WARNING

THIS IS AN APPEAL UNDER THE

YOUTH *CRIMINAL JUSTICE ACT*

AND IS SUBJECT TO:

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.

(2) Subsection (1) does not apply

(a) in a case where the information relates to a young person who has received an adult sentence;

(b) in a case where the information relates to a young person who has received a youth sentence for a violent offence and the youth justice court has ordered a lifting of the publication ban under subsection 75(2); and

(c) in a case where the publication of the information is made in the course of the administration of justice, if it is not the purpose of the publication to make the information known in the community.

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

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.

138(1) Every person who contravenes subsection 110(1) (identity of offender not to be published), 111(1) (identity of victim or witness not to be published), 118(1) (no access to records unless authorized) or 128(3) (disposal of R.C.M.P. records) or section 129 (no subsequent disclosure) of this Act, or subsection 38(1) (identity not to be published), (1.12) (no subsequent disclosure), (1.14) (no subsequent disclosure by school) or (1.15) (information to be kept separate), 45(2) (destruction of records) or 46(1) (prohibition against disclosure) of the Young Offenders Act, chapter Y-1 of the Revised Statutes of Canada, 1985,

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years; or

(b) is guilty of an offence punishable on summary conviction.

COURT OF APPEAL FOR ONTARIO

CITATION: Toronto (Police Service) v. L.D., 2018 ONCA 17
DATE: 20180112
DOCKET: C62728

Feldman, MacPherson and Huscroft JJ.A.

BETWEEN

Chief of Police
Toronto Police Service

Appellant (Applicant)

and

L.D., a young person

Respondent (Responding Party)

and

Steven Mignardi

Respondent (Cross-Applicant)

Gail Glickman, for the appellant, Chief of Police Toronto Police Service

No one appearing for the respondent, L.D.

Joanne Mulcahy, for the respondent, Steven Mignardi

Jane Stewart and Mary Birdsell, for the intervener, Justice for Children and Youth

Miriam Saksznajder and Carla Goncalves, for the intervener, Office of the Independent Police Review Director

Margaret Bojanowska, for the intervener, Criminal Lawyers' Association

Deborah Krick, for the Attorney General (Ontario) (written submissions only, by invitation of the Court)

Heard: November 7, 2017

On appeal from the judgment of Justice E.M. Morgan of the Superior Court of Justice, dated August 31, 2016, allowing an appeal from the amended judgment of Justice M.L. Cohen of the Ontario Court of Justice, dated September 10, 2015.

MacPherson J.A.:

A. INTRODUCTION

[1] An unusual preliminary issue has arisen on the appeal: should the appeal be quashed because of a jurisdictional issue?

[2] What makes the issue unusual is that there is no question that this court has jurisdiction to hear the appeal from the judgment of the Superior Court judge. However, it is not clear that the Superior Court judge had jurisdiction to hear an appeal from the decision of the Ontario Court of Justice judge, sitting as a youth justice court judge.

[3] For the reasons set out below, I have determined that there was no right of appeal from the decision of the youth justice court to the Superior Court of Justice. The Superior Court did have jurisdiction to review the decision of the youth justice court by way of a *certiorari* application under part XXVI of the *Criminal Code*, which also provides for a further appeal to this court. It would therefore be open to this court to treat the decision of the Superior Court judge as if it were made on an application for *certiorari* and to determine this appeal despite the error in the

Superior Court. However, I have decided that the court should decline to do so in the circumstances of this case.

B. FACTS

(1) The case in the Ontario Court of Justice (sitting as a youth justice court)

[4] Constable Steven Mignardi of the Toronto Police Service ("TPS") was charged under the *Police Services Act*, R.S.O. 1990, c. P. 15 ("*PSA*") with discreditable conduct in relation to the alleged assault of L.D., a young person who had been arrested by the TPS. The matter has been referred to a disciplinary hearing.

[5] In the context of this administrative proceeding, the TPS brought an application for an order under s. 119(1)(s) of the *Youth Criminal Justice Act*, S.C. 2002, c.1 ("*YCJA*") allowing access to the police records from the evening in question.

[6] Constable Mignardi brought a cross-application under ss. 119(1)(s) and 123 of the *YCJA* for access to records in the TPS's possession relating to additional incidents where L.D. was investigated, detained, arrested, convicted, and/or prosecuted.

[7] On August 6, 2015, Cohen J. of the Ontario Court of Justice (sitting as a youth justice court judge under the *YCJA*) released her decision dismissing both

the TPS and Mignardi applications. She issued very slightly revised reasons on September 10, 2015. Her conclusion was:

> I find that the TPS and the officer, have failed to establish a valid interest in the section 119 records, or a valid and substantial interest in the section 123 records.
>
> I further find that the TPS, and the officer, have failed to establish that access to the records is desirable in the interest of the proper administration of justice in relation to the section 119 records, or necessary in the interest of the proper administration of justice, in relation to the section 123 records.
>
> For all of these reasons, I conclude there should be no access by the TPS and the officer to the records of LD. The application is dismissed.

