ARTICLE

MISSPENT YOUTH: THE (MIS)APPLICATION OF THE *YOUTH CRIMINAL JUSTICE ACT* BY THE *CRIMINAL CODE* REVIEW BOARDS OF BRITISH COLUMBIA AND ONTARIO

Kyle McCleery *

CITED: (2020) 25 *Appeal* 109

ABSTRACT

This article examines the treatment of young people, as defined in the *Youth Criminal Justice Act* (*YCJA*), by the *Criminal Code* review boards of British Columbia and Ontario. Section 141(6) of the *YCJA* requires provincial review boards to give special consideration in making disposition decisions applicable to young people found not criminally responsible on account of mental disorder (NCRMD). Through an analysis of decisions made by the two review boards in 2015 and 2016, this article concludes that neither review board is consistently giving effect to this provision. It then considers whether there is a need to provide distinct treatment to young people in this context, concluding that there are compelling reasons for giving special consideration to young people found NCRMD, but also that the requirements of section 141(6), even if given their full effect, are insufficient to account for the unique circumstances of this population.

INTRODUCTION

Among the foundational principles of the Canadian criminal justice system is that each individual is an autonomous and rational being, who can distinguish right from wrong and whose actions can give rise to criminal liability.[1] However, Canadian law does recognize some limits to this principle. Among these are that, in some circumstances, individuals suffering from mental disorders should not be held responsible for criminal acts and that young people under the age of 18 bear less responsibility for their crimes than do adults. Both of these exceptions have been recognized by the Supreme Court of Canada as principles of fundamental justice[2] and have been the subject of significant academic and

* Kyle McCleery completed an LLM at the University of British Columbia and is a member of the Law Society of British Columbia. This article is based on research made possible through a grant from the Law Foundation of British Columbia. The author is grateful to Professor Isabel Grant for her guidance and thoughtful feedback on a previous draft of this article.

1 *R v Bouchard-Lebrun*, 2011 SCC 48 at paras 48–49.

2 *R v DB*, 2008 SCC 25 at para 70 [*DB*]; *R v Swain*, [1991] 1 SCR 933 at 976–977 [*Swain*].

judicial attention.[3] Far less consideration has been given to cases in which they intersect; that is, when young people commit criminal acts while suffering from a mental disorder.

This article is intended to begin to fill this gap in two ways. First, it presents data on the population of young people, as defined in the *Youth Criminal Justice Act*[4] ("*YCJA*" or the "Act"), under the jurisdiction of the British Columbia and Ontario *Criminal Code* review boards in 2015 and 2016. Second, it examines how the two review boards have treated these accused, ultimately concluding that neither is giving meaningful consideration to their status under the *YCJA*.

The article proceeds in four parts. It begins with an overview of the legislative context created by the *Criminal Code of Canada*[5] and the *YCJA*. Part two presents data regarding the population of young people under review board jurisdiction in British Columbia and Ontario in 2015 and 2016. Part three examines the approach taken by the review boards to cases involving young people and considers whether they are satisfying the requirements of section 141(6) of the *YCJA*. Section 141(6) provides that:

> Before making or reviewing a disposition in respect of a young person under Part XX.1 (mental disorder) of the *Criminal Code*, a youth justice court or review board shall consider the age and special needs of the young person and any representations or submissions made by a parent of the young person.

Finally, part four discusses the implications of the analyses set out in parts two and three and identifies directions for future research. It argues that there are compelling reasons to treat young accused found not criminally responsible by reason of mental disorder ("NCRMD") differently from adults. This argument is grounded in the elevated impact of an NCRMD verdict on the liberty interests of a young person and the different incentives facing young people considering pursuing the NCRMD verdict. In its present form, section 141(6) does not allow provincial review boards to adequately recognize the unique circumstances of young people as it does nothing to expand the scope of the review board's decision-making beyond the narrow dangerousness analysis mandated by the *Criminal Code*.

I. LEGISLATIVE CONTEXT: THE *CRIMINAL CODE* AND THE *YCJA*

The legal status of young people accused of criminal offences while suffering from mental disorder is governed by two pieces of legislation. Section 16 and Part XX.1 of the *Criminal Code* apply to all accused, regardless of age, who successfully raise the mental disorder defence. The *YCJA* also applies in cases where the accused was 12 years old or older[6] and under the age of 18 at the time of the alleged offence.

---

3 See *Winko v British Columbia (Forensic Psychiatric Institute)*, [1999] 2 SCR 625; *Bouchard-Lebrun*, *supra* note 1; *Swain*, *supra* note 2; *DB*, *supra* note 2; *R v BWP; R v BVN*, 2006 SCC 27; *R v CD; R v CDK*, 2005 SCC 78; Anne G Crocker, "The National Trajectory Project on Individuals found Not Criminally Responsible on Account of Mental Disorder" (2015) 60:3 Canadian Journal of Psychiatry 96; Isabel Grant, "Canada's New Mental Disorder Disposition Provisions: A Case Study of the British Columbia *Criminal Code* Review Board" (1997) 20:4 International Journal of Law and Psychiatry 419; James D Livingston et al, "A Follow-Up Study of Persons Found Not Criminally Responsible on Account of Mental Disorder in British Columbia" (2003) 48:6 Can J Psychiatry 408; Nicholas Bala et al, "Evaluating the Youth Criminal Justice Act After Five Years: A Qualified Success" (2009) 51:2 Canadian Journal of Criminology and Criminal Justice 131; Lihui Zhang, "Are youth offenders responsive to changing sanctions? Evidence from the Canadian Youth Criminal Justice Act of 2003" (2016) 49:2 Canadian Journal of Economics 515.

