Youth Court Assessment Resource Guide 2015

Contents

***YCJA* Section 34: Medical and Psychological Reports**

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I. Overview

These materials are presented to suggest a "best practices" model for ordering, using and redistributing *YCJA* section 34 reports. The materials are advisory in nature only and should not be taken as binding authority.

II. Background

Section 34 assessment reports are prepared by mental health professionals. They are typically conducted by clinics or hospitals, such as the Centre for Addiction and Mental Health (CAMH) in Toronto. These reports provide valuable information about the specific needs and conditions of the youth before the court. They are designed to provide an objective assessment of any mental health concerns that may be relevant to the youth's functioning and disposition decision-making, any criminogenic factors underlying his or her behaviour, potential responsiveness to therapeutic treatment, and may address the youth's risk for recidivism.[2]

The mental health problems of Ontario's children and youth are a significant public health issue. The Ministry of Children and Youth Services (MCYS) estimates that between 15 and 21 percent of children and youth[3] have at least one mental health disorder, with significantly higher rates reported for Aboriginal children and youth.[4]

Many youth have learning disabilities, mental health concerns, or live with conditions such as fetal alcohol spectrum disorder (FASD).[5] A 2013 MCYS survey of youth probation officers in Ontario revealed that 68% of young persons in the youth justice system had mental health needs. Over 80% of those same young persons demonstrated resistance at first to utilizing mental health services.[6]

Studies have found that more than 90% of justice-involved youth meet minimal diagnostic criteria for at least one mental health disorder[7], and rates of serious mental disorder have been estimated at one in four justice-involved youth.[8] A 2003 comprehensive review of the existing scientific literature at the time found that prevalence rates of any mental disorder ranged from 50% to 100% amongst justice-involved youth in the studies sampled.[9]

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[2] Skilling, Dr. Tracey A, Department of Psychiatry, University of Toronto; Psychologist, CAMH, Toronto.
[3] In Ontario, this means, approximately, between 467,000 and 654,000 children and youth.
[4] MCYS, "A Shared Responsibility: Ontario's Framework Policy for Child and Youth Mental Health", available online:
http://www.children.gov.on.ca/htdocs/English/topics/specialneeds/mentalhealth/shared_responsibility.aspx
[5] Bala, N. and Anand, S. Youth Criminal Justice Law (Irwin Law, Toronto, 2012), at 534.
[6] "A Snapshot of Mental Health and Addiction Issues Within the Youth Justice System", Presentation by Misiorowski, Jennifer (MCYS), HSJCC Conference, Toronto, Ontario, November 27, 2013
[7] Drerup, L. C., Croysdale, A., & Hoffmann, N. G., "Patterns of behavioral health conditions among adolescents in a juvenile justice system". *Professional Psychology: Research and Practice*, (2008), Vol. 39(2) at 122-128; Unruh, D. K., Gau, J.M. and Waintrup, M.G., "An exploration of factors reducing recidivism rates of formerly incarcerated youth with disabilities participating in a re-entry intervention", *Journal of Child and Family Studies* (2009) Vol. 18(3) at 284-293.
[8] Shufelt, J.S. and Cocozza, J.C., "Youth with mental health disorders in the juvenile justice system: Results from a multi-state, multi-system prevalence study." (2006: Delmar, NY: National Centre for Mental Health and Juvenile Justice.)
[9] Vermeiren, R. "Psychopathology and delinquency in adolescents: A descriptive and developmental perspective", *Clinical Psychology Review* Vol. 23(2) at 277-318.

In the Canadian context specifically, young persons with mental health concerns also frequently interact with the youth criminal justice system. It is estimated that the prevalence of mental disorders in the youth criminal justice system is at least 2 to 4 times greater than in the general adolescent population.[10] The types of mental health issues identified in the CIHI study of custodial youth included depression and anxiety (18-31%); post-traumatic stress disorder (25%); conduct disorder (30%), ADHD (30%), and drug or alcohol abuse (22-39%).[11]

In the Toronto area, data from the CAMH suggests that approximately 80% of the youth seen in their clinic live with at least one diagnosed (DSM-IV) mental illness. Further, approximately 60% of youth in this sample have two diagnosed mental health disorders and 15% have three mental health diagnoses.[12] For incarcerated youth, CAMH estimates anywhere from 70-100% of these young persons live with at least one diagnosed DSM-IV psychological disorder.[13] These may include depression (18-31%); anxiety (30%+); post-traumatic stress disorder (25-50%); conduct disorder (70%) or drug or alcohol abuse (22-39%).[14]

Youth with mental health concerns do not often receive a proper assessment and diagnosis of their condition. Research suggests only 25-30% of these young persons will actually receive the treatment they require.[15] In turn, the first time many young persons are formally diagnosed with and treated for their mental health concerns is upon entering the youth criminal justice system.[16]

An appropriate diagnosis and plan for treatment will assist all parties in identifying the most appropriate resources available to foster the youth's rehabilitation and reintegration into society. Section 34 reports thus offer an invaluable resource to assist both counsel and the youth justice court to meet the goals of the *YCJA* when addressing youth with mental health concerns.

III. Who May Author a Section 34 Report

YCJA section 34(1) requires that a "qualified person" assess a young person and author the report. "Qualified person" is defined in section 34(14) as follows:

> … "qualified person" means a person duly qualified by provincial law to practice medicine or psychiatry or to carry out psychological examinations or assessments, as the circumstances require, or, if no such law exists, a person who is, in the opinion of

[10] "Improving the Health of Canadians: Mental Health, Delinquency and Criminal Activity" (October 31, 2008), Canadian Institute for Health information (Available online: www.cihi.ca)
[11] Skilling, Dr. Tracey (CAMH), Presentation to the HSJCC 2013 Conference, Toronto, Ontario. (November 25, 2013.)
[12] Skilling, Dr. Tracey (CAMH), "Mental Health Issues in Justice-Involved Youth: The Case for Evidence-Based Assessment and Treatment Practices", November 7, 2013. The Canadian Institute for Health Information in its 2008 study similarly estimates at least 70% of youth within correctional institutions suffer from at least one mental health disorder. *Supra* note 10.
[13] *Ibid.*
[14] *Supra* note 11.
[15] Kitcher, S. & McDougall, A. (2009) "Problems with access to adolescent mental health care can lead to dealings with the criminal justice system." *Pediatrics and Child Health*, v. 14(1)
[16] Urbszat, Dr. Dax, Department of Psychology, University of Toronto at Mississauga, "Youth Crime and Mental Health", presentation to the Mississauga Police Force (July 3, 2012.)

the youth justice court, so qualified, and includes a person or a member of a class of persons designated by the lieutenant governor in council of a province or his or her delegate.

Each region of the province has a local service provider available to provide section 34 reports upon receipt of a court order There is no cost to the young person to complete a section 34 report.

IV. When a Section 34 Report May Be Ordered

Section 34(1) of the *YCJA* establishes when a section 34 report may be ordered:

> A youth justice court[17] may, at any stage of proceedings against a young person, by order require that the young person be assessed by a qualified person who is required to report the results in writing to the court [Emphasis added.]

Ordering a report is a discretionary matter for the youth justice court.[18] While section 34 reports are typically ordered for use in sentencing proceedings, counsel should note they may be ordered at "any stage of proceedings against a young person", when appropriate. This may include at the bail stage, or in other limited circumstances, before a finding of guilt has been entered. All of these scenarios are discussed in more detail under Part VI of this memorandum.

V. Pre-Conditions to Ordering a Section 34 Report

Section 34(1) of the *YCJA* stipulates the necessary pre-conditions to a youth justice court ordering a section 34 report.

YCJA section 34(1)(a) states a report may be ordered "with the consent of the young person and the prosecutor." The young person should have the assistance of counsel before giving informed consent given the serious nature of such a decision.[19]

YCJA section 34(1)(b) states a report may also be ordered on the youth justice court's "own motion, or on an application of the young person or the prosecutor, if the court believes a medical, psychological, or psychiatric report in respect of the young person is necessary for a purpose mentioned in paragraphs (2)(a) to (g) and:

(i) The court has reasonable grounds to believe that the young person may be suffering from a physical or mental illness or disorder, a psychological disorder, an emotional disturbance, a learning disability or a mental disability,

(ii) The young person's history indicates a pattern of repeated findings of guilt under this Act or the *Young Offenders Act* […], or

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[17] *YCJA* sections 2 and 13 and the *Courts of Justice Act* section 38 define a youth justice court as a member of the Ontario Court of Justice. This will include Justices of the Peace as well as Ontario Court Judges. In cases where the young person has had an election as to his or her mode of trial, and has elected trial in the Superior Court, a Superior Court judge may also constitute a youth court and may order a section 34 assessment.

[18] *R v M.B.W.*, 2007 ABPC 214; *R. v. M.O.*, 2011 MBPC 5

[19] In *R v L.T.H.* 2008 SCC 49 at para 40, the Supreme Court held that a young person may only waive his or her rights if a judge is satisfied "that it is premised on a true understanding of the rights involved and the consequences of giving them up."

(iii) The young person is alleged to have committed a serious violent offence.

Each of these subsections provides a potential basis for ordering a section 34 assessment.

(i) Reasonable grounds to believe that the young person may be suffering from a physical or mental illness or disorder, a psychological disorder, an emotional disturbance, a learning disability or a mental disability

Counsel are not required to present to the court any formal prior medical diagnosis of the conditions designated in *YCJA* section 34(1)(b)(i). The court may find that "reasonable grounds to believe" the young person is afflicted with one of these criteria have been established simply by the nature of the allegations themselves, any agreed statement of facts between the parties, evidence provided from outside sources about the young person's background or needs, or the court's own observations of the young person.

Counsel should consider using the resources of their local youth mental health court worker (YMHCW). Across Ontario, currently 45 of 54 Ontario Court of Justice jurisdictions with a youth justice court now have a YMHCW. This program is run by MCYS and described as follows:

> The Youth Mental Health Court Worker (YMHCW) provides supports to Youth Justice Court for youth aged 12-17 with mental health needs. The worker establishes effective linkages between the youth in conflict with the law, the Youth Justice Court and appropriate community mental health, and youth justice resources. The YMHCW functions as a short-term "bridge" between these systems to reduce barriers to youth accessing necessary mental health and ancillary services and to reduce recidivism.[20]

The YMHCW may provide invaluable information that would establish reasonable and probably grounds to believe the young person meets the criteria to order a section 34 report. If counsel have concerns that the young person may have mental health needs, a referral to the YMHCW should be discussed as soon as practicable.

