in the absence of evidence to the contrary, appears to be twelve years old or older, but less than eighteen years old.”

[45] Sections 110 and 111 of the YCJA, therefore, continue to prohibit the identification of young persons – whether accused or witnesses – in youth court proceedings. This is based on the long-standing recognition in Canadian and international law that young persons have diminished moral blameworthiness and that the public interest in rehabilitation and reintegration of young offenders into society is promoted by protecting them from stigmatization as criminals: see, e.g., YCJA, Preamble and s. 3; *R. v. D.B.*, 2008 SCC 25, [2008] 2 SCR 3 at paras. 84-85; *Convention on the Rights of the Child*, Article 40(2)(b)(vii).

[46] Sections 110 and 111 are not challenged by the applicants. Nor do they take direct issue with s. 118, which presumptively prohibits access to youth court records. Section 118(1) of the YCJA states:

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, 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.

[47] Section 114 includes youth court records. Section 2 of the YCJA defines a “record” as including:

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

[48] Section 119(1) creates exceptions, permitting access to youth court records to a range of persons, many only for specific purposes. Subsections 119(1)(a)-(r) of the YCJA contain a list of persons that “on request, shall be given access to a record kept under s. 114.” This list includes, among others, the young person to whom the record relates, their counsel, parents of the young person or an adult assisting the young person, the victim, the Attorney General, a peace officer, a judge, court, or review officer; and representatives of various government institutions and agencies acting in the course of their specific statutory duties.

[49] Section 119(2) limits the period during which access may be obtained under s. 119(1), until the disposition of the proceeding or a punishment imposed on a young person is completed. Once that period is over, access to a record can only be obtained through an order by a youth court judge under ss. 123, 124 or 126 of the YCJA.

[50] The media is not listed in s. 119(1). However, subsection (s) provides for access in the following circumstances:

(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.

[51] Unlike the persons listed in subsections (a)-(r) of subsection 119(1), access to a record under subsection (s) requires a judge to find that the person seeking it has “a valid interest in the record” and that access is desirable under subsections (i) or (ii).

[52] Section 129 of the YCJA provides a limit on the ability to disclose information in a record, regardless of how it is obtained, as follows:

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 other person unless the disclosure is authorized under this Act.

[53] A party who breaches provisions under Part 6 of the YCJA, including the prohibition on identifying young persons and the prohibition on disclosure of information under section 129, which is described as “no subsequent disclosure”, commits an offence under s. 138(1) of the Act, which may be prosecuted by indictment or by way of summary conviction proceedings.

The applicants’ position

[54] The media’s complaint with s. 119 is that it does not create an exemption for media access, similar to the other exemptions found in s. 119(1). The media applicants submit that s. 119(1)(s), which provides the court with the discretion to release records, does not cure this problem, as it places a burden on the media, or any other party relying on it, to establish that they have a “valid interest in the record” and that “access to the record is... desirable in the interest of the proper administration of justice.” This, it is argued, creates a discretionary prohibition on access to court records inconsistent with the test in *Sherman Estate*, which places the burden on the party resisting public disclosure. The media also argue that the test is “impossibly vague.”

[55] With respect to s. 129 of the YCJA, the applicants submit that it imposes a complete ban on disclosing information derived from court records, even if the information has already been disclosed in open court and does not identify any young person. As a result, the section poses a barrier to court staff providing information about a case, including information that may have been stated in open court. It is also argued that the section inhibits the media by limiting its ability as journalists to discuss information gleaned from a record, hindering the news gathering process and, even, the editing process as they cannot discuss information with their editors.

Section 119(1)(s)

Section 119(1)(s) infringes s. 2(b) of the Charter

- [56] The respondent concedes that s. 119(1)(s) of the YCJA infringes s. 2(b) of the *Charter*. As stated in the respondent's factum, "Canada acknowledges that s. 119(1)(s)(ii) contains a limit on expressive freedoms by placing an onus on individuals to satisfy a youth court judge that they have a valid interest in youth records and their access is desirable in the interest of the proper administration of justice, and by the potential exercise of judicial discretion to deny access."
- [57] This is a prudent concession. Section 119(1)(s) must be read in conjunction with s. 118 which states that "no person shall be given access to a record... where to do so would identify the young person..." Although the applicants' notice of application and notice of constitutional question challenged the validity of s. 118, this was not pressed before me. Rather, the focus was on s. 119(1)(s) which, it is argued, "confers a discretion to infringe a *Charter* right" and is on that basis unconstitutional, citing *Slaight Communications Inc v Davidson*, [1989] 1 S.C.R. 1038 at p. 1078 and *Dagenais* at p. 875.
- [58] The applicants do not, then, challenge the scheme of the YCJA, which creates a presumptive ban on access to youth court records in order to protect the privacy of young persons. Instead, they ask "that the news media be read into s. 119(1) of the YCJA as a class of persons presumptively entitled to access youth court records" or, alternatively, "a declaration that to the extent that ss. 118 and 119(1)(s) presumptively restrict media access to youth court records, they unjustifiably infringe section 2(b) of the *Charter* and should be rendered of no force and effect pursuant to section 52(1) of the *Charter*."
- [59] In my view, the s. 2(b) infringement which can be stated this way. Youth courts are courts to which the openness principle applies: *Re Southam Inc. and The Queen (No. 1)*; *CBC 2024* at paras. 29-30. Section 118 of the YCJA creates a ban on access to youth court records, subject to the exceptions set out in s. 119. Section 119(1)(s) creates a discretion to permit access, but it also creates a discretion to prohibit access. The three-part *Sherman Estate* test "applies to all discretionary limits on court openness, subject only to valid legislative enactments": *Sherman Estate*, at para. 38. By placing an onus on the media or other members of the public who seek access under s. 119(1)(s), the section is not consistent with the *Sherman Estate* test and therefore infringes s. 2(b) of the *Charter*. Thus, the remaining question is whether s. 119(1)(s), in departing from the *Sherman Estate* test, can be justified under s. 1 of the *Charter* and be a "valid legislative enactment."

Section 119(1)(s) is demonstrably justified under s. 1 of the Charter

- [60] Section 1 of the *Charter* states:

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

- [61] The issue of whether s. 119(1)(s) complies with s. 1 of the *Charter* requires application of the well-known test in *R. v. Oakes*, [1986] 1 S.C.R. 103, at pp. 136-40. In short, a breach of the *Charter* is justified when the challenged law has a “pressing and substantial objective and... the means chosen are proportional to that object.” The proportionality test is met if “the means adopted are rationally connected to the law’s objective, minimally impairing of the right in question, and the law’s salutary effects outweigh its deleterious effects.... The focus of the analysis is on the infringing measures, not on the overall legislative scheme”: *R. v. Ndhlovu*, 2022 SCC 38, [2022] 3 S.C.R. 52 at para. 119. The burden is on the Crown to show that s. 1 is met.

