***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

[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.)

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]

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:

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

[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.)

> … "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 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:

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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."

(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

(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

[20] "Youth Mental Health Court Worker – Program Description", MCYS – Youth Justice Services Division (2013)
[21] *YCJA* s. 39(1)(c)

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:

- 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.

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[22] *R v S.A.C.*, 2008 SCC 47 at para 22
[23] In force October 23, 2012.
[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

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);
(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

[26] *R v K.T.J.* [2013] B.C.J. No. 1614 (Prov. Ct.); *R v* 2011 ABQB 455
[27] *R v Smith*, 2009 NSCA 8 at para 56.
[28] *Supra* note 1
[29] *Ibid.*
[30] *Ibid.*
[31] *Ibid.*

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.

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

[32] *Supra* note 1

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.

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

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

- 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]

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
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> (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"

[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

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:

- 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.

[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)

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.

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:

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[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.
[39] *YCJA* section 3(1)(b)(iii)
[40] 2012 SCC 46
[41] 2012 ONCJ 27

> 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]

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

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[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.*
[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).

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:

> (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]

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[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)
[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

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.*

(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.

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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

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 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.)

[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.

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.

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 <u>not</u> 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.

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