(ii) The young person's history indicates a pattern of repeated findings of guilt under this Act or the *Young Offenders Act*

There is no formal definition of what constitutes a "pattern" for subsection (ii). However, the Supreme Court of Canada held that this same language, as used in the sentencing provisions of the *YCJA*,[21] requires that a "pattern" consist of at least three prior convictions, unless the court finds that the offences "are so similar that a pattern of findings of guilt can be found in only two prior convictions."[22]

(iii) The young person is alleged to have committed a serious violent offence

Counsel should note that the definition of "serious violent offence" for subsection (iii) was amended by the *Safe Streets and Communities Act*,[23] and is now defined by *YCJA* section 2 to include only the following offences:

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[20] "Youth Mental Health Court Worker – Program Description", MCYS – Youth Justice Services Division (2013)
[21] *YCJA* s. 39(1)(c)
[22] *R v S.A.C.*, 2008 SCC 47 at para 22
[23] In force October 23, 2012.

- 1st degree murder or 2nd degree murder (*Criminal Code* section 231 or 235);
- Attempt to commit murder (*Criminal Code* section 239);
- Manslaughter (*Criminal Code* sections 232, 234 or 236); and
- Aggravated Sexual Assault (*Criminal Code* section 273).

VI. Purposes For A Section 34 Report

Section 34 reports may be ordered only for one of the enumerated purposes in section 34(2):

Bail

(i) Considering an application under section 33 (release from or detention in custody);

Section 34 reports can offer a violent risk assessment of the young person.[24] They can offer an opinion on the ability of a surety or responsible person to supervise a young person outside a detention centre and any concordant risk to public safety.[25]

Section 34 reports should be ordered with caution at the judicial interim release stage. Typically, a youth justice court is well equipped to assess the risk a young person poses to public safety or any victim or witness through traditional means employed at a bail hearing. However, when the allegations and evidence against the young person are particularly concerning and some evidence exists to suggest an underlying mental disorder, a section 34 report may be invaluable in assessing the young person's risk factors and developing a treatment plan (either custodial or non-custodial) to address any secondary ground concerns (i.e., substantial likelihood of reoffending.)

Counsel should consider the time it takes to complete a section 34 report, and if the young person's continued detention in custody pending the completion of the report is consistent with the principles of the *YCJA*. The legislation provisions addressing in-custody adjournments for section 34 reports are discussed in Part VIII of this memorandum.

This subsection references *YCJA* section 33 which addresses a bail *de novo* hearing only, and not an original application for judicial interim release. There is no authority to order a section 34 report at a bail hearing in the first instance.[26]

Sentencing

Section 34(2) allows a youth justice court to order a section 34 report for a variety of sentencing purposes, including:

(ii) Making its decision on an application hear under section 71 (hearing – adult sentences);
(iii) Making or reviewing a youth sentence;
(iv) Considering an application under subsection 104(1) (continuation of custody);

[24] In *K.L.Q. v R*, 2007 SKCA 120, the Saskatchewan Court of Appeal held that the use of a risk assessment contained in a pre-sentence report when crafting an appropriate sentence for a young person is a matter of discretion for the youth justice court.
[25] *Supra* note 1
[26] *R v K.T.J.* [2013] B.C.J. No. 1614 (Prov. Ct.); *R v* 2011 ABQB 455

(v) Setting conditions under subsection 105(1) (conditional supervision);
(vi) Making an order under subsection 109(2) (conditional supervision);

The decision to order a section 34 report in a sentencing hearing is a discretionary matter for the youth justice court. This is the case even when the Crown seeks an adult sentence.[27]

An assessment completed for one of these purposes involves a full evaluation of the individual's background, character, maturity and social functioning, in addition to psychiatric and psychological status.[28] If completed under subsection (b) for a possible *adult sentencing application*, the assessment may include a risk evaluation for future violent behaviour. This can also be included in any other report upon request.[29]

Assessments completed under subsection (d) for *continuation of custody* will include both a violence risk assessment and an evaluation as to whether community treatment and supervision would substantially reduce the risk posed by a young person, or not.[30]

Assessments completed under subsection (e) or (f) for the setting or varying of *conditional supervision* conditions will assess the risk of future criminal and/or violent behaviour, and whether treatment or social interventions may reduce that risk. It will include recommendations for appropriate conditions of conditional release.[31]

Disclosure of Personal Information

(vii) Authorizing disclosure under subsection 127(1) (information about a young person).

If an order is sought under subsection (g) to have a youth justice court authorize the disclosure of information about a young person to a person or persons on public safety grounds, the report will include a risk assessment to determine whether the young person poses a risk of serious harm to other persons, such that disclosure of information to specified members of the public may be required.[32]

Section 127 of the *YCJA* permits such disclosure if a youth justice court is satisfied that the disclosure is necessary, having regard to the following circumstances:

(a) the young person has been found guilty of an offence involving serious personal injury;
(b) the young person poses a risk of serious harm to persons; and
(c) the disclosure of the information is relevant to the avoidance of that risk.

Given the emphasis placed on privacy rights in the *YCJA*, such orders should be sought with extreme caution.

[27] *R v Smith*, 2009 NSCA 8 at para 56.
[28] *Supra* note 1
[29] *Ibid.*
[30] *Ibid.*
[31] *Ibid.*
[32] *Supra* note 1

Pre-Finding of Guilt Assessments

Nothing in section 34(2) expressly requires a finding of guilt, and indeed pre-finding of guilt assessments are clearly contemplated such as those for bail hearings. Obtaining a section 34 report early may, in some cases, assist the Crown in understanding the full picture of the young person's particular background and circumstances, and also assist defence counsel with formulating an appropriate plan to address the young person's particular needs and plot a course of treatment commensurate with those needs.

It is important to remember, however, that a section 34 report must still be ordered for a specific purpose authorized under *YCJA* section 34(2). If counsel wish to order a report in the absence of a finding of guilt, they must be prepared to articulate how this is in keeping with the statutory requirements of the Act.

When requesting a section 34 report before the young person has accepted responsibility for the offence, counsel should be mindful that in most cases, if a full structured risk assessment is required, this can be completed regardless of the young person's position with respect to the allegations.

Counsel should be mindful that any admissions made by the young person in the course of the completion of the report may not be used to incriminate the young person should the matters nevertheless proceed to trial pursuant to *YCJA* section 147. This may help assuage any concerns counsel or the young person and his or her family have about ordering a section 34 report at any early stage in the proceedings. These provisions are discussed in more detail in Part X of this memorandum.

VII. Section 34 Reports vs. Pre-Sentence Reports (PSR)

Section 34 reports provide an objective assessment of the young person's risk; psychological, psychiatric, educational or medical needs; and responsiveness to treatment. They add accuracy and precision to the youth justice court's attempts to understand and rehabilitate the young persons, consistent with the fundamental principles of the *YCJA* and the goals of sentencing specifically.[33]

The reports will identify priorities in the young person's life and areas of concern. They will also identify possible methods of intervention and modes of service delivery available in the young person's local region to assist with treatment.

A young person's mental health needs may be directly related to his or her risk to reoffend and indirectly linked to successful rehabilitation efforts. Information contained in the report can be critical to direct the treatment necessary to facilitate his or her successful reintegration into society.[34]

A comprehensive section 34 assessment may be essential for the most effective sentence possible to be crafted to ensure the young person's rehabilitation.

[33] *YCJA* sections 3 and 38; *supra* note 1.
[34] *Supra* note 1.

PSRs are also extremely useful, but will not cover the same range of material that a section 34 assessment does. The requirements of a PSR are set out in *YCJA* section 40. They must include:

- information about the young person's character, maturity, behaviour, attitude and willingness to make amends;
- plans the young person has to change or improve him or herself;
- any prior youth court record or experience with extrajudicial sanctions;
- information about the availability and appropriateness of community services and facilities for young person and his or her willingness to avail him or herself of them;
- the nature of the young person's family relationships; and
- the school attendance and performance record (and any employment record) of the young person.

A PSR is typically completed by a probation officer from MCYS and includes sentencing recommendations. It does not address mental health or cognitive functioning issues. Those matters can only be properly and fully addressed by a "qualified person" authoring a section 34 report.

A thorough section 34 report will include the following:

- an examination of the young person's current mental status and any required diagnosis;
- an opinion on how the young person's mental health condition(s) are related to criminal offending;
- psychometric testing when necessary (e.g. cognitive and academic functioning; youth self-report and parent report measures on different areas of functioning);
- an estimate of risk to reoffend based on actuarial measures;
- an evaluation of the young person's responsiveness to treatment and/or barriers to the potential effectiveness of interventions;
- recommended interventions and a treatment framework; and
- local resources available for the young person.

The significance of obtaining a thorough section 34 report cannot be understated. A young person's mental health needs may be directly related to his or her risk for continued involvement with the justice system and his or her prospects for rehabilitation. Treatment programs that are designed and implemented with a young person's mental health needs properly diagnosed and understood are likely to be far more effective.

For example, a 10 year ongoing study from CAMH following over 700 young persons (who had a section 34 completed) through their probation terms found that matching services with youths' individual criminogenic needs results in lower rates of re-offense for youths, and this was especially true for those youth classified in the moderate to high risk range for reoffending. The impact of treatment matched to individual needs, based on a comprehensive assessment, is vital.[35]

[35] Skilling, Dr. Tracey C, *supra* note 7. See also Viera, T., Skilling, T, and Peterson-Baali, M. "Matching Court-Ordered Services With Treatment Needs", *Criminal Justice and Behaviour*, Vol. 36, No. 4 (April 2009), 385-401

VIII. In Custody Adjournments to Obtain Section 34 Reports

Section 34(3) authorizes a youth justice court to remand a young person while in custody for a period not exceeding thirty days while the assessment is completed, subject to subsections 34(4) and (6).

34(4) prohibits an in-custody adjournment for the purposes of obtaining a section 34 assessment, unless:

> (a) the youth justice court is satisfied that
>
> > (i) On the evidence custody is necessary to conduct an assessment of the young person, or
> > (ii) On the evidence of a qualified person detention of the young person in custody is desirable to conduct the assessment of the young person, and the young person consents to custody; or
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> (b) the young person is required to be detained in custody in respect of any other matter or by virtue of any provision of the *Criminal Code*.