Pressing and substantial objective

- [62] Section 119(1) has two objectives: to protect the interests of young persons and to facilitate public access to youth court records. As the respondent puts it, “[t]he provision is intended to regulate access to youth records in a manner that protects youth privacy to the extent necessary, while also accommodating for other important interests like media access.”
- [63] Both of these objectives are pressing and substantial and are rooted in objectives of the YCJA.
- [64] The Supreme Court has repeatedly found that the privacy of young persons is inextricably linked to their diminished moral blameworthiness and the public interest in their rehabilitation and reintegration: *F.N. (Re)*, 2000 SCC 35, [2000] 1 S.C.R. 880, at paras 10-11, 14-17; *R. v R.C.*, 2005 SCC 61, [2005] 3 S.C.R. 99, at para 42; *D.B.* at paras 83-87. The Court has noted that young people are recognized in Canadian and international law as inherently vulnerable as a class. The Court has also recognized that a separate criminal process for young people is required because they have “heightened vulnerability, less maturity, and a reduced capacity for moral judgement”: *A.B. v. Bragg Communications Inc.*, 2012 SCC 46, [2012] 2 S.C.R. 567 at para. 17; *D.B.* at paras. 41 and 48.
- [65] At the same time, as Dr. Kelly discusses in her report, when youth court proceedings were conducted in secret under the JDA, this was to the detriment of young persons. The need to have “due process safeguards”, such as “greater public access to and scrutiny of juvenile proceedings”, was identified to improve the integrity of the system, she noted. The *Report of the Department of Justice Committee on Juvenile Delinquency* (1967), authored by Allen J. MacLeod, recommended that the media be permitted “to attend juvenile court hearings as of right” and be permitted to report on them (without identifying the youths) in order to be a safeguard against “improper or undesirable practices.”
- [66] Despite the different and somewhat competing objectives, to the extent s. 119(1)(s) limits media access it is in furtherance of the pressing and substantial objective of protecting the privacy of vulnerable youths involved in youth court proceedings. The first branch of the *Oakes* test is therefore met.

Proportionality: rational connection

- [67] In *Oakes*, at para. 70, the Supreme Court described the rational connection portion of the proportionality test as follows:

... the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective.

- [68] However, the Supreme Court has also stated that the rational connection test is “not particularly onerous” and that the government need only show that it is “reasonable to suppose that the limit may further the goal, not that it will do so”: *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120, at para. 228; *Health Services and Support – Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27, [2007] 2 S.C.R. 391, at para. 148; *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, at para. 48.
- [69] The applicants’ argument that the section is not rationally connected to its objectives is based on the assertion that s. 119 ought to have specifically accounted for the media, given its role in protecting the integrity of the justice system and promoting transparency. The applicants submit it is “irrational and arbitrary” not to have carved out an exception for media access similar to the presumptive exceptions for persons listed in s. 119(1)(a)-(r).
- [70] I do not accept this submission. The rational connection test has a low threshold. Section 119(1)(s) is rationally connected to both objectives of the section. It provides an avenue to obtain youth court records despite s. 118 and therefore is connected to the objective of facilitating oversight of youth court proceedings. To that extent it addresses the interests of the media as the eyes and ears of the public. On the other hand, it protects youth privacy by placing an evidentiary burden on applicants to demonstrate a valid interest in the record and that their access is desirable in the interest of the proper administration of justice, thereby limiting the risk of disclosure and potential harm to young persons involved in proceedings.
- [71] The fact that there is no presumptive exception for the media, and that it must satisfy an evidentiary burden to obtain access to youth court records, is more appropriately addressed under the minimal impairment and balancing steps of the proportionality test.
- [72] The rational connection test is met.

Proportionality: minimal impairment

- [73] In *Carter v. Canada*, 2015 SCC 5, [2015] 1 S.C.R. 331, the Supreme Court said that minimal impairment requires questioning “whether the limit on the right is reasonably tailored to the objective.” The Court continued, at para. 102:

The inquiry into minimal impairment asks ‘whether there are less harmful means of achieving the legislative goal.’ (*Hutterian Brethren*, at para. 53). The burden is

on the government to show the absence of less drastic means of achieving the objective ‘in a real and substantial manner’ (*ibid.*, at para. 55). The analysis at this stage is meant to ensure that the deprivation of *Charter* rights is confined to what is reasonably necessary to achieve the state’s object.

- [74] Like the Supreme Court in *Carter*, both parties cite para. 55 of *Hutterian Brethren*, which states, in part:

...in considering whether the government’s objective could be achieved by other less drastic means, the court need not be satisfied that the alternative would satisfy the objective to *exactly* the same extent or degree as the impugned measure. In other words, the court should not accept an unrealistically exacting or precise formulation of the government’s objective which would effectively immunize the law from scrutiny at the minimal impairment stage.... While the government is entitled to deference in formulating its objective, that deference is not blind or absolute. The test at the minimum impairment stage is whether there is an alternative, less drastic means of achieving the objective in a real and substantial manner. [Emphasis in original]

- [75] The applicants submit that s. 119(1)(s) is not minimally impairing as it requires an application by the media, and that the media bears an evidentiary burden based on a test which is inconsistent with the *Sherman Estate* test and which is “impossibly vague.”. The respondent, on the other hand, notes that courts have a supervisory jurisdiction over court files and that “frictionless administrative access to youth records is not protected by s. 2(b)” of the *Charter*.

- [76] The respondent is correct that courts have a supervisory jurisdiction over court records, but the applicants are correct that court records are presumptively public in accordance with the openness principle. Indeed, it has been recognized that the court’s control of its records fosters openness which might otherwise be constrained by government policies, such as the Access Policy referred to by the respondent’s affiant, Ms. Theoret. As the Supreme Court stated in *Canadian Broadcasting Corp. v. Manitoba*, 2021 SCC 33, [2021] 2 SCR 785 at para. 37:

Supervisory authority over the court record has long been recognized as a feature of the jurisdiction of all courts (*Attorney General of Nova Scotia v. MacIntyre*, [1982] 1 S.C.R. 175, at p. 189; see also *Canadian Broadcasting Corp. v. The Queen*, 2011 SCC 3, [2011] 1 S.C.R. 65, at para. 12). As Goudge J.A. observed in *CTV Television Inc. v. Ontario Superior Court of Justice (Toronto Region)* (2002), 59 O.R. (3d) 18 (C.A.), “it is important to remember that the court’s jurisdiction over its own records is anchored in the vital public policy favouring public access to the workings of the courts” (para. 13). Specifically, courts must ensure compliance with the robust and constitutionally-protected principle of court openness, while also remaining responsive to “competing important public interests” that may be put at risk by that openness (*Vancouver Sun (Re)*, 2004 SCC 43, [2004] 2 S.C.R. 332, at paras. 26 and 28). [Emphasis added]