(2) The case in the Superior Court of Justice

[8] Both the TPS and Constable Mignardi appealed the youth court judge's decision to the Superior Court of Justice. The TPS cited s. 40(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 ("*CJA*") as the basis for the appeal. Constable Mignardi cited no statutory basis for his appeal.

[9] Section 40(1) of the *CJA* provides:

> 40(1) If no provision is made concerning an appeal from an order of the Ontario Court of Justice, an appeal lies to the Superior Court of Justice.

[10] The appeal was heard by Morgan J. of the Superior Court of Justice. In a decision released on August 31, 2016, he allowed the appeal. He set aside the decision of the youth court judge and ordered the following:

> The records sought by Mignardi in his application before the youth court judge are hereby ordered to be produced.

Although the appeal judge did not expressly address the records sought by the TPS in its appeal, those records were included in the records sought by Constable Mignardi.

(3) The case in the Court of Appeal

[11] The TPS appealed the Superior Court judge's decision to this court under s. 6(1)(b) of the *CJA*. Facta were delivered, and oral submissions made, by the appellant TPS, the respondent Constable Mignardi, and three interveners – Justice for Children and Youth, Office of the Independent Police Review Director, and the Criminal Lawyers' Association.

[12] During the hearing, the court raised the issue of the jurisdiction of the Superior Court judge to hear an appeal from the decision of the youth court judge. Some of the parties and interveners made brief submissions on this issue.

[13] Following the hearing, the court further considered, and became concerned about, this issue. On November 20, 2017, the court's Senior Legal Officer sent a letter to the parties, the interveners, and the provincial Crown inviting written submissions on the issue. The letter said, in part:

> Further to the hearing of this Appeal, the Panel has directed that counsel provide written submissions on the issue of whether there was jurisdiction to appeal the decision of the Youth Court Judge. In this regard, I draw your attention to the case of *R. v. Parker*, 2011 ONCA

> 819. Counsel are asked to consider the impact of that decision on whether s. 40(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43 provided a route of appeal to the Superior Court of Justice. Counsel are also asked to make submissions on whether this Court should entertain the appeal even if s. 40(1) did not provide a right of appeal to the Superior Court of Justice.

[14] By December 11, 2017, the court had received very helpful written submissions from the appellant, the respondent, two interveners, and the provincial Crown.

C. ISSUES

[15] The issues are:

> (1) Does s. 40(1) of the *CJA* support an appeal to the Superior Court of Justice from a decision of a youth court judge made under the *YCJA*?
>
> (2) If the answer to question (1) is 'No', is there another route to appeal or review a decision of a youth court judge to the Superior Court of Justice?
>
> (3) In light of the answers to questions (1) and (2), what should this court do with the appeal?

D. ANALYSIS

(1) Section 40(1) of the *CJA*

[16] The TPS concedes that its appeal of the youth justice court's decision to the Superior Court grounded in s. 40(1) of the *CJA* was misconceived in light of this court's decision in *R. v. Parker*, 2011 ONCA 819. This is a fair concession.

[17] In *Parker*, the appellant (Parker) applied to the Ontario Court of Justice for the return of marijuana plants that had been seized under the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 ("*CDSA*"). This was a stand-alone application under s. 24 of the *CDSA*; there was no related prosecution. The application was dismissed and the appellant appealed to the Superior Court of Justice. The Superior Court judge held that he could hear the appeal under s. 40(1) of the *CJA*. He dismissed the appeal and Parker appealed to this court.

[18] This court held that s. 40(1) of the *CJA* did not support the appeal. The court said, at para. 19:

> [The appeal judge] held that the Superior Court had jurisdiction to hear the matter, pursuant to the summary conviction appeal provisions in the *Courts of Justice Act*, s. 40. *Amicus* counsel and Crown counsel agree that [the appeal judge] erred in reaching this conclusion. … While the interplay between federal and provincial jurisdictions in drug cases can be problematic, we are satisfied that the correct characterization of a s. 24 application is that it flows out of Parliament's criminal law power. *Accordingly, provincial rights of appeal have no application*. [Citations omitted; emphasis added.]