The initial court order beginning the assessment process may be amended at a subsequent date, if necessary. Section 34(6) states:

> A youth justice court may, at any time while an order made under subsection (1) is in force, on cause being shown, vary the terms and conditions specified in the order in any manner that the court considers appropriate in the circumstances.

IX. What To Send To The "Qualified Person"

Ensuring the accuracy of any section 34 report is imperative.[36] The reports will be used by a variety of parties, including the provincial director and others charged with implementing the youth court's sentence. The quality of treatment and care the young person receives will depend greatly on the nature of any section 34 report.

Counsel should ensure that the qualified person has enough information to complete a proper report. Anything that is sent is disclosed to the third party in question and may form part of the final report, and in turn be sent to the young person, his or her lawyer, the Crown's office and the youth justice court.[37] Counsel must ensure nothing intended to remain privileged is sent.

Local practices on how information is relayed to the author of the section 34 report will vary. Crown and defence counsel should ensure any information sent for the preparation of the section 34 report is discussed with one another. If counsel cannot agree on what material is forwarded to the qualified person, counsel should request an order from the youth justice court clarifying what materials the court authorizes being distributed.

In general, the material provided should include:

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[36] In *R v R.H.*, 2013 SKPC 8 at para. 46, the youth justice court noted that the accuracy of any section 34 report is "very important" for ensuring those responsible for the administering a youth sentence provide the proper quality care and treatment required to rehabilitate the offender.

[37] *YCJA* section 34(7)

- an Agreed Statement of Facts, if any, for a guilty plea, or a copy of the police synopsis that was read into the court record;
- for bail hearings – a copy of the police synopsis, and any "show cause" notes that may be disclosed, detailing the allegations and the evidence against the young person;
- a copy of the young person's prior youth court record (subject to Part VI of the *YCJA* dealing with record retention);
- a copy of the signed assessment order by the youth justice court;
- a copy of any standard information form preferred by the local service provider; and
- any victim impact information available.

X. Privacy Interests and Redistribution of Section 34 Reports

(i) Standard Procedure Upon Receipt of a Section 34 Report

Section 34 reports, upon completion, are sent directly to the youth justice court. Section 34(7) requires that certain parties have access to the report, subject to its ability to withhold part of the report under 34(10), discussed below.

Those parties entitled to a copy of the report under section 34(7)(a) include:

(i) the young person;
(ii) any parent of the young person who is in attendance at the proceedings against the young person;
(iii) any counsel representing the young person; and
(iv) the prosecutor.

Pursuant to section 34(7)(b), the youth justice court may cause a copy of the report to be given to:

(i) A parent of the young person who is not in attendance at the proceedings if the parent is, in the opinion of the court, taking an active interest in the proceedings; or
(ii) Despite subsection 119(6) (restrictions respecting access to certain records), the provincial director, or the director of the provincial correctional facility for adults or the penitentiary at which the young person is serving a youth sentence, if, in the opinion of the court, withholding the report would jeopardize the safety of the young person.[38]

Counsel should note that the youth justice court retains the authority to withhold part of all of the report. Section 34(10) states:

> A youth justice court shall withhold all or part of a report made in respect of a young person…. From the young person, the young person's parents, or a private prosecutor, if the court is satisfied, on the basis of the report or evidence given in the absence of the young person, parents or private prosecutor by the person who made the report, that disclosure of the report or parent would seriously impair the treatment or recovery of the young person, or would be likely to endanger the life or safety of, or result in serious psychological harm to, another person.

[38] In *R v B.E.O.* [2012] S.J. No. 120 (Sask. Prov. Ct.) at para 15 the court held "any person" need not be a specific person, but there must be some evidence of risk to a member of the public.

Section 34(11) further clarifies that despite subsection (10), the youth justice court may release all or part of the report to the young person, or his or her parents, "if the court is of the opinion that the interests of justice make disclosure essential."

In cases where a report comes back with potentially harmful information to a young person that he or she might otherwise have not been aware of, the decision to show the report to the young person will fall upon counsel for the defence. However, when considering further redistribution of the report, counsel should discuss with the youth justice court about whether it is necessary or desirable that elements of the report should be withheld from other parties in order to protect the privacy interests of the young person and promote his or her long-term rehabilitation.

(ii) Privacy Interests in Section 34 Reports

Section 3(1)(b) of the *YCJA* states that the "criminal justice system for young person must be separate from that of adults" and "must emphasize" a variety of factors, including young persons' "right to privacy."[39] The Supreme Court of Canada has noted that this right to privacy may take on constitutional characteristics. In *A. B. v. Bragg Communications,*[40] Abella J. cited approvingly from Cohen J.'s decision in *Toronto Star Newspapers v. Ontario*[41] on the importance of youth privacy rights where her Honour stated:

> The privacy of young persons under the [*Youth Criminal Justice Act*] has deeper roots than exclusively pragmatic considerations would suggest. We must also look to the Charter, because the protection of privacy of young persons has undoubted constitutional significance. …
>
> In *Dyment*, the [Supreme Court] stated that privacy is worthy of constitutional protection because it is "grounded in man's physical and moral autonomy", is "essential for the well-being of the individual," and is "at the heart of liberty in a modern state." *These considerations apply equally if not more strongly in the case of young persons.*[42]

In *R v K.M.* 2011 ONCA 252 the Ontario Court of Appeal recognized the "heightened expectation of privacy" that young persons are entitled to under the *YCJA.*[43]

Section 34 reports enjoy an even higher degree of privacy protection than most other youth records. In *L.(S)* v *B. (N.)*[44], Doherty J.A. of the Ontario Court of Appeal noted that the provisions of the *YCJA* which govern access to youth records "demonstrate beyond peradventure Parliament's intention to maintain tight control over access to [youth court] records."[45] His Honour further noted that "particularly sensitive records such as medical reports are available only in limited circumstances to specifically identified persons or groups[.]"[46]

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[39] *YCJA* section 3(1)(b)(iii)
[40] 2012 SCC 46
[41] 2012 ONCJ 27
[42] *Supra* note 32 at para 18. (Emphasis in the Supreme Court of Canada's decision in *Bragg Communications Inc*.)
[43] *R v K.M.* 2011 ONCA 252 at para 97
[44] (2005), 195 C.C.C. (3d) 481 (C.A.)
[45] *Ibid.* at para 24.
[46] *Ibid.*

In *R v B.E.O.*, the youth justice court noted that Parliament's decision to include section 34 reports and DNA testing results together in subsection 119(6) of the *YCJA* (which restricts the manner by which they may be accessed) was done deliberately and with the intention of affording them the "same high level of confidentiality."[47]

(iii) Further Access Via Part VI of the *YCJA* (Youth Records Provisions)

Section 34(12) states that a section 34 report "forms part of the record of the case in respect of which it was requested."

The ability to access and disclose section 34 reports is thus subject to the provisions of Part VI of the *YCJA*, including sections 118 and 119.[48] The nature of the final disposition, and whether the Crown proceeded summarily or by indictment, will affect the length of time that the youth record remains active and accessible by any interested parties.[49]

If counsel are still within the sentencing hearing stage of a particular case, the record remains active and may be disclosed to interested third parties, subject to the youth justice court's discretion. *YCJA* Section 119(6) states that access to a section 34 report may only be given under certain provisions of section 119.[50] The most commonly used will be an order sought pursuant to section 119(1)(s)(ii). This permits access to the record to:

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

The test for access to a youth court record under section 119(1)(s)(ii) was explained in *Toronto Star Newspaper Ltd. v. R.*[51] Cohen J. ruled that this section provides a "legislated discretion" to the court, but does not provide "express direction, or stipulate criteria, for how the discretion is to be exercised."[52] In addition to considering the principles and provisions of the *YCJA*, the youth justice court must also apply the *Dagenais/Mentuck* test established by the Supreme Court of Canada to ensure that the discretion will be exercised "in a constitutionally sound manner."[53]

The reformulated *Dagenais/Mentuck* test requires that the youth justice court consider the following test when deciding whether to prevent access to the record for the specified purpose requested:

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[47] *Ibid.* at para 30

[48] See *Catholic Children's Aid Society of Toronto v B.J.N.B.*, [2010] O.J. No. 1499 (O.C.J.); *R v Wellwood*, [2011] B.C.J. No. 972 (BCSC)

[49] Crown counsel must review the record retention periods found in the YCJA, section 119(2).

[50] 119(1)(a)-(c), (e)-(h), (q) and (s)(ii)

[51] 2012 ONCJ 27 at para.16

[52] *Ibid.*

[53] *Ibid.* Cohen J. at para 19 notes this test has been applied to youth court records by various other courts: *R v J.K.E.* [2005] Y.J. No. 21Yukon Territorial Court, per Lillies, J; *R v T.C.*, [2006] N.S.J. No. 531 (N.S. Prov. Ct.); *R v A.A.B.*, [2006] N.S.J. No. 226 (N.S. Prov. Ct.); *R v R.D.S. (Re Halifax Herald Ltd.)*, [1995] N.S.J. No. 207*; R v Canadian Broadcasting Corp.*, [2006] O.J. No. 1685(Ont. S.C.); *R v J.S.R.*, [2008] O.J. No. 4160 (Ont. S.C.); *R v G.C.*, [2009] O.J. No. 6331(Ont. S.C.) contra: *R v A.Y.D.*, [2011] A.J. No. 1031(Alta. Q.B)

(a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and

(b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

(iv) Seeking Access for the Provincial Director (MCYS)

Before the conclusion of any sentencing hearing, counsel should consider whether to request an order of the youth justice court *pursuant to section 119(1)(s)(ii)* releasing a copy of the section 34 report to MCYS to assist the Ministry with implementing its recommendations.[54] As a youth worker will have been assigned to the particular young person before the court, regardless of the type of sentenced imposed, that youth worker will be responsible for overseeing the young person's treatment and supervision. Without access to the report being granted to the youth worker, the young person's treatment and rehabilitation will be unnecessarily hindered.

As MCYS policy is to assign a dedicated case manager to a young person for the entirety of their time in the youth justice system (i.e., ages 12-17 or beyond if still serving a youth sentence while an adult), this will enable the assigned youth worker to know everything about a young person's youth court record. This will enable MCYS to act as a central repository of this information and ensure the best possible treatment for the young person.