- [77] The YCJA creates a separate process for dealing with youth court records. As Doherty J.A. observed in *S.L.* at para. 54, “the language of s. 118 and the comprehensiveness of the scheme itself demonstrate that Parliament intended that access to the records could be gained only through the Act.” This is rooted in the need to protect the privacy of young persons, recognizing their vulnerability and diminished moral blameworthiness and in order to promote their rehabilitation. These are powerful “competing important public interests.”
- [78] The applicants do not challenge the prohibition on identifying young persons nor do they challenge the scheme in the YCJA which creates a restriction on access to court records in s. 118; their complaint is that the exceptions in s. 119 are not broad enough to provide the media with presumptive access.
- [79] The media’s proposal would involve effectively reading in a provision granting the media “administrative access” or, as they also put it, “controlled administrative access”, like those individuals listed in s. 119(1)(a)-(r), on request and without judicial oversight. The applicants point, in this regard, to a list of “designated media” maintained by the courts in Ontario identifying media organizations which may obtain access to digital recordings of court proceedings and which, according to Ms. Pagliaro, is also used for facilitating access to exhibits.
- [80] However, the applicants’ proposal would in fact give the media easier access to youth court records than many of the people listed in s. 119(1)(a)-(r). Most of those listed can only obtain the record for a specified purpose, when acting in accordance with enumerated statutory duties; others, such as the young person or a victim, have a very direct interest. If an accused person in another proceeding wants access under s. 119(1)(q), they or their counsel must swear an affidavit “to the effect that access to the record is necessary to make a full answer and defence.”
- [81] Further, while the court maintains a list of “designated media” to facilitate access to *public* materials¹, youth court records are not public, but sealed subject to exceptions. Adopting the applicants’ proposal would require consideration of, among other things, what media should have “administrative access”, raising the challenging question in the era of the internet of defining “the media.” Is it limited to traditional, large, legacy media such as the applicants in this case, or does it include independent bloggers, self-published content providers, or true crime podcasters, to name just some examples? The court’s current list includes traditional media only.
- [82] In other contexts, courts have avoided creating special rules for the media, or certain types of media. For example, in *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640, in which the Supreme Court decided to adopt a defence to defamation of responsible communication in the public interest as opposed to merely responsible “journalism”: at

¹ The Court list of media states that the list is for policies on the release of digital court records and “should not be referenced as a list of designated media for any other policy or protocol applicable to the courts.”

para. 97. The anti-SLAPP regime in Ontario has now been used successfully by large media organizations to dismiss defamation cases even though the legislation was intended to address imbalances between large, well-resourced plaintiffs muzzling expression by individuals or organizations that are not well-positioned to defend themselves: see, e.g., *Windrift Adventures Incorporated v. CTV-Bell Media Inc.*, 2025 ONCA 346; 2504027 *Ontario Inc. o/a S-Trip! v. Canadian Broadcasting Corporation (CBC) et al.*, 2021 ONSC 3471.

[83] An exemption for the “media” as suggested by the applicants, therefore, is not a practical alternative without reckoning with this challenging question. Otherwise, it would simply create an exception for any member of the public who chooses to call themselves the media. Even assuming it is for the court, and not Parliament, to define the “media”, I am in no position to do so based on the record in this application.

[84] In the swarming case the Court of Appeal also addressed the issue of whether the media should be given special status to get access to youth court records, stating in *CBC 2024* at para. 84:

The *YCJA* was enacted after *Dagenais* and *Mentuck* were released and has since been amended. In crafting s. 119(1)(s), the Federal Parliament was aware of the critical role played by the media in ensuring that courts are open to public scrutiny. Despite this, the legislator did not choose to give the media a presumptive right of access to *YCJA* records. The appellants have not pointed to any caselaw or governing principles that would justify reading in a presumption for access to youth records for media in s. 119(1) that the legislator has failed to enact.

[85] The persuasive burden on the media under s. 119(1)(s) is a low one. As the Crown concedes, “Canadian courts have consistently found that media representatives such as the Applicants have a valid interest in youth records, so this element of the *YCJA* test is not onerous”, citing the Court of Appeal in *CBC 2024* at paras. 29 and 86; *R. v. M.M.*, 2017 NSPC 12, 141 W.C.B. (2d) 710, at para. 36; *R. v. B.J.*, 2009 ABPC 248, 479 A.R. 248, at para 4; *R. v. A.Y.D.*, 2011 ABQB 590, 527 A.R. 242, at paras. 30-31.

[86] Similarly, for most media in most cases, it will be easy to establish that access to a court record is “desirable in the interest of the proper administration of justice.” The openness principle effectively presumes that access is in the public interest, subject to narrow and limited exceptions. Disclosure of court records to the media helps to ensure accurate reporting, helping the media to better understand and report the evidence, to review the documentary information before the judge, to scrutinize the judge’s decision or the Crown’s position, and to comment on the fairness of a disposition, perhaps in comparison to other dispositions, and on whether a particular judge is acting fairly or arbitrarily. These are all good reasons to provide access to the media which are rooted in the rationales for the openness principle and should be readily accepted by youth courts in considering applications under s. 119(1)(s) of the *YCJA*.

- [87] Further, the media’s position that the test of whether disclosure is “desirable in the interest of the proper administration of justice” is “impossibly vague” is not supported by the case law. In *Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996] 3 S.C.R. 480, the Supreme Court rejected a similar argument regarding the vagueness of the term as it appears in s. 486(1) of the *Criminal Code*, stating at para. 59:

Section 486(1) provides an intelligible standard -- the proper administration of justice -- according to which the judiciary can exercise the discretion conferred. The phrase “administration of justice” appears throughout legislation in Canada, including the *Charter*. Thus, “proper administration of justice”, which of necessity has been the subject of judicial interpretation, provides the judiciary with a workable standard.

- [88] Subsequently, as the Court of Appeal noted at para. 86 of *CBC 2024*:

In *F.N. Binnie J.* rejected an interpretation of the ‘interest of the proper administration of justice’ that would allow for a category of access not specifically carved out by Parliament, writing at para. 34 that ‘control subject to such a broad exception would in effect be no control at all and would render superfluous many of the other restrictions and protections carefully written by Parliament’. This reasoning has the same force now, under the *YCJA*, as it did under the *YOA*.