[19] The remaining question is whether the *YCJA*, like the *CDSA*, is a federal law anchored in s. 91(27) of the *Constitution Act*, *1867*. This question has been definitively answered in the affirmative: see *Reference re Young Offenders Act (P.E.I.)*, [1991] 1 S.C.R. 252, at pp. 261-62. This general answer applies to the records provisions of the *YCJA*: see *L.(S.) v. B.(N.)* (2005), 196 O.A.C. 320, at

para. 60. It follows that provincial legislation such as s. 40(1) of the *CJA* cannot create an appeal right from an order made under the *YCJA*.

(2) Another appeal or review route?

[20] As discussed above, s. 40(1) of the *CJA* does not provide for an appeal from the decision of a youth court judge relating to the records provisions of the *YCJA*. Nor is there any provision in the *YCJA* authorizing such an appeal. Is there any other avenue to review the decision?

[21] The appellant and respondent jointly submit that there is a route to review a decision of a youth court judge relating to the records provisions of the *YCJA*. The route is an application for *certiorari* brought under Part XXVI of the *Criminal Code* before a judge of the Superior Court of Justice.

[22] I agree with this submission. The *certiorari* route was confirmed in *Parker*, at paras. 20-22. In my view, what this court said about *certiorari* as an available review route in proceedings under the *CDSA* applies equally to this proceeding under the *YCJA*.

[23] Section 784 of the *Criminal Code* provides a right to appeal a decision granting or refusing *certiorari* to the Court of Appeal.

(3) Should this court decide the appeal?

[24] In *Parker* this court, having determined that the proper route to review the Ontario Court of Justice judge's decision was a *certiorari* application to a Superior

Court judge, went on to hear and determine the appeal from the Superior Court judge's decision on the merits. In doing so, the court said, at para. 22:

> There is little, if any, disadvantage to a party seeking to review a [*CDSA*] s. 24 order having to apply for *certiorari* rather than proceeding by way of appeal. In this province, the reviewing court is the same, the Superior Court of Justice. The grounds of review are also the same and, one advantage to a party is that an appeal lies to this court as of right.

[25] There is no doubt that this court has the jurisdiction to treat the appeal decision as a decision made on an application for *certiorari*, and to determine the appeal on the merits, as it did in *Parker*. However, after anxious consideration, I am of the view that the court should decline to do so. The issues and surrounding circumstances in this case strike me as sufficiently different from those in *Parker* to justify a more cautious result. In articulating the reasons for caution in this case, I can do no better than set out the argument on this point made by the intervener Independent Police Review Director in its supplementary factum:

> While the Director agrees that this appeal is similar in many ways to the *Parker* decision, there is one notable and significant difference: in *Parker*, the judge in the first instance declined to order the return of the marijuana pursuant to the CDSA. On appeal, the Superior Court Justice *upheld* the decision of the judge in the first instance, *i.e.*, the Superior Court Justice did not find error in the decision of the lower court and did not make an order for return of the marijuana seized. The Court of Appeal agreed.
>
> In contrast, in the present case, Justice Morgan did *not* uphold the order of Justice Cohen but rather quashed it

> and ordered production of youth records. Had the appeal been brought properly as an application for *certiorari*, Justice Morgan could only have quashed Justice Cohen's decision and ordered access to the records if he found that she had exceeded her jurisdiction in denying access, or if her reasons had disclosed an error of law on the face of the record. As his reasons considered neither of these two bases, it is respectfully submitted that this Honourable Court cannot now properly review his decision to determine if he erred in law.
>
> In fact, the Director submits that if this Honourable Court did wish to properly consider and determine whether access to L.D.'s youth records ought to have been granted, this Honourable Court would have to review not Justice Morgan's decision but rather that of Justice Cohen, to determine if she exceeded her jurisdiction or made an error of law on the face of the record. It is respectfully submitted that this would be an impossible task on the materials presently before the Court, as the written and oral submissions of all parties have focused almost exclusively on Justice Morgan's decision, not that of Justice Cohen. [Emphasis in original.]

[26] I agree with this analysis. The combination of the different results in the two courts below, the robust review applied by the appeal judge in overturning the decision of the youth court judge (a review that, arguably, went beyond the jurisdiction and error of law on the face of the record construct of a *certiorari* review), and the fact that the facta and oral submissions of the parties and interveners focussed predominantly on the appeal judge's reasons rather than those of the youth court judge, means that this court is not well-placed, at this juncture, to determine this appeal.

E. DISPOSITION

[27] Having declined to determine this appeal due to the erroneous manner in which the appeal proceeded before the Superior Court of Justice, this court cannot allow the Superior Court decision to stand. The decision of the appeal judge is set aside. I leave it to the parties to determine what steps, if any, to take in light of these reasons.

Released: “KNF” JAN 12 2018

“J.C. MacPherson J.A.”
“I agree. K. Feldman J.A.”
“I agree. Grant Huscroft J.A.”