This procedure has been endorsed in the 2013 text, A Guide to the Youth Criminal Justice Act, by Lee Tustin and Robert Lutes, Q.C. The authors observe that the Act

> …should be clarified to ensure that the provincial director is authorized in all circumstances to be provided with a copy of the report. The circumstances in [section 34(7)] are too narrow and these assessments are essential to case management and reintegration planning. Psychological/behaviour issues contained in a report such as this are critical to direct the program and the treatment to facilitate the successful reintegration and rehabilitation of young persons.[55]

Counsel must remember that even though the young person is granted access to the report upon its completion, the young person may not disclose the report to subsequent parties absent a youth court order expressly authorizing such disclosure. Nor may the Crown disclose the report without a youth court order. *YCJA* section 129 creates an absolute bar to subsequent disclosure of a youth record unless authorization is granted under the *YCJA*.

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[54] See the following cases where such orders have been made: *R v E.B.* 2013 ONCJ 713 at para 42; *R v T.R.D.*, 2011 BCSC 1515 (BC Supreme Court) at para 108; *R v A.W.* 2009 ONCJ 650 (Ontario Court of Justice) at para 59. The report must not be used for any other purpose, nor distributed. See also *R v B.E.O.*, *supra* note 12 at paras 30-31, where access was sought by the provincial director under *YCJA* section 34(7) for a different purpose (safety concerns to the public) and the youth justice court refused the order, noting the high level of privacy associated with section 34 assessment reports.

[55] Tustin, L. and Lutes, Robert E., A Guide to the Youth Criminal Justice Act (2013: LexisNexis Canada, Toronto) at page 83

(v) Access for Additional Third Parties

Counsel should also canvass with the youth justice court if any other organizations or interested parties should be granted access to the report to help effect the youth court's sentencing recommendations. Another court order will be required.

For example, the educational component of a section 34 report may be extremely helpful to outsides agencies or service providers assisting the young person with educational programming. If a learning disability has been diagnosed, providing that information and possible treatment methods to educators will help facilitate properly tailored programming for the young person.

Another possible order is to grant the young person the authority to redistribute the report, on his or her own initiative, to certain parties for limited purposes. This could allow the young person to determine if it is of assistance to have the report (or a portion of it) given to a variety of future service providers, such as doctors, therapists, or educational institutions.

The authority for such an order remains subject to debate. Some youth justice courts have held section 124 of the YCJA, which states a "a young person to whom a record relates… may have access to the record at any time", authorizes a youth justice court to make an order addressing both access and disclosure of a youth record.[56]

XI. Evidentiary Matters with Section 34 Reports

Statements made by a young person during the course of completing a section 34 assessment may only be used for certain purposes. *YCJA* section 147(1) states that:

> …no statement or reference to a statement made by the young person during the course and for the purposes of the [section 34] assessment to the person who conducts the assessment or to anyone acting under that person's direction is admissible in evidence, without the consent of the young person, in any proceeding before a court, tribunal, body or person with jurisdiction to compel the production of evidence.

Section 147(2) does allow such statements to be admissible in evidence for the following purposes however:

(a) making a decision on an application heard under section 71 (hearing – adult sentences)
(b) determining whether the young person is unfit to stand trial;
(c) determining whether the balance of the mind of the young person was disturbed at the time of commission of the alleged offence, if the young person is a female person charged with an offence arising out of the death of her newly-born child;
(d) making or reviewing a sentencing in respect of a young person;
(e) determining whether the young person was, at the time of the commission of an alleged offence, suffering from automatism or a mental disorder so as to be exempt from criminal responsibility by virtue of subsection 16(1) of the *Criminal*

[56] For example, see: *Ontario (HRC)* v *Toronto Police Services Board*, [2008] O.J. No. 4546, where Blacklock J. granted such an order in the context of a young person seeking a record of an "extra-judicial measure" to launch a human rights complaint; *R v R.M.*, 2011 ONCJ 143, where Murray J. granted such an order in a similar context.

Code,if the accused puts his or her mental capacity for criminal intent into issue, or if the prosecutor raises the issue after verdict;

(f) challenging the credibility of a young person in any proceeding if the testimony of the young person is inconsistent in a material particular with a statement referred to in subsection (1) that the young person made previously;
(g) establishing the perjury of a young person who is charged with perjury in respect of a statement made in any proceeding;
(h) deciding an application for an order under subsection 104(1) (continuation of custody);
(i) setting the conditions under subsection 105(1) (conditional supervision);
(j) conducting a review under subsection 109(1) (review of decision); or
(k) deciding an application for a disclosure order under subsection 127(1) (information about a young person.)

Admissions to other, uncharged offences

In the course of preparing a section 34 report, the qualified person may ask the young person about his or her proclivity to crime generally. These questions will generally veer beyond the specific offences before the court. It is common for young persons to admit to criminal behaviour related to prior, uncharged offences for which they have never been formally dealt with.

Counsel should be aware that courts "will generally not admit evidence of other offences that have not been proved." [57]Accordingly, separate, uncharged offences cannot form the basis of an *aggravating factor* against the accused, unless the Crown seeks leave of the court to prove those offences beyond a reasonable doubt at the sentencing hearing.

However, a youth justice court may arguably consider admissions to uncharged offences when assessing a young person's risk to re-offend which may in turn have an effect on the ultimate sentence imposed. In *R v Wesley*[58], the British Columbia Court of Appeal addressed this issue in the context of an adult, aboriginal offender and a psychiatric report commission for his sentencing hearing. The court held that a sentencing court may properly use statements of the offender admitting to uncharged offences in determining his character and risk of reoffending. The Court cited *Angelilo* at paragraph 32 where Charron J. explained:

> Finally, the court must draw a distinction between considering facts establishing the commission of an uncharged offence for the purpose of punishing the accused *for that other offence*, and considering them to establish the offender's character and reputation or risk of re-offending for the purpose of determining the appropriate sentence for *the offence of which he or she has been convicted*. In my example, the sentence imposed on a violent offender may well be more restrictive than the sentence imposed on an offender who has committed an isolated act, but this is in no way contrary to the presumption of innocence.

[57] *R v Angelilo*, 2006 SCC 55 at para 23; *Criminal Code* s. 725.
[58] 2014 BCCA 321

It should be noted that *YCJA* section 50 which addresses the interaction of the sentencing provisions of the *Criminal Code* with the *YCJA* explicitly does not reference and incorporate section 725 into youth sentencing hearings. Nothing in the *YCJA* itself appears to directly address this evidentiary matter either. Thus, the applicability of the general principles enunciated in *Angelilo* and *Wesley*, *supra* to youth matters remains unresolved.

Young Persons and Forensic Assessments

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Table of Contents

[59] These materials were produced with the assistance of members from the Ministry of Children and Youth Services, and the Ministry of Health and Long-Term Care. They are intended to be shared and widely distributed. Comments and/or feedback are welcomed.

I. Overview

In *Winko v. British Columbia (Forensic Psychiatric Institute),* the Supreme Court of Canada made the following observation about how the criminal justice regime governs the mentally disordered offender:

> In every society there are those who commit criminal acts because of mental illness. The criminal law must find a way to deal with these people fairly, while protecting the public against further harms. The task is not an easy one.[60]

The task is particularly challenging and complicated when the accused before the court is a young person. Courts, lawyers, and health care professionals will require comprehensive knowledge of not only the relevant provisions of the *Criminal Code of Canada*[61] but also the *Youth Criminal Justice Act*[62] and several provincial statutes.[63]

These materials are presented to suggest a "best practices" model for the forensic assessment provisions contained in Part XX.1 of the *Criminal Code* as they should be applied to young persons prosecuted under the *YCJA*. The materials are advisory in nature only and should not be taken as binding authority. They provide a general overview only. For a more comprehensive understanding of Part XX.1 of the *Criminal Code*, reference should be made to a leading textbook or annotated looseleaf.

II. Background: Young Persons and Mental Health

The rates of mental health concerns are much higher among young people involved in the criminal justice system than in the general population.[64] A 2013 Ministry of Children and Youth Services (MCYS) survey of youth probation officers in Ontario revealed that 68% of young persons in the youth justice system had mental health needs. Over 80% of those same young persons demonstrated resistance at first to utilizing mental health services.[65]

Studies have found that more than 90% of justice-involved youth meet minimal diagnostic criteria for at least one mental health disorder[66], and rates of serious mental disorder have been estimated at one in four justice-involved youth.[67] A 2003 comprehensive review of the

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[60] [1999] 2 S.C.R. 625 at para 1
[61] R.S.C. 1985 c. C-46 [hereinafter "Criminal Code"]
[62] S.C. 2002, c. 1 [hereinafter "YCJA"]
[63] For example, in Ontario, the *Mental Health Act* R.S.O. 1990 c. M-7, and *Health Care Consent Act* 1996 S.O. c. 2, have provisions directly relevant to the treatment of patients subject to forensic assessment orders
[64] Peterson-Badali, M., et al, "Mental Health in the context of Canada's Youth Justice System", (2015) 19 Can. Crim. L.R. 5
[65] "A Snapshot of Mental Health and Addiction Issues Within the Youth Justice System", Presentation by Misiorowski, Jennifer (MCYS), HSJCC Conference, Toronto, Ontario, November 27, 2013
[66] Drerup, L. C., Croysdale, A., & Hoffmann, N. G., "Patterns of behavioral health conditions among adolescents in a juvenile justice system". *Professional Psychology: Research and Practice*, (2008), Vol. 39(2) at 122-128; Unruh, D. K., Gau, J.M. and Waintrup, M.G., "An exploration of factors reducing recidivism rates of formerly incarcerated youth with disabilities participating in a re-entry intervention", *Journal of Child and Family Studies* (2009) Vol. 18(3) at 284-293
[67] Shufelt, J.S. and Cocozza, J.C., "Youth with mental health disorders in the juvenile justice system: Results from a multi-state, multi-system prevalence study." (2006: Delmar, NY: National Centre for Mental Health and Juvenile Justice)

existing scientific literature found that prevalence rates of any mental disorder ranged from 50% to 100% amongst justice-involved youth in the studies sampled.[68]

It is estimated that the prevalence of mental disorders in the youth criminal justice system is at least 2 to 4 times greater than in the general adolescent population.[69] The types of mental health issues identified in the CIHI study of custodial youth included depression and anxiety (18-31%); post-traumatic stress disorder (25%); conduct disorder (30%), attention deficit hyperactivity disorder (ADHD) (30%), and drug or alcohol abuse (22-39%).[70]