- [89] The Court of Appeal found that the youth court judge in the swarming case had correctly applied the test under s. 119(1)(s), stating at para. 66 that, “like other courts who have considered this issue, she concluded that the *Dagenais-Mentuck* test [now the *Sherman Estate* test] must be considered through the lens of the *YCJA* and the principles enshrined in the Act to protect the privacy of youth”, citing *R. v. M.M.*, at paras. 33 and 34; *R. v. G.D.S.*, 2007 NSCA 94, 226 C.C.C. (3d) 196, at para. 38; *R. v. A.Y.D.*, at para. 23. An order under s. 119(1)(s), the Court of Appeal continued, is “based on weighing relevant factors pursuant to the comprehensive statutory regime for access set out under the Act” which incorporates the second part of the *Sherman Estate* test. In the face of this authority, I cannot find that the test is unduly vague.
- [90] In my view, having regard to the important reasons for maintaining judicial control over youth court records, the requirement that media must make a request to a judge for a youth court record and meet the low test for access in s. 119(1)(s), is minimally impairing of its right to access court records. Accordingly, s. 119(1)(s) meets the minimal impairment test.

Proportionality: salutary and deleterious effects

- [91] The final part of the *Oakes* test requires the court to consider “proportionality between the effects of the measure (including a balancing of its salutary and deleterious effects) and the stated legislative objective... The proportionality inquiry is both normative and contextual and requires that courts balance the interests of society with those of individuals and groups”: *Frank v. Canada (Attorney General)*, 2019 SCC 1, [2019] 1 S.C.R. 3 at para. 38, citations omitted. This stage involves weighing “whether the deleterious effects are out of

proportion to the public good achieved by the infringing measure”: *Hutterian Brethren*, at para. 78.

[92] In *Oakes*, at para. 71, Dickson C.J.C. stated:

Some limits on rights and freedoms protected by the *Charter* will be more serious than others in terms of the nature of the right or freedom violated, the extent of the violation, and the degree to which the measures which impose the limit trench upon the integral principles of a free and democratic society.

(a) Salutary effects

[93] The Crown submits that the principal salutary effect of s. 119(1)(s) is that it keeps control of court records under the supervision of youth court judges, who can thereby ensure the privacy of young persons are protected. This is linked to the public interest in rehabilitation and reintegration of young persons. Put another way, judges can ensure that records are being released to responsible media who will respect the privacy of young persons by not identifying them.

[94] Further, by requiring the media to request records under s. 119(1)(s), judges have the opportunity to consider the content of the records and redact information that would be impermissible to publish, or to redact or prohibit publication of sensitive information contained in court records the dissemination of which may also damage a young person, even if not identified. As the evidence shows, this is a particular concern with youth court records, which may contain psychiatric, psychological and other behavioural reports that provide sensitive information which, while it may be discussed in open court, may be damaging to young persons if released in full, even when the young person is not identified.

[95] Dr. Kelly discusses this concern, noting that even though information may not identify the person to the world at large, its release and dissemination can have serious and traumatic impacts on young persons – both those accused and victims – and their families. There is no getting around the fact that people who know, or know of, the young persons will often be aware that they are participants in youth court proceedings, and special care must be taken to protect the privacy of those participants in order to avoid causing them harm. Publicity of this nature, even when the young person’s identity is not published, can frustrate efforts at rehabilitation, creating psychological and social stress along the lines of the harms noted by Abella J. in *D.B.*, at para. 87. Similarly, in *F.N. Binnie J.* stated at para. 14:

Stigmatization or premature ‘labelling’ of a young offender still in his or her formative years is well understood as a problem in the juvenile justice system. A young person once stigmatized as a lawbreaker may, unless given help and redirection, render the stigma a self-fulfilling prophecy.

[96] Dr. Grimbos also addresses this issue. She notes the “higher rates of mental illness, discrimination, and peer rejection among antisocial or justice-involved youth”, where it is common to see multiple disorders, making them especially vulnerable to the effects of

being involved in the youth justice system. Like Dr. Kelly, Dr. Grimbos emphasizes the deleterious impacts of shame and embarrassment. She notes that public identification of youth offenders can have “a highly negative impact on youth, including increases in mental health problems and internalized shame, and further behavioural concerns and trouble with the law.”

- [97] Dr. Grimbos also addresses the contents of medical or psychological reports prepared pursuant to s. 34(1) of the YCJA, which can contain a large amount of sensitive and deeply personal information derived from interviews with the young person charged, family members, teachers, counsellors and others. She states the goal in preparing a s. 34 report is to obtain a “comprehensive understanding of the youth's life and functioning.” The report can include the young person's mental health history and diagnoses, their mother's pregnancy and labour, comments on intimate relationships, and other information that relates to the “biographical core” of an individual containing sensitive “intimate or personal details” about them, as that term is used in *Sherman Estate* at e.g., para. 75.
- [98] These reports, like pre-sentence reports, are prepared for the judge in considering, among other things, whether to release a young person, conditions of supervision, review of a sentence, or whether to sentence a young person as an adult. Publication of such reports, even without identifying information, can lead to many people who know, or know of, the young person obtaining sensitive information about them which can be harmful to the young person for the reasons identified by Dr. Kelly and Dr. Grimbos.
- [99] Dr. Kelly has also described how, through “reverse searches” on the internet, it has been possible in some cases, by searching a person’s name, to confirm that an individual is a young person before the court. She also referred to examples of social media posts linking young persons to youth court proceedings. Even in the absence of the internet, individuals familiar with a young person may be able to find out that they are charged with offences. In some cases, word may spread through a school or community that someone is an accused – the information might even be shared, or confirmed, by the young person. The YCJA has never prevented this; it just prevents publishing information that identifies a young person.
- [100] The Crown relies on reverse searches to raise the spectre that online exposure is likely, citing risks from “data aggregation”, as Dr. Kelly puts it, which occurs when disparate information is “assembled incorrectly or even maliciously to form a ‘comprehensive’ digital profile of that person.” However, it is one thing to go looking for information, and quite another to deliberately break the law by publishing something.
- [101] The overarching concern here is that if documents are posted on the internet, then dissemination is broad and likely irreversible. For this reason, the Canadian Judicial Council has stated that “it is essential that the differences in access in the paper and electronic environments be considered” when courts set “policies of access to electronic court records and to docket information.”
- [102] Ultimately, underlying all these concerns is the very strong public interest in protecting the privacy of young persons, recognizing their diminished culpability, their increased

vulnerability, and the desire to foster their rehabilitation and reintegration into society. This interest is well-recognized in the *Convention on the Rights of the Child*, the Preamble to the YCJA and in the jurisprudence. Judicial control over youth court records furthers this important interest and is a significant salutary effect of s. 119(1)(s).