In the Toronto area, data from the Centre for Addiction and Mental Health (CAMH) suggests that approximately 80% of the youth seen in their clinic live with at least one diagnosed DSM-IV mental illness. Further, approximately 60% of youth in this sample have two diagnosed mental health disorders and 15% have three mental health diagnoses.[71] For incarcerated youth, CAMH estimates anywhere from 70-100% of these young persons live with at least one diagnosed DSM-IV psychological disorder.[72] These may include depression (18-31%); anxiety (30%+); post-traumatic stress disorder (25-50%); conduct disorder (70%) or drug or alcohol abuse (22-39%).[73]

Youth with mental health concerns do not often receive a proper assessment and diagnosis of their condition. Research suggests only 25-30% of these young persons will actually receive the treatment they require.[74] In turn, the first time many young persons are formally diagnosed with and treated for their mental health concerns is upon entering the youth criminal justice system.[75]

III. Mental Illness and the *Youth Criminal Justice Act*

Young persons[76] accused of a criminal offence are subject to both the *Criminal Code of Canada* and the *Youth Criminal Justice Act*. Generally speaking, except where the provisions of the *Criminal Code* are inconsistent with or excluded by the *YCJA*, those provisions still apply, but with any modifications that the circumstances require.[77]

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[68] Vermeiren, R. "Psychopathology and delinquency in adolescents: A descriptive and developmental perspective", *Clinical Psychology Review* Vol. 23(2) at 277-318

[69] "Improving the Health of Canadians: Mental Health, Delinquency and Criminal Activity" (October 31, 2008), Canadian Institute for Health information (Available online: www.cihi.ca)

[70] Skilling, Dr. Tracey (CAMH), Presentation to the HSJCC 2013 Conference, Toronto, Ontario. (November 25, 2013)

[71] Skilling, Dr. Tracey (CAMH), "Mental Health Issues in Justice-Involved Youth: The Case for Evidence-Based Assessment and Treatment Practices", November 7, 2013. The Canadian Institute for Health Information in its 2008 study similarly estimates at least 70% of youth within correctional institutions suffer from at least one mental health disorder. *Supra* note 10

[72] *Ibid*

[73] *Supra* note 11

[74] Kitcher, S. & McDougall, A. (2009) "Problems with access to adolescent mental health care can lead to dealings with the criminal justice system." *Pediatrics and Child Health*, v. 14(1)

[75] Urbszat, Dr. Dax, Department of Psychology, University of Toronto at Mississauga, "Youth Crime and Mental Health", presentation to the Mississauga Police Force (July 3, 2012.)

[76] A "young person" is someone who, at the time of their offence, was between 12 and 17 years of age: *YCJA*, section 2. Persons who were younger than 12 years of age at the time of an offence cannot be charged criminally in Canada. Rather, they can be addressed under the provisions of provincial child welfare legislation, such as the *Child and Family Services Act* R.S.O. 1990 c. C-11 in Ontario

[77] *YCJA* s. 140

The *YCJA* references mental health concerns at various stages of the proceedings. For example, a youth justice court shall not detain a young person at the pre-trial stage nor sentence a young person to custody after a finding of guilt as "a substitute for appropriate child protection, mental health, or other social measures."[78] However, specialized sentencing options that can help address a young person's mental health concerns and provide individualized treatment are available to a youth justice court.[79] Furthermore, a youth justice court may order an assessment of a young person's mental health concerns for a variety of purposes at any stage of the proceedings. These reports, known as section 34 assessments, are unique to the *YCJA* and are discussed briefly in the next section.

The sections of the *Criminal Code* that relate to criminal responsibility and mental disorder,[80] and fitness to stand trial,[81] also apply to young persons. Forensic assessments, ordered under the authority of Part XX.1 of the *Criminal Code*, are thus also applicable to young persons and the primary subject of this guidebook.[82] While findings of not criminally responsible ("NCR") and unfit to stand trial are extremely rare in the youth justice system,[83] understanding the differences between these assessment reports and reports ordered under section 34 of the *YCJA* or another applicable statute is absolutely crucial for all justice system participants.

IV. Differences With *YCJA* Section 34 Assessments

Section 34 of the *YCJA* has no analogue in the *Criminal Code.* It allows for a comprehensive assessment of a young person's mental health concerns for a variety of purposes**.** Section 34 assessment reports are prepared by mental health professionals. They are typically conducted by clinics or hospitals, such as the Centre for Addiction and Mental Health (CAMH) in Toronto. These reports provide valuable information about the specific needs and conditions of the youth before the court. They are designed to provide an objective assessment of any mental health concerns that may be relevant to the youth's functioning and disposition decision-making, any criminogenic factors underlying his or her behaviour, potential responsiveness to therapeutic treatment, and may address the youth's risk for recidivism.[84]

Ordering a report is a discretionary matter for the youth justice court.[85] While section 34 reports are typically used in sentencing proceedings, counsel should note they may be ordered at "any stage of proceedings against a young person"[86], when appropriate. This may include for a bail *de novo* hearing, or in other limited circumstances, before a finding of guilt has been made by a youth justice court.

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[78] *YCJA* ss. 29(1) and 39(5)
[79] See *YCJA* s. 42(2)(l) and the Intensive Support and Supervision Program; *YCJA* s. 42(7) and the Intensive Rehabilitation and Custody Supervision Order
[80] *Criminal Code* s. 16
[81] *Criminal Code* ss. 672.11 – 672.33
[82] *YCJA* s. 141
[83] Statistics Canada's "Youth Court Statistics in Canada" for both 2010/2011 and 2011/2012, available online at http://www.stancan.gc.ca
[84] Skilling, Dr. Tracey A, Department of Psychiatry, University of Toronto; Psychologist, CAMH, Toronto
[85] *R v M.B.W.*, 2007 ABPC 214; *R. v. M.O.*, 2011 MBPC 5
[86] *YCJA* s. 34(1)

More information on *YCJA* section 34 reports may be obtained from the "Guidebook to YCJA section 34 Reports", available online at the Human Services and Justice Coordinating Committee website: http://www.hsjcc.on.ca

It is important to remember that section 34 assessments are fundamentally different in scope and ordered for very distinct purposes than forensic assessments conducted under the authority of Part XX.1 of the *Criminal Code*. Section 34 reports will involve a comprehensive examination of the young person's mental health and also educational needs, focus on treatment options designed to reduce the risk of recidivism and typically assist the youth justice court with crafting an appropriate sentence. By contrast, youth forensic assessments should be narrowly tailored to the specific concerns contained in the assessment order and must be conducted in the least intrusive manner possible to adequately assess the mental condition of accused young person.

A forensic assessment report that strays beyond the narrow confines of the lawful basis for which it was ordered risks bringing the young person needlessly further and deeper into the criminal justice system. This can have adverse effects on the young person's ultimate rehabilitation and reintegration and may unduly delay the disposition of his or her criminal charge(s).

V. Forensic Assessments under Part XX.1 of the *Criminal Code* for Young Persons

Part XX.1 of the *Criminal Code* addresses mental disorder and accused persons. It provides courts with a very limited jurisdiction to order forensic assessments for certain specified purposes. Only those sections which relate to the fitness of an accused person to stand trial, or to assist the court in determining whether the accused person is not criminally responsible by virtue of a mental disorder will be examined in detail.

Readers should note that the *Criminal Code* does not give the court the power to order a psychiatric assessment of an accused person as a means to simply learn more about their mental health status and how it may or may not relate to his offending more broadly.[87]

(i) Interaction Between the *YCJA* and the *Criminal Code*

Part XX.1 of the *Criminal Code* is incorporated into youth criminal justice proceedings by virtue of *YCJA* section 141. However, a few key differences and special protections for young persons should be noted.

First, the section states that the provisions of the *Criminal Code* are incorporated "except to the extent that they are inconsistent with or excluded by" the *YCJA*, with "any modifications that the circumstances require".[88] Whether or not a provision of the *Criminal Code* is "inconsistent" with the *YCJA* may be difficult to determine and subject to varying opinions. However, generally speaking, the underlying philosophy of the *YCJA* should be brought to bear in any proceedings affecting a young person subject to a forensic assessment order.

[87] *R v Snow* (1992), 76 C.C.C. (3d) 43 (Ont. Gen. Div); *R v Gray* (2002) 169 C.C.C. (3d) 194 (B.C.S.C.); "The Pros and Cons of Court Ordered Assessments", Justice Mara Greene (OCJ), *For the Defence* (2011), Vol. 32, No. 6

[88] *YCJA* s. 141(1)

The parents of young persons are also entitled to a copy of anything that would be sent to an accused person as required by Part XX.1 of the *Criminal Code*, so long as they are in attendance at the proceeding against the young person, or the court determines that they are taking an active interest in the proceedings.[89]

The same provisions apply to any requirement to provide the young person with notice under Part XX.1 of the *Criminal Code*.

Furthermore the *YCJA* expressly requires that before making or reviewing a disposition in respect of a young person under Part XX.1 of the *Criminal Code*, "a youth justice court… shall consider the age and special needs of the young person and any representations or submissions made by a parent of the young person."[90]

The Supreme Court of Canada has held that young persons are entitled under the *Charter of Rights and Freedoms* to a "presumption of diminished moral culpability" which reflects their reduced capacity for moral judgment, heightened vulnerability and lack of maturity.[91] This is now also a statutory requirement in section 3(1)(b) of the *YCJA*. The Supreme Court has also held that the youth justice system must be separate from the adult criminal justice system and reflect its principles accordingly throughout the process.[92]

These principles must be considered and applied when addressing a court-ordered forensic assessment for a young person.

(ii) What is an "Assessment"?

"Assessment" is defined in section 672.1 of the *Criminal Code:*

> "Assessment" means an assessment by a medical practitioner or any other person who has been designated by the Attorney General as being qualified to conduct an assessment of the mental condition of the accused under an assessment order made under section 672.11 or 672.121, and any incidental observation or examination of the accused.

These are completed by qualified "medical practitioners"[93], usually a psychiatrist, or other qualified person designated by the Attorney-General.

(iii) Requirements For A Youth Forensic Assessment Order

Section 672.11 of the *Criminal Code* states:

> A court having jurisdiction over an accused in respect of an offence may order an assessment of the mental condition of the accused, if it has reasonable grounds to believe that such evidence is necessary to determine

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[89] *YCJA* s. 141(2)
[90] *YCJA* s. 141(6)
[91] *R v D.B.*, 2008 SCC 25
[92] *R v S.J-.L*, 2009 SCC 14; *R v R.C.* 2005 SCC 61; *YCJA* s. 3
[93] Defined in s. 672.1 of the *Criminal Code* to mean "a person who is entitled to practise medicine by the laws of a province"

(*a*) whether the accused is unfit to stand trial;

(*b*) whether the accused was, at the time of the commission of the alleged offence, suffering from a mental disorder so as to be exempt from criminal responsibility by virtue of subsection 16(1);

(*c*) whether the balance of the mind of the accused was disturbed at the time of commission of the alleged offence, where the accused is a female person charged with an offence arising out of the death of her newly-born child;

(*d*) the appropriate disposition to be made, where a verdict of not criminally responsible on account of mental disorder or unfit to stand trial has been rendered in respect of the accused;

(*d.1*) whether a finding that the accused is a high-risk accused should be revoked under subsection 672.84(3); or

(*e*) whether an order should be made under section 672.851 for a stay of proceedings, where a verdict of unfit to stand trial has been rendered against the accused.

There is no requirement for medical evidence to support an assessment order.[94] Rather, an assessment order may be issued simply if the court has "reasonable grounds to believe such evidence is necessary" to determine the issue of concern before it.

An assessment order should never be sought simply to secure psychiatric treatment for a young person, or to place the young person in a hospital environment. The youth criminal justice system cannot be used as a proxy for "appropriate child protection, mental health or other social measures."[95]

(iv) When A Court May Order An Assessment

Section 672.12(1) of the *Criminal Code* empowers a court to order an assessment of an accused any stage of the proceedings on its own motion, or on the application of the accused. However, certain limitations exist on the application by a prosecutor.

In summary conviction matters, which are the norm in youth justice court[96], prosecutors may only apply for an assessment order to determine if the accused is fit to stand trial if:

(a) The accused raised the issue of fitness; or

(b) The prosecutor satisfies the court that there are reasonable grounds to doubt that the accused is fit to stand trial.[97]

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[94] *R v Isaac* [2009] O.J. No. 5135 (O.C.J.)
[95] *YCJA* s. 29(1) in the context of judicial interim release; *YCJA* s. 39(5) in the context of sentencing considerations
[96] See *R v S.J-L.*, 2009 SCC 14
[97] *Criminal Code* s. 672.12(2)

Furthermore, where the prosecutor applies for an assessment in order to determine if an accused person was not criminally responsible at the time of the offence, the court may only order the assessment if:

(a) The accused puts his or her mental capacity for criminal intent into issue; or

(b) The prosecutor satisfies the court that there are reasonable grounds to doubt that the accused is criminally responsible for the alleged offence, on account of mental disorder.[98]

Contents of Assessment Orders

Section 672.13 of the *Criminal Code* establishes the requirements of an assessment order. An assessment order must specify:

(a) the service that or the person who is to make the assessment, or the hospital where it is to be made;

(b) whether the accused is to be detained in custody while the order is in force; and

(c) the period that the order is to be in force, including the time required for the assessment and for the accused to travel to and from the place where the assessment is to be made.

Assessment orders are made in Form 48 which is a proscribed form under the *Criminal Code of Canada*.

Time Periods

An assessment order shall not be in force for more than 30 days.[99] An assessment order to determine whether or not the accused is fit to stand trial shall be in force for no more than 5 days (excluding holidays and the time required for the accused to travel to and from the place where the assessment is to be made), unless the accused and prosecutor agree to a longer period (still not exceeding 30 days).[100]

A court may make an assessment order that remains in force for 60 days if the court is satisfied that "compelling circumstances" warrant it.[101] A court may also extend an assessment at any time during which the assessment order is in force for a period of not more than 30 days at a time, up to a maximum of 60 days.[102]

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[98] *Criminal Code* s. 672.12(3)
[99] *Criminal Code* s. 672.14(1)
[100] *Criminal Code* s. 672.14(2)
[101] *Criminal Code* s. 672.14(3)
[102] *Criminal Code* s. 672.15

Pre-Trial Detention Orders

The *Criminal Code* places a presumption against custody for an accused person subject to an assessment order. A pre-trial detention order may only be issued under an assessment order in limited circumstances:

> (*a*) the court is satisfied that on the evidence custody is necessary to assess the accused, or that on the evidence of a medical practitioner custody is desirable to assess the accused and the accused consents to custody;
>
> (*b*) custody of the accused is required in respect of any other matter or by virtue of any other provision of this Act; or
>
> (*c*) the prosecutor, having been given a reasonable opportunity to do so, shows that detention of the accused in custody is justified on either of the grounds set out in subsection 515(10).[103]

While assessment orders generally take precedence over standard bail hearings,[104] these provisions are arguably subject to the pre-trial detention regime of the *YCJA*[105] which places a heavy emphasis on keeping young persons in the community and has strict threshold requirements for when a detention order may be granted.[106] Parliament's intention in enacting the *YCJA* was to reduce the number of young persons detained in custody at **all stages** of the youth justice system.[107]

Young persons are additionally entitled to enhanced procedural protections.[108] The onus to justify any detention order or conditions on release always lies with the Crown, which stands in contrast to section 515(10) of the *Criminal Code* for adults, which allows for some "reverse-onus" provisions where the accused must justify their release.[109]

Young persons subject to assessment orders will therefore likely be assessed on an out of custody basis.

Varying an Assessment Order

An interim release order may be varied while an assessment order is in force. The prosecutor or the accused must show cause, accordingly, and the court may vary its order.[110]

Assessment Orders Cannot Incorporate Treatment

Section 672.19 of the *Criminal Code* states clearly:

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[103] *Criminal Code* s. 672.16(1)
[104] *Criminal Code* s. 672.17
[105] As *YCJA* s. 141 only incorporates Part XX.1 of the *Criminal Code* to the extent the provisions are not inconsistent with the *YCJA*, it seems logical that some alteration of s. 672.16 of the *Code* addressing detention as part of an assessment order is necessary when it is applied to young persons
[106] Briefly stated, *YCJA* s. 29(2) requires that a young person must be charged with a "serious offence" or "an offence, other than serious offence, if they have a history that indicates a pattern of either outstanding charges or findings of guilt." A "serious offence" is defined in section 2 of the *YCJA* as "an indictable offence under an Act of Parliament for which the maximum punishment is imprisonment for five years or more"
[107] *R v R.D.*, 2011 ONCA 899
[108] *YCJA* s. 3(1)(b)(iii); *R.D., supra*
[109] *YCJA* s. 29(3)
[110] *Criminal Code* s. 672.18

> No assessment order may direct that psychiatric or any other treatment of the accused be carried out, or direct the accused to submit to such treatment.

A definition of "treatment" is found in section 2 the *Health Care Consent Act*[111]*:*

> *"*treatment" is "anything that is done for a therapeutic, preventive, palliative, diagnostic, cosmetic or other health-related purpose, and includes a course of treatment, plan of treatment or community treatment plan". The definition of treatment specifically states that it <u>does not include</u>:
>
> 1. the assessment for the purpose of this Act of a person's capacity with respect to a treatment, admission to a care facility or a personal assistance service, the assessment for the purpose of the SDA of a person's capacity to manage property or a person's capacity for personal care, or <u>the assessment of a person's capacity for any other purpose</u>,
>
> 2. the assessment or examination of a person to determine the general nature of the person's condition,
>
> 3. the taking of a person's health history,
>
> 4. the communication of an assessment or diagnosis,
>
> 5. the admission of a person to a hospital or other facility,
>
> 6. a personal assistance service,
>
> 7. a treatment that in the circumstances poses little or no risk of harm to the person,
>
> 8. anything prescribed by the regulations as not constituting treatment.[112]

Section 25 of the *Mental Health Act* provides that any person who is detained in a psychiatric facility under Part XX.1 of the *Criminal Code* may be "restrained, observed, and examined under this Act and provided with treatment under the *Health Care Consent Act.*"[113]

However, there is a requirement for formal rights advice to be given to any patient in a psychiatric facility who has been found incapable with respect to treatment if they are 14 years of age or older.[114]

The Ontario Hospital Association's 2012 publication, "A Practical Guide To Mental Health and the Law in Ontario",[115] adds the following commentary:

> Therefore, so long as the assessment order requires that the accused be detained in a psychiatric facility, the attending psychiatrist could resort to the provisions of the

[111] S.O. 1996, C. 2, Sch. A
[112] Emphasis added
[113] *Mental Health Act*, s. 25
[114] R.R.O. 1990 Reg. 741 under the *Mental Health Act*, s. 15
[115] Available online: http://www.oha.com/KnowledgeCentre/Library/Toolkits/Pages/Default.aspx

HCCA to provide the accused with treatment. However, practically speaking, given that an assessment order may not exceed 60 days, the process for determining incapacity under the *HCCA* may not be concluded until after the assessment order expires, if the accused person challenges the finding.[116]

Minimizing Interference With The Young Person's Home Life And Community

The *YCJA* stipulates that reliance on "programs or agencies in the community" is a fundamental principle of the of the youth justice system.[117] The involvement of the young person's "parents, extended family, community and social or other agencies in the young person's rehabilitation and reintegration" should be encouraged.[118] Particular attention must also be given to "gender, ethnic, cultural and linguistic differences" and the "needs of aboriginal young persons and of young persons with special requirements."[119]

Youth forensic services should be designed, accordingly, to minimize the service's psychosocial and emotional impact on the young person. Interference with the young person's home life, education, and attachment to his or her local community should be kept to a minimum. The least restrictive and most developmentally appropriate milieu consistent with their clinical need, their safety and the safety of others should be employed.

The *YCJA* also emphasizes "timely intervention" and "the promptness and speed with which persons responsible for enforcing this Act must act, given young persons' perception of time."[120] Accordingly, assessment orders should be completed as quickly as possible, to minimize the young person's involvement with the youth forensic process and allow the criminal case to proceed.

At all times, young persons must be kept separate and apart from adult offenders in forensic institutions and programs. Section 3 of the *YCJA* states that the "criminal justice system for young persons must be separate from that of adults"[121] and section 84 states that "a young person who is committed to custody shall be held separate and apart from any adult who is detained or held in custody."[122]

Section 141(11) of the *YCJA* clarifies that a reference in Part XX.1 of the *Criminal Code* to a hospital in a province "shall be construed as a reference to a hospital designed by the Minister of Health for the province for custody, treatment or assessment of young persons."