- [103] The *Convention*, which is incorporated by reference into the YCJA, requires in Article 3 that the primary consideration is the “best interests of the child”: see *Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61, [2015] 3 S.C.R. 909, at paras. 37 and following. This is reflected in the stand-alone criminal justice system for children that recognizes and addresses the unique features of young persons and their vulnerabilities. In *R. v. R.C.*, 2005 SCC 61, [2005] 3 S.C.R. 99 at para. 41, the Supreme Court stated:

In creating a separate criminal justice system for young persons, Parliament has recognized the heightened vulnerability and reduced maturity of young persons. In keeping with its international obligations, Parliament has sought as well to extend to young offenders enhanced procedural protections, and to interfere with their personal freedom and privacy as little as possible.

- [104] In *D.B.* at para. 85, the Supreme Court referred to the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*, G.A. Res. 40/33 (November 29, 1985) (“the Beijing Rules”), which provide in Rule 8 (“Protection of privacy”) that “[t]he 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” and declares that “[i]n principle, no information that may lead to the identification of a juvenile offender shall be published.”
- [105] The Beijing Rules are an important tool, together with the *Convention*, in interpreting the scope, rights, and protections of the YCJA: *R. v. C.P.*, 2021 SCC 19, [2021] 1 S.C.R. 679, at paras. 147-148. The Beijing Rules address youth records, stating in Rule 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.”
- [106] The General Comments of the United Nations Committee on the Rights of the Child interpret and clarify the content of rights under the *Convention*. Canadian Courts have referred to General Comments in cases addressing the rights of children and interpreting legislation. See, for example: *ARP v. Children's Aid Society of London and Middlesex*, 2024 ONSC 4023, 2024 A.C.W.S. 3763 (Div. Ct.), at paras. 49-51; *S.S. v R.S.*, 2021 ONSC 2137, 331 A.C.W.S. (3d) 697, at paras. 31-36; *Ward v. Quebec (Commission des droits de la personne et des droits de la jeunesse)*, 2021 SCC 43, [2021] 3 S.C.R. 176, at para. 197; and *R. v. McGregor*, 2023 SCC 4, [2023] 1 S.C.R. 198, at para. 72 (relying on Human Rights Committee, General Comment No. 31).72.
- [107] General Comment No. 24 states, among other things:

States parties should respect the rule that child justice hearings are to be conducted behind closed doors. Exceptions should be very limited and clearly stated in the law. If the verdict and/or sentence is pronounced in public at a court session, the identity of the child should not be revealed. Furthermore, the right to privacy also means that the court files and records of children should be kept strictly confidential and closed to third parties except for those directly involved in the investigation and adjudication of, and the ruling on, the case.

[108] The Beijing Rules, then, would prohibit any disclosure of youth court records, not just identifying information. General Comment No. 24 suggests that youth court hearings should, generally, be “behind closed doors” and that records should not be disclosed to the public or the media. This is more restrictive than Canadian law and emphasizes the importance of ensuring that the privacy interests of young persons are respected and protected.

[109] An additional salutary effect of the provision is that it does not place a burden on young persons facing criminal charges to persuade a court to maintain the privacy of their records. In *D.B.*, the Supreme Court struck down provisions of the YCJA that placed a burden on young persons found guilty of serious offences, such as murder, attempted murder, manslaughter, and aggravated sexual assault, to persuade the court that they should still be sentenced under the YCJA and not as an adult. The Court stated that “[t]his onus on young persons is inconsistent with the presumption of diminished moral culpability, a principle of fundamental justice which requires the Crown to justify the loss both of a youth sentence and of a publication ban”: *D.B.*, at para. 95.

(b) Deleterious effects

[110] Put against this are the deleterious effects on the media and the values and objectives underlying the open court principle. Here, the applicants emphasize the obstacles created by s. 119(1)(s). This includes the issues discussed above under the discussion of minimal impairment – the need to bring an application at all, and that the media bears the burden of satisfying the court that their access to records is “desirable in the interest of the proper administration of justice.”

[111] A deleterious effect of requiring the media to bring an application is that it imposes a burden on the media which might cause it not to seek documents at all, thereby preventing public scrutiny of youth justice. It can also delay access to youth court records preventing timely reporting and sometimes causing inaccurate reporting. This requires some discussion.

[112] In most cases, “motions brought under s. 119(1)(s) will be straightforward.” In *S.L.* at paras. 52 and 53, Doherty J.A. observed that notice is not technically required, contrasting s. 119, which is silent on notice, with s. 123(2) of the YCJA which specifically requires it. However, in its decision in the swarming case, the Court of Appeal has now stated (at para. 90) that “s. 119(1)(s) is premised on a motion or application on notice.” But in discussing notice, Gomery J.A. gives no particulars of how that should be done, other than, at para.

89, stating that “the requirement for an application, whether oral or in writing, is plain on the wording of s. 119(1)(s).” [Emphasis added]

- [113] Plain or not, the reference to “oral” applications supports my view that formalities should, where appropriate, be relaxed when dealing with requests under s. 119(1)(s). The Attorney General of Ontario now shares this view, stating in his factum that “the provision does not require that the application be in writing. In appropriate circumstances, a youth court judge could agree to hear an oral application.” I say “now” because the Crown (Ontario) in the swarming case took the position before O’Connell J. that a written application was necessary: *CBC ONCJ* at para. 24.
- [114] Judges may in some cases find that a formal application is required, such as where there are several accused and parties are not present, or particularly sensitive information is sought, but in many cases a verbal request made by a journalist in the courtroom or conveyed to the judge through counsel or the registrar, should suffice. Crown attorneys, who must uphold the public interest – which includes openness - should assist in bringing such requests to the attention of the Court. Youth courts may also wish to consider creating a request form to streamline such applications, similar to that implemented by Paul Scovil JYC in *R. v. M.M.*, 2017 NSPC 12, at para. 29:

With regards to procedure for this type of request, I have instructed NSPC Administration to maintain at the court office an application form which can be quickly filled out by an individual, particularly media, that sets out the records sought and why. Further, that the application can be brought to the attention of a Judge of the Youth Criminal Justice Court, who can either direct that the documents requested be shown to the applicant or in the alternative court staff can be directed to set the matter down for hearing with all relevant parties being given notice.

- [115] My views on process are informed by the fact that this is a *Charter* application. In *CBC 2024* and *S.L.*, the Court of Appeal was interpreting the intention of Parliament but was not considering the constitutionality of s. 119(1)(s). When the section is viewed in a *Charter* context, requiring a formal, written application may be inconsistent with the requirement for timely access. Forcing the media to bring a formal application could, in some cases, lead to a *Charter* violation as it may defeat the media’s freedom to report, and the public’s right to receive, timely and accurate information about the courts.
- [116] In the swarming case, the registrar told the media to send a letter to the judge. This, or even a handwritten note, may often be all that should be necessary. An informal process is also consistent with the low test to be met, as the media, or at least the well-recognized media, will almost always have a “valid interest” in reviewing court records, and in most cases they will also readily satisfy the court that access to the records is “desirable in the interest of the proper administration of justice” without requiring any evidence. Even where valid concerns are raised by the Crown, the defence, or the court, they may be more effectively addressed directly at the time. This can facilitate at least some access, rather than bogging down an entire request in a lengthy and expensive application process that

delays access to anything, which would raise concerns about unreasonable infringements of s. 2(b) of the *Charter*.

- [117] Turning to delay, it is well-recognized that “[n]ews is often a perishable commodity”: *Grant v. Torstar Corp.*, at para. 70, quoting Lord Nicholls in *Reynolds v. Times Newspapers Ltd.*, [1999] 4 All E.R. 609 at p. 626. In *R. v. White*, 2005 ABCA 435, 376 A.R. 63, Berger J.A. elaborated on this point, stating at para. 6:

Because “[n]ews, as the word implies, involves something new - something fresh.” (*Triple Five Corp. v. United Western Communications Ltd.* (1994), 1994 ABCA 141, 19 Alta. L.R. (3d) 153 at 155 (C.A.)), unjustified delay in permitting full public access will have a deleterious effect on the ability of the media to report, and, in the result, for the public to be informed. Contemporaneous access to court documents and processes allows the media to fulfil their legitimate role as the eyes and ears of the public. As Kerans, J.A. noted in *Triple Five Corp.*, “time [for the media] is always of the essence.”

- [118] Nordheimer J., as he then was, put it well when he stated that “transgressions of fundamental freedoms ought not to be readily justified on the basis that any such infringements will be transient or short-lived”: *Toronto Star Newspapers Ltd. v. Canada* (2005) 204 C.C.C. (3d) 397 (Ont. S.C.), at para. 33. The Court of Appeal in the swarming case also observed that the public should have “real time transparency”: *CBC 2024* at para. 44.
- [119] The experience in the swarming case is that even where the parties moved quickly, it took three weeks to obtain an order permitting access to some of the records. To obtain other documents, more applications were required. The delay in the Kennedy Station case is far worse and should not be countenanced. Unreasonable delay in responding to requests for access raises constitutional concerns, as the public is denied timely access to information about the courts, frustrating the openness principle.
- [120] The Court of Appeal commented that the media’s concerns about delay in the swarming case were “speculative”, as there was “no evidence that the application process prevented the appellants from reporting... in a meaningful and timely way”: *CBC 2024* at para. 94. However, the Court was not considering the constitutional dimension of the impact of delay. Any delay in accessing information about the courts is concerning and has an impact on freedom of expression – both the media’s right to report and the public’s right to know.
- [121] Nor I expect did the Court of Appeal intend to require that the media be required to show, on an application, that access to youth court records is necessary in order to provide “meaningful” reporting. Courts are not editors. It is not their role to second-guess the media’s requests or decide what the media do or do not need in order to be able to report “meaningfully.” In this context, courts should generally not require the media to explain why they require documents beyond their interest in gathering information about the courts in order to report to the public. If the court has concern about releasing certain information,

it may consider imposing publication bans or other conditions having regard to the interest to be protected, the *Sherman Estate* test and the values underlying the openness principle.

- [122] As occurred in the swarming case, without timely access to court records youth court hearings may be missed. Records often contain information that assists the media in following a case and reporting on it accurately. It is a frequent complaint of journalists, as referred to in Ms. Pagliaro's affidavit, that not being able to obtain copies of exhibits, which include items such as agreed statements of fact that were read aloud in court, impedes their ability to follow evidence and to discuss editorial issues effectively with their editors and legal issues with their lawyers, and to fairly and accurately report on court proceedings.
- [123] Accordingly, courts, including youth courts, need to ensure that the media have access to court records in a timely way. Courts can and should be nimble and be promptly responsive to requests by the media to access exhibits and other court records without formality. Indeed, this is the case with many informal requests made by journalists. This furthers openness and enhances the administration of justice.
- [124] To the extent MAG policies, like the Access Policy, have created obstacles or delays, they must be reviewed and improved. Ms. Pagliaro's evidence of the delays caused by the Crown and the court clerk's office in delaying access to the Kennedy Station documents even after the court ordered access is particularly concerning. As Ms. Pagliaro noted, those records were to be released after redactions were made by the Crown. When counsel for the media requested them from the Crown, the Crown said they should be obtained through the clerk's office. A request sent to the clerk's office was not responded to for at least a week, despite the Access Policy stating that "timeliness is essential to ensure access to court files and documents" and that "court staff must facilitate access to court files and documents as quickly and efficiently as possible." This is unacceptable and should not have happened. Crowns should facilitate access, not obstruct it, and court staff should respond more quickly.
- [125] In *Canadian Broadcasting Corp. v. Manitoba* at para. 37, the Supreme Court quoted Goudge J.A. in *CTV Television*, that "the court's jurisdiction over its own records is anchored in the vital public policy favouring public access to the workings of the courts." Put another way, the courts are not bound by government access policies. If government policies or practices are unjustifiably getting in the way of access to court records, the courts must get them out of the way.
- [126] In this regard, I have concerns with portions of the Access Policy, which make statements not supported by the law. For example, the Policy states generally that "judicial consent is required to obtain access to court exhibits." While, in practice, a trial judge may retain control over access to exhibits, I am not aware of any legal requirement that an exhibit entered in a public trial cannot be released without judicial consent. Indeed, although there are many cases dealing with applications for exhibits following a trial, they confirm that the *Sherman Estate* test applies, placing an onus on the party resisting release to convince the Court that they should not be released.

- [127] In *R. v. Canadian Broadcasting Corporation*, 2010 ONCA 726, 102 O.R. (3d) 673, Sharpe J.A. reviewed the jurisprudence and noted, at para. 28 that “even before the *Charter*, access to exhibits that were used to make a judicial determination, even ones introduced in the course of pre-trial proceedings and not at trial, was a well-recognized aspect of the open court principle” citing *MacIntyre*. He continued, at para. 33, to state:

In *Named Person v. Vancouver Sun*, [2007] 3 S.C.R. 253, [2007] S.C.J. No. 43, at para. 33, the court reaffirmed the holding in *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326, [1989] S.C.J. No. 124, at p. 1338 S.C.R., that the right to access exhibits includes the right to make copies as “s. 2(b) provides that the state must not interfere with an individual's ability to ‘inspect and copy public records and documents, including judicial records and documents.’”[Emphasis added]

- [128] The *Courts of Justice Act*, R.S.O. 1990, c C.43, s. 137, also provides for public entitlement to court records:

Documents public

137 (1) On payment of the prescribed fee, a person is entitled to see any document filed in a civil proceeding in a court, unless an Act or an order of the court provides otherwise

- [129] Dealing specifically with YCJA matters, the Access Policy states that “YCJA records are accessible to persons listed in s. 119 of the YCJA” and then states that daily court lists providing the location for YCJA matters are available to the public, with initials. Court staff will not release a young person’s name, perhaps due to s. 129 of the YCJA, but this is not explained. The Access Policy also states:

Future court dates in YCJA matters are available to the public if sufficient information is provided to allow court staff to access the information in a reasonable amount of time. The following are examples of information that may be necessary to allow court staff to locate the information: court file number; last court date; charges against the young person; and date of birth. If an exclusion or sealing order has been made in the YCJA matter, disclosure of next court date information is not permitted.