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[116] Under the *HCCA*, no treatment may be commenced until the appeal of the Consent and Capacity Board's decision "has been finally disposed of": see *HCCA*, s. 18(3)(d)(ii). This issue was discussed in *Centre for Addiction and Mental Health v. Al-Sherewadi* 2011 ONSC 2272, at para 11

[117] *YCJA* s. 3(1)(a)(iii)

[118] *YCJA* s. 3(1)(c)(iii)

[119] *YCJA* s. 3(1)(c)(iv)

[120] *YCJA* ss. 3(1)(b)(iv) and (v)

[121] See *R v S.J-L, supra*, where the Supreme Court of Canada held that young persons could not be jointly tried with adults even when they were alleged to have committed the offences together.

[122] See also *YCJA* s. 30(3) requires that young persons held in pre-trial detention be kept "separate and apart" from any adult who is detained or held in custody", unless otherwise ordered by a youth justice court judge or justice. In *R v P.A.*, 2011 ONCA 673 the Court of Appeal was critical of a youth court judge who did not consider this before ordering the young person detained at an adult psychiatric facility, and subsequent decisions of the Ontario Review Board keeping him there.

The specific hospitals designated under the *Criminal Code* in Ontario to provide court ordered forensic services that are funded to provide forensic services for persons under 18 years of age are:

1) Ontario Shores Centre for Mental Health Sciences
2) Royal Ottawa Hospital
3) North Bay Regional Health Centre
4) St. Joseph's Health Care – Southwest Centre for Forensic Mental Health
5) Thunder Bay Regional Health Sciences Centre

In addition, the Secure Treatment Program of the Syl Apps Youth Centre (Kinark) is designated under the *Criminal Code* and the *Youth Criminal Justice Act.* This is the only facility in Ontario to offer secure custody facilities for forensic assessment or treatment orders.[123]

Completed Assessment Orders

Upon completion of the assessment order, the young person shall appear before the court that made the order as soon as practicable and not later than the last day of the period that the order is to be in force.[124]

VI. Fitness To Stand Trial

(i) Definition

Unfit to stand trial is defined in the *Criminal Code* and means:

> …unable on account of mental disorder to conduct a defence at any stage of the proceedings before a verdict is rendered or to instruct counsel to do so, and, in particular, unable on account of mental disorder to
>
> (*a*) understand the nature or object of the proceedings,
>
> (*b*) understand the possible consequences of the proceedings, or
>
> (*c*) communicate with counsel[.][125]

[123] While the Syl Apps Youth Centre is the only designated hospital under the *Criminal Code* for young persons who are the subject of forensic assessments and treatment orders, children and young persons may also be admitted to two other secure custody facilities under the relevant provisions of the *CFSA*: Youthdale in Toronto and Roberts Smart Centre in Ottawa.
[124] *Criminal Code* s. 672.191
[125] *Criminal Code* s. 2

Presumption and Burden of Proof

Accused persons are presumed fit to stand trial unless the court is satisfied on a balance of probabilities that the accused is unfit to stand trial.[126] The party raising the issue of fitness bears the burden of proof in establishing there are reasonable grounds to try the issue.[127]

Timing of Application

The court may order the trial of the issue of fitness at any stage of the proceedings provided it is before a verdict is rendered.[128]

"Limited Cognitive Ability"

The test to be applied is one of "limited cognitive ability." This test is based on whether the accused understands the nature and object of the proceedings, understands the possible consequences, and can recount to counsel the necessary facts relating to the offence in such a way that counsel can then properly present a defence. It is not necessary that the accused be able to meet some higher test of analytic capacity or capacity to make rational decisions beneficial to themselves.[129]

An accused is incapable of conducting their defence if they cannot:

(i) Distinguish between available pleas;

(ii) Understand the nature or purpose of the proceedings, including the respective roles of the judge, jury and counsel;

(iii) Communicate with counsel rationally or make critical decisions on counsel's advice; or

(iv) Take the stand to testify if necessary.[130]

However, testimonial competence is not a condition precedent to fitness to stand trial. The test must be interpreted in a purposive and functional manner. It refers to an accused person's ability to recount the facts generally relating to the offence before the court in such a way that counsel can properly present a defence.[131]

The Ontario Court of Appeal held that an accused person must be mentally fit before that person can be tried for a criminal offence. Indeed, in one case the Court noted that "it is a basic tenet of our law that persons charged should not be required to defend against a

[126] *Criminal Code* s. 672.22
[127] *Criminal Code* s. 672.23(2)
[128] *Criminal Code* s. 672.23(1). See *Canada (Attorney General) v. Balliram* (2003), 173 C.C.C. (3d) 547 (S.C.J.) holding that the failure to provide for a fitness hearing after a verdict has been rendered violates s. 7 of the *Charter of Rights and Freedoms.*
[129] *R v Taylor* (1992), 77 C.C.C. (3d) 551 (Ont. C.A.)
[130] *R v Steele* (1991), 63 C.C.C. (3d) 149 (Que. C.A.)
[131] *R v Morrissey* (2007), 227 C.C.C. (3d) 1 (Ont. C.A.), leave to appeal to S.C.C. refused 231 C.C.C. (3d) vi

criminal charge if that person is not fit to stand trial."[132] In a subsequent case, the Court noted that these standards ensure a trial meets "minimum standards of fairness and accords with principles of fundamental justice, such as the right to be present at one's own trial and the right to make full answer and defence."[133]

Right To Counsel

Section 672.24(1) of the *Criminal Code* requires the appointment of counsel where a court has reasonable and probable grounds to believe that an unrepresented accused person is unfit to stand trial.

The *YCJA* also provides a robust right to "retain and instruct counsel without delay" and to "exercise that right personally, at any stage of proceedings against the young person…"[134]

Practical Considerations

In some locations of the Ontario Court of Justice, psychiatrists attend regularly on a scheduled day or days of the week, and are able to conduct fitness assessments in a relatively short period of time. An assessment report can be generated promptly. In other locations, however, the young person may have to travel to a different location to be assessed.

Note that each of the designated forensic hospitals that are funded to provide youth services (see page 13) have the capacity to do fitness assessments by video conference when this is clinically appropriate and video conference capacity exists in the community where the court is sited. This can obviate the need for travel in some circumstances.

Delays often occur between the court ordering an assessment and the psychiatrist being able to complete the assessment. With respect to in custody assessments, the Ontario Court of Appeal has held that assessment orders need not be carried out immediately, and that some amount of lag time between the order being made and the assessment being carried out is acceptable. In some cases, however, it will be acceptable for judges to order that the assessment be carried out immediately. Alternatively, judges can delay making the assessment order until a hospital is prepared to accept the accused young person.[135] The consent of the hospital is a statutory prerequisite under *Criminal Code* section 672.58.[136]

VII. Not Criminally Responsible

(i) Definition

Section 16 of the *Criminal Code* deals with the defence of mental disorder. It allows for a verdict of "not criminally responsible" (NCR) by reason of mental disorder in relation to accused persons who, by virtue of a disease of the mind, are unable to appreciate the nature and consequences of their criminal actions or did not know that their actions were wrong:

[132] *R v Ta* (2002), 157 OAC 385 at para 26
[133] *Morrissey, supra.*
[134] *YCJA* s. 25(1)
[135] *R v Phaneuf,* 2010 ONCA 901 at paras 17-18
[136] *R. v. Conception*, 2014 SCC 60

> 16(1) No person is criminally responsible for an act committed or an omission made while suffering from a mental disorder that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong.

Presumption and Burden of Proof

Every person is presumed not to suffer from a mental disorder so as to be exempt from criminal responsibility. The party that raises the issue bears the burden of proof, on a balance of probabilities.[137]

Timing of Application

Section 672.12(1) of the *Criminal Code* authorizes a court to make an assessment order at any stage of the proceedings against the accused of its own motion, or on the application of the accused. However, where the prosecutor applies for an assessment in order to determine if an accused person was not criminally responsible at the time of the offence, the court may only order the assessment if:

(a) The accused puts his or her mental capacity for criminal intent into issue; or

(b) The prosecutor satisfies the court that there are reasonable grounds to doubt that the accused is criminally responsible for the alleged offence, on account of mental disorder.[138]

A Cautionary Approach

Courts will approach requests for an assessment order, particularly by the Crown, with great care. An assessment order may result in the accused person being confronted with a significant deprivation of liberty. Where the Crown seeks the order, to a certain extent, the accused person loses control over how to structure his or her own defence. The assessment process in this context is generally accepted as being particularly invasive for the accused person.[139]

Evidence

There is little authority from existing case law on what evidence is necessary to support an application for an NCR assessment. The section of the *Criminal Code* does not address the nature of the foundation that must be laid.[140] While the mere possibility an accused might be NCR is insufficient to meet the test, the fact that the accused engaged in "unusual behaviour" is also insufficient.[141] At least one court has ruled that sworn evidence to establish the

[137] *Criminal Code* ss. 16(2) and (3)
[138] *Criminal Code* s. 672.12(3)
[139] See *Winko v B.C. (Forensic Psychiatric Institute)* (1999), 135 C.C.C. (3d) 129 (S.C.C.) at p. 156; *Penetanguishene Mental Health Centre v Ontario (A.G.)* (2004), 182 C.C.C. (3d) 183 (S.C.C.) at p. 201; *R v Conway* 2010 SCC 22 at p. 232
[140] *R v Bernardo* [1994] O.J. No. 4382 (S.C.J.)
[141] *R v John Doe* [2011] O.J. No. 52 (S.C.J.) at para 40

requisite reasonable grounds is necessary.[142] Whether the order is being requested on consent or not is a significant consideration.