- [130] This, however, is a practice, not law, and is not supported by the law. Why is information about a future court date not available because an “exclusion or sealing order” has been made? An “exclusion order” can mean many things – it can apply to witnesses, or others, but it may not apply to the public. Similarly, a “sealing order” may only apply to certain records. In short, in the absence of a court order not to provide future court dates, there is no basis in law not to do so.

- [131] While the information that “may be necessary” to locate a court file may be helpful to court staff, these should not be requirements if the court staff can otherwise provide the information about the next date. Ms. Pagliaro described how court staff have often treated

the list of information as a requirement, rather than as items which might, as a practical matter, be helpful to locate a file. She provided an example of court staff telling her that she would need to provide the full name and the date of birth of a young person before they could provide her with court dates – information that is often not available other than from court records. This does not mean that an application by the media is not required for court records. The court’s supervisory jurisdiction over court records facilitates openness while being responsive to “competing important public interests” where they arise: *CBC v Manitoba* at para. 37.

- [132] The applicants make one other argument that s.119(1)(s) is disproportionate and should not survive *Charter* scrutiny. In short, the media submits that the concern that access to documents will lead to identification of young persons is speculative and unsupported. As Ms. Pagliaro points out, she and other journalists attend youth courts and learn the names of young persons. They often hear and sometimes see the content of exhibits and other court records when they are referred to in open court. Journalists can and do respect the prohibition on identifying young persons.
- [133] This issue was addressed by the Court of Appeal in the earlier proceedings arising from the swarming case in which the Court agreed, at para. 70, with the concern of the youth court judge that the media “might inadvertently disclose information if they were given unlimited access” to youth court records. There, the youth court judge stated that “[t]he risk is not speculative, but real, given the speed at which information travels in this digital age.”
- [134] I am concerned that the youth court judge may have conflated a speculative risk that the media may inadvertently disclose information with the less speculative concern that such disclosure can be quickly and widely disseminated digitally. There is much to be said for the concern about wide and irreversible dissemination on the internet. Kasirer J. noted this in *Sherman Estate* at para. 80; however, he went on to say that “it may well be difficult for courts to be sure that information will not be broadly disseminated in the absence of an order.” [Emphasis added]. Put another way, if the law or a court order restricts someone from publishing or posting something, then it may only be “speculative” that prohibited information will be posted on the internet.
- [135] I do not find the evidence before me to be persuasive that there is anything more than a speculative concern that these media applicants would breach the ban on publishing information that would identify young persons. As Tetley J. stated in the Kennedy Station case, at para. 51:

At present this proceeding is subject to several orders that restrict the dissemination of any information that would identify the Respondents. The Applicants have undertaken to abide by these bans and contend that no further restriction to the record is required. That undertaking is observed every day in this country in circumstances involving even the most serious offences. Day after day, members of the press and broader media listen to evidence during applications related to such matters as judicial interim release, preliminary hearings, and evidentiary voir dieres,

matters that are all subject to publication bans. For these reasons I conclude that the risk of inadvertent disclosure by the multi-media that might violate the privacy or potentially compromise fair trial interests of the Respondent to be exceedingly remote. In these cases, the press and media know much more about the given prosecution than they are authorized to report. An established record of compliance with ordered restraints regarding the dissemination of information is concluded to allay any concerns regarding the risk of disclosure of such information to the public.

- [136] One can always point, as Dr. Kelly and the Crown do, to isolated cases in which there has been some inadvertent disclosure of someone's identity (although usually not publication which is where the prohibition lies), but that does not mean we prevent the public from attending youth court hearings where the name of the accused – as well as the contents of exhibits – are stated in open court. If there was such a concern, we would have to revert to *in camera* hearings as well, and no one is suggesting that.
- [137] Nevertheless, despite concerns about process and delay, in the context of the YCJA's extraordinary emphasis on protecting privacy, the recognition of the special position of young persons including their vulnerability, diminished responsibility and the objective of rehabilitation, as well as the concern that young persons not be identified, I conclude that the salutary impact of s. 119(1)(s) outweighs the deleterious effects on freedom of expression and the media. The privacy of young persons is an overarching concern that is especially important in the youth justice context, as recognized in domestic and international law. Retaining some judicial control over youth court records by requiring the media to request access and to meet a low burden to justify their request is not unreasonable and does not constitute such a deleterious impact on freedom of expression that it should override the very strong societal interest in protecting young persons involved in youth court proceedings.

Section 129

Section 129 infringes s. 2(b) of the Charter

- [138] Section 129 clearly breaches s. 2(b) of the *Charter*. It imposes a prohibition on “disclosure” of information found in a record for persons who have been “given access to a record or to whom information is disclosed under this Act.” The term “disclosure” is defined in s. 2(1) of the YCJA as “the communication of information other than by way of publication.” The section thereby prevents discussion, or expression, about the contents of records unless disclosure is “authorized” under the YCJA. The sections authorizing disclosure are narrow and have no relevance to this case.² It is not clear what sections would authorize it.

² In addition to the circumstances in s. 119(1)(a)–(r), these provisions are as follows: s. 34(7) provides for the disclosure of copies of medical or psychological reports about the young person (defined as part of the record under s. 34(12))

- [139] The respondent argues that the section does not breach s. 2(b) because the media has not demonstrated that the provision has any impact on its ability to report on youth court proceedings, in part it seems, because the section does not restrict “publication” of such information. This misses the point. The section prohibits communication, i.e., expression. It prevents someone from disclosing information to someone else on pain of prosecution. On its face, s. 2(b) is violated: *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927, at p. 973.

Section 129 is not demonstrably justified under s. 1 of the Charter

Pressing and substantial objective

- [140] Section 129 has only one purpose – to protect the privacy of young persons. Unlike s. 119(1)(s), it does not create an avenue to achieve transparency. Nevertheless, the protection of the privacy of young persons involved in the youth justice system is a pressing and substantial objective.

Proportionality: rational connection

- [141] In my view, s. 129 also meets the rational connection test. As I noted earlier, the test is “not particularly onerous”: *Little Sisters* at para. 228.
- [142] By imposing a prohibition on disclosure of information in a youth court record, s. 129 protects youth privacy by limiting disclosure or dissemination of information about the proceeding and the participants. There is a connection between the section and its objective. Although the applicants argue that the section is not carefully designed to be limited to information that does not identify the accused or other young persons and may also apply to information disclosed in open court, those submissions are more appropriately dealt with at the minimal impairment and balancing stages of the *Oakes* test.

to the young person, any parent of the young person in attendance at the proceedings against the young person, any counsel representing the young person, and the prosecutor, and also allows the court to disclose the report to a parent of the young person not present but who is actively taking an interest in the proceedings, along with the director of the facility or penitentiary where the young person resides; s. 40(8)-(9) provides for the disclosure of the pre-sentence report (defined as part of the record under s. 40(4)) to the same individuals with the exception of the director of the facility or penitentiary; s. 120 provides for the court to allow access to RCMP records to the young person, the young person’s counsel or their representative, an employee or agent of the Canadian government for statistical purposes, the Attorney General or a peace officer to investigate a subsequent offence or to establish the existence of an order or the breach of an order and any person for the purposes of the *Firearms Act*, S.C. 1995, c. 39; s. 125 provides for disclosure of information in a record by a peace officer or the Attorney General in certain contexts, such as investigations and extraditions, including to a foreign state, insurance companies, or to schools; s. 126 provides for disclosure to archivists; s. 127 also provides for disclosure on court order if the court views it as necessary where the young person has been found guilty of an offence involving serious personal injury, the young person poses a risk of serious harm to persons, and the disclosure of the information is relevant to the avoidance of that risk.

Proportionality: minimal impairment

- [143] Section 129 fails the minimal impairment test. The minimal impairment test is intended to ensure that any limit on *Charter* rights is minimally impairing, in that it is reasonably tailored to achieve the legislative objective. Section 129, however, applies to anyone given access to a record, and bans the disclosure of any information in the record to anyone else, “unless disclosure is authorized by this Act.” If the purpose of s. 129 is to protect the “sliver” of information relating to identification, as argued by the respondent and the Attorney General of Ontario, it goes far beyond what is necessary.
- [144] Section 129 also prohibits disclosure of information in records which may have been disclosed in open court. The name of an accused for example, or a young witness or victim may be known by attending court, yet the same information cannot be disclosed by someone who has access to a record, or an exhibit. The Crown says that this effect of s. 129 is simply an extension of the prohibition on publication of information that would tend to identify a young person, found in ss. 110 and 111 of the YCJA; however, this makes little sense when someone can find out the identification of a person by attending court; further, it is only the publication of identifying information that is prohibited by ss. 110 and 111.
- [145] Curiously, the Crown seeks to say the section is minimally impairing *because* the information may be available through attending court. Arguably, this makes the section irrational, as well as not proportionate. If the section were minimally impairing, it would make exceptions for information disclosed in open court and would be “carefully tailored” to only restrict expression necessary to protect the young person’s identity or, if necessary, other information the release of which would raise concerns about harm to the young person. The section fails to do any of that.
- [146] The reality is that, on its face, s. 129 is not carefully designed to achieve the legislative objective of protecting the identification of young persons while infringing freedom of expression as little as possible.

Proportionality: salutary and deleterious effects

- [147] The deleterious effects of s. 129 in my view clearly outweigh whatever salutary impacts the law has.
- [148] Unlike s. 119(1)(s), which provides a route for the media to obtain access to records, s. 129 provides no exceptions to its blanket ban on disclosure of anything found in a record. The section goes far beyond the publication ban that prevents dissemination of information which would identify young persons. It prohibits sharing any information contained in the records, including records that do not identify a young person.
- [149] The argument that the words “that information” in s. 129 is limited to the “sliver” of information that makes the “prohibited link” to a young person, relying on *F.N.*, is misplaced. *F.N.* was decided in the context of s. 46(1) of the YOA which stated:

46. (1) Except as authorized or required by this Act, no record kept pursuant to sections 40 to 43 may be made available for inspection, and no copy, print or negative thereof or information contained therein may be given, to any person where to do so would serve to identify the young person to whom it relates as a young person dealt with under this Act. [Emphasis added.]

- [150] This is quite different from s. 129, which speaks in broad terms, prohibiting disclosure of “that information”, which is undefined and not limited, as it was in s. 46(1) of the YOA. Indeed, in *S.L.* at para. 43, Doherty J.A. described s. 129 as “limiting dissemination of the information in the records even after access is granted.” There was no discussion of it only applying to the “sliver” of identifying information.
- [151] Ontario’s bald assertion that s. 129 only prohibits unauthorized disclosure of identifying information about a young person is entirely unsupported – by the language of the section and the jurisprudence. In a factum that is otherwise carefully supported by 146 footnotes – they provide no authority for their interpretation. It is also, I note, different from the position it took before O’Connell J. in which the Ontario Crown argued that s. 129 “prohibits an access recipient from showing the record, or revealing the information contained in the record, to any other person absent authority to do so under Part 6.”
- [152] Section 129 prevents disclosure of scheduling and other innocuous or otherwise public information about a case. This would apply to court staff. It can also apply to journalists, wishing to investigate or verify information found in a record, or who wish to discuss the contents of a record with, for example, their editor. This poses yet another barrier to timely, fair and accurate reporting on youth proceedings, which is inconsistent with the public interest in having open courts.
- [153] These are serious deleterious effects on freedom of expression which can restrict or prevent reporting that is in the public interest. These effects are out of proportion to the public concern for protecting youth privacy which is already addressed in ss. 118 and 119 dealing with access to records, and ss. 110 and 111 which prohibit publication of identifying information about children and young persons involved in youth justice.

The respondent’s request for a suspended declaration of invalidity

- [154] The respondent requested that any declarations of invalidity should be suspended in order to continue to protect the privacy of young persons. However, this request was made in the context of an application that originally sought far broader relief, seeking to strike down many more sections in Part 6 of the YCJA which, had it been granted, might have required reconsideration of the entire scheme. Those concerns do not arise when s. 129 is the only section to be declared of no force and effect.
- [155] The argument of both the respondent and Ontario was that s. 129 is only intended to protect the subsequent disclosure of identifying information of young persons. Implicit in this position is that there is no need to suspend the declaration of invalidity to prevent subsequent disclosure of other information that may be contained in youth court records.

The identification of young persons continues to be protected by the prohibitions on publication of identifying information – whether found in records or stated in open court. Accordingly, I decline to suspend the declaration that s. 129 of the YCJA is of no force and effect.

Conclusion

- [156] The application is granted, in part. Section 129 of the YCJA unjustifiably infringes s. 2(b) of the *Charter* and is declared of no force and effect.
- [157] Should the parties wish to address costs, they may contact my judicial assistant to arrange a case conference.

Paul B. Schabas J.

Date: July 14, 2026