While there need not be medical evidence before the court, there must be some evidence that the accused (i) suffers from a mental disorder, (ii) that the disorder was active at the time of the commission of the offence, and (iii) that the disorder was of such a degree that it caused the accused person to either not appreciate the nature and consequences of the criminal conduct in question or that the conduct was wrong.[143]

"Disease of the Mind"

The term "disease of the mind" is a legal concept. Any malfunctioning of the mind, or mental disturbance having its source primarily in some subjective condition or weakness internal to the accused may be a disease of the mind. Transient disturbances of consciousness due to certain specific external factors do not fall within the concept.[144]

The term embraces any illness, disorder or abnormal condition which impairs the human mind and its functioning, excluding, however, self-induced states caused by alcohol or drugs, as well as transitory mental states such as hysteria or concussion.[145]

"Appreciating The Nature And Quality of the Act"

Appreciation of the nature and quality of the act refers to an incapacity by reason of disease of the mind to appreciate the physical consequences of the act.[146] The word "appreciates" imports a requirement beyond mere knowledge of the physical quality of the act and requires a capacity to apprehend the nature of the act and its consequences.[147]

This defence will not be made out where the accused has the necessary understanding of the nature, character and consequences of the act, but merely lacks appropriate feelings for the victim or lacks feelings of remorse or guilt for what he has done, even though such lack of feelings stems from a disease of the mind (e.g. a psychopath).[148]

A delusion which renders the accused incapable of appreciating that the penal sanctions attaching to the commission of the crime are applicable to him does not render him incapable of appreciating the nature and quality of the act within the meaning of this section.[149]

"Morally Wrong"

The term "wrong" means "morally wrong" and not simply "legally wrong." The court must determine whether the accused, because of a disease of the mind, was rendered incapable of

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[142] *R v Muschke* (1997), 121 C.C.C. (3d) 51 (B.C.S.C.)
[143] Justice Mara Greene, "The Pros and Cons of Court Ordered Assessments", *supra*. See also *R v P.A.*, 2011 ONCA 696 where the failure of the youth court judge to have a proper medical opinion meeting all these criteria before him effectively invalidated a finding that the young person was not criminally responsible.
[144] *R v Rabey* (1977), 37 C.C.C. (2d) 461 (Ont. C.A.), aff'd [1980] 2 S.C.R. 513
[145] *R v Cooper* [1980] 1 S.C.R. 1149
[146] *R v Chaulk* [1990] 3 S.C.R. 1303
[147] *R v Cooper* [1980] 1 S.C.R. 1149
[148] *R v Simpson* (1977), 35 C.C.C. (2d) 337 (Ont. C.A.), approved in *R v Kjeldsen*, [1981] 2 S.C.R. 617
[149] *R v Abbey*, [1982] 2 S.C.R. 24

knowing that the act committed was something that they ought not to have done.[150] A person may know that the act was contrary to law and yet, by reason of a disease of the mind, be incapable of knowing that the act is morally wrong in the circumstances according to the moral standards of society.[151]

The inquiry under this section should focus not on a general capacity to know right from wrong, but rather on the ability to know that a particular act was wrong in the circumstances. The accused must not only possess the intellectual ability to know right from wrong in an abtract sense but most possess the ability to apply that knowledge in a rational way to the alleged criminal act. The crux of the inquiry is whether the accused lacks the capacity to rationally decide whether the act is right or wrong and hence to make a rational choice of whether to do it or not.[152]

Where, by reason of delusions, the accused perceives an act which is wrong as right or justifiable, and the disordered condition of their mind deprives the accused of the ability to rationally evaluate what they are doing, the defence will apply.[153] Not every mental illness or delusion-driven subjective view will qualify the accused for a section 16 defence.[154] If the accused is still capable of knowing, in spite of a delusion, that the act in question would have been morally condemned by reasonable members of society, the defence will not apply.[155]

The Ontario Court of Appeal described the concept of moral wrongfulness as a "subjective belief by the accused that their conduct was justifiable will not spare him from criminal responsibility even if his personal views or beliefs were driven by mental disorder, as long as he retained the capacity to know that it was regarded as wrong on a societal standard."[156] A societal standard encompasses the everyday standards of the ordinary person.[157]

Whether the accused has the "capacity to know" his actions are contrary to society's moral standards and to make that choice to act in spite of that knowledge is what must be determined. It is not the level of honesty or unreasonableness with which one may hold those beliefs.[158]

Right To Counsel

It bears repeating that the *YCJA* provides a robust right to "retain and instruct counsel without delay" and to "exercise that right personally, at any stage of proceedings against the young person…"[159]

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[150] *R v Chaulk*, [1990] 3 S.C.R. 1303, *R v Oommen*, [1994] 2 S.C.R 507
[151] *R v Chaulk, supra*
[152] *R v Oommen, supra*
[153] *R v Oommen, supra*
[154] *R v Campione* 2015 ONCA 67 at para 30
[155] *R v Ratti*, [1991] 1 S.C.R. 68 at p. 80
[156] *R v Ross* 2009 ONCA 149 at para 27; see also *R v Woodward* 2009 ONCA 911 at para 5, and *R v Campione, supra* at para 31
[157] *R v Oommen, supra* at p. 520*; R v Campione, supra* at para 54
[158] *R v Campione, supra* at para 39
[159] *YCJA* s. 25(1)

Practical Considerations

If the young person is in custody, there may be substantial delays in securing a bed in a hospital so that the assessment order can be administered. For out of custody young persons, outpatient services should be utilized wherever possible to avoid delay and minimize the intrusion into the young person's daily routine and connection with his family and community.

VIII. Protected Statements

Statements made by an accused young person during the course of an assessment order are "protected statements" under the *Criminal Code*. A "protected statement" is defined to mean "a statement made by the accused during the course and for the purposes of an assessment… to the person specified in the assessment order… or to anyone acting under that person's direction."[160]

A "protected statement" or reference to such a statement made by an accused cannot be used to incriminate the young person at his or her trial. However, it is admissible in evidence, without the consent of the accused young person, for certain enumerated purposes:

> (*a*) determining whether the accused is unfit to stand trial;
>
> (*b*) making a disposition or placement decision respecting the accused;
>
> (*c*) determining, under section 672.84, whether to refer to the court for review a finding that an accused is a high-risk accused or whether to revoke such a finding;
>
> (*d*) determining whether the balance of the mind of the accused was disturbed at the time of commission of the alleged offence, where the accused is a female person charged with an offence arising out of the death of her newly-born child;
>
> (*e*) determining whether the accused was, at the time of the commission of an alleged offence, suffering from automatism or a mental disorder so as to be exempt from criminal responsibility by virtue of subsection 16(1), if the accused puts his or her mental capacity for criminal intent into issue, or if the prosecutor raises the issue after verdict;
>
> (*f*) challenging the credibility of an accused in any proceeding where the testimony of the accused is inconsistent in a material particular with a protected statement that the accused made previously; or
>
> (*g*) establishing the perjury of an accused who is charged with perjury in respect of a statement made in any proceeding.

The common law voluntariness rule and protections that accrue to detained persons under the *Charter of Rights and Freedoms* apply to the subsequent use of these statements. Thus,

[160] *Criminal Code* s. 672.21(1)

where a protected statement is inadmissible by reason of either of those evidentiary rules, it cannot be used for any purpose.[161] Even where an accused person consents to an assessment order, the consent does not constitute consent to the gathering of evidence against him on a psychiatric remand. Any statements are admissible solely for the purpose of addressing the issues of fitness and criminal responsibility.[162]

The Ontario Court of Appeal has held that a sentencing judge may consider statements made by the accused in the course of a pre-trial assessment. The protected statement provisions in section 672.21 of the *Criminal Code* apply to an accused person, but not to an offender.[163]

IX. Privacy Interests and Redistribution of Youth Forensic Assessments

(i) Standard Procedure Upon Receipt of an Assessment Report

An assessment report, upon completion, is sent directly to the youth justice court that ordered it.[164] Copies of the report shall be provided without delay to the prosecutor, the accused and any counsel representing the accused.[165]

Pursuant to *YCJA* section 141(2) the parents of the young person, if they are in attendance at the proceedings, shall be given a copy as well. If they are not in attendance, by taking an active interest in the proceedings, they too shall be given a copy.

A Youth Forensic Report is a "Record" under Part VI of the *YCJA*

Youth forensic assessments constitute youth "records" under the *YCJA* and are thus subject to the very strict privacy regime of the Act. Access to youth records may only be achieved through the provisions of the *YCJA*.[166] Failing to comply with these provisions constitutes an offence punishable by indictment with a maximum punishment of two years' incarceration.[167]

Young Persons' Privacy Rights In Youth Records

Youth records are deemed to have a high expectation of privacy associated with them[168] and medical or psychiatric reports especially so.[169] The Ontario Court of Appeal has noted that the provisions of the *YCJA* which govern access to youth records "demonstrate beyond peradventure Parliament's intention to maintain tight control over access to [youth court] records."[170] The Court specified that "particularly sensitive records such as medical reports are available only in limited circumstances to specifically identified persons or groups."[171]

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[161] *R v B.G.*, [1999] 2 S.C.R. 475
[162] *R v Genereux* (2000), 154 C.C.C. (3d) 362 (Ont. C.A.)
[163] *R v Paul* 2010 ONCA 696 at para 26
[164] *Criminal Code* s. 672.2(2)
[165] *Criminal Code* s. 672.2(4)
[166] *YCJA* s. 118(1)
[167] *YCJA* s. 138(1)(a)
[168] *R v K.M.*, 2011 ONCA 252
[169] *NS v LB* (2005), 195 C.C.C. (3d) 481 (Ont. C.A.)
[170] *Ibid* at para 24
[171] *Ibid*

Lawfully Granting Further Access Via Part VI of the *YCJA*

Youth records are generally considered accessible by parties entitled to lawful access for a certain period of time which varies based on how the charge(s) are disposed of. After the expiry of these access periods, no one may access them without a valid youth court order.[172] The nature of the final disposition, and whether the Crown proceeded summarily or by indictment, will affect the length of time that the youth record remains active and accessible by any interested parties.[173]

Youth forensic assessments should not be redistributed to any other parties (beyond those delineated in subsection (i)), including another forensic institution or outside psychiatrist or psychologist, without a valid youth court order authorizing distribution of the report to that specific institution or person(s). In the absence of such an order, a legal opinion from counsel should be obtained by the record keeper as to whether further distribution of the report is in fact lawful.

[172] See *YCJA* s 119-123
[173] Counsel should review the record retention periods found in the *YCJA*, s. 119(2)

YCJA Pocket Guide

Please access the Youth Criminal Justice Act Pocket Guide at,

http://www.hsjcc.on.ca/Resource%20Library/Children%20and%20Youth/Youth%20Criminal%20Justice%20Act%20(YCJA)%20-%20Ontario%20Pocket%20Guide.pdf