4 SC 2002, c 1 [*YCJA*].

5 RSC 1985, c C-46 [*Criminal Code*].

6 Section 13 of the *Criminal Code*, *supra* note 5, provides that children under the age of 12 bear no criminal responsibility for their acts.

A. Section 16 and Part XX.1 of the *Criminal Code*

Section 16(1) of the *Criminal Code* establishes the "defence of mental disorder":

> 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.

Exemptions from criminal liability for those suffering from mental illness or mental disorder have existed in the English-speaking world since the 11th century.[7] Section 16 of the *Criminal Code* reflects a version of this defence first articulated by the English House of Lords in *M'Naghten's Case* in 1843.[8] Despite its long history in the common law, the defence is rarely applied in Canada today. Over the past decade, the number of new cases entering the Ontario Review Board system, including both new NCRMD accused and those found unfit to stand trial, has not exceeded 300 accused in any year.[9] In British Columbia, this number has not exceeded 100.[10]

While section 16 describes mental disorder as a "defence," an accused person who successfully raises it does not receive a complete acquittal. Rather, the accused is found "not criminally responsible by reason of mental disorder,"[11] a verdict the Supreme Court of Canada has held is neither a true acquittal nor a conviction.[12] Following the verdict, an accused found NCRMD cannot be punished, but may be detained in a hospital or subject to other restrictions on his or her liberty for the purpose of protecting the public.[13]

A disposition hearing must be held to determine whether the accused should remain under the jurisdiction of the review board. If so, the accused's custodial status is also determined at this hearing.[14] The hearing is most often held by a provincial review board, [15] but it may also be held by the court that entered the verdict.[16] Each province is required to establish a review board with jurisdiction over accused persons who have been found NCRMD or unfit to stand trial.[17] Following this initial disposition hearing, there must be a subsequent hearing to review the disposition every 12 months.[18]

---

7 Cyril Greenland, "Crime and the Insanity Defence, an International Comparison: Ontario and New York State" (1979) 7:2 Bulletin of the American Academy of Psychiatry and Law 125 at 125.

8 *Daniel M'Naghten's Case* (1843), 10 Cl & Fin 200, 8 ER 718 (HL).

9 Ontario Review Board, Annual Report Fiscal Reporting Period April 1, 2017–March 31, 2018 (Toronto: Ontario Review Board, 2018) at 8.

10 British Columbia Review Board, Annual Report Fiscal Year: April 2017–March 2018 (Vancouver: British Columbia Review Board, 2015) at 14.

11 *Criminal Code*, *supra* note 5, s 672.34.

12 *Winko*, *supra* note 3 at para 35.

13 *Ibid* at para 21.

14 *Criminal Code*, *supra* note 5, ss 672.45–672.46.

15 Anne G Crocker et al "To Detain or to Release? Correlates of Dispositions for Individuals Declared Not Criminally Responsible on Account of Mental Disorder" (2011) 56:5 Can J of Psychiatry 293 at 294; Livingston et al, *supra* note 3 at 411.

16 *Criminal Code*, *supra* note 5, s 672.45.

17 *Ibid*, s 672.38.

18 *Ibid*, s 672.81; the time for holding a hearing may be extended to 24 months where the accused is represented by counsel and both the accused and the Crown agree to the extension: s 672.81(1.1); this rule does not apply in the case of accused designated "high-risk accused" under s 672.64 of the *Criminal Code*. For these accused, the time for holding a subsequent hearing may be extended up to 36 months if the review board is satisfied that the accused's condition is not likely to improve and that detention remains necessary for the period of the extension: s 672.81(1.32).

At the conclusion of each initial and subsequent disposition hearing the court or review board must make an order imposing one of three dispositions. The accused may be detained in a hospital, discharged with conditions, or discharged absolutely.[19] In making an order, the court or review board must take into account "the safety of the public, which is the paramount consideration, the mental condition of the accused, the reintegration of the accused into society, and the other needs of the accused."[20]

If a review board concludes that "the accused is not a significant threat to the safety of the public," the accused must be absolutely discharged.[21] This outcome frees the accused from the review board's jurisdiction and eliminates the need for further hearings. In *Winko v British Columbia (Forensic Psychiatric Institute)*,[22] the Supreme Court of Canada held that there is no presumption of dangerousness and that in order to retain jurisdiction over the accused, a review board must make a positive finding that the accused is "dangerous."[23] If the review board is unable to make such a finding, the accused must be discharged absolutely.

Where the review board finds that the accused poses a significant threat to the safety of the public, it must either detain the accused in hospital or grant a conditional discharge. Here, the review board must make an order that is "necessary and appropriate,"[24] a standard held by two appellate courts to require the "least onerous and least restrictive" disposition.[25] All disposition decisions made by the review board can be appealed to the court of appeal of the province in which the decision was made.[26]

B. The *Youth Criminal Justice Act*

The *YCJA* came into force in 2003, replacing the *Young Offenders Act*[27] ("*YOA*"). The *YCJA* was enacted in large part to address concerns regarding the administration of youth criminal justice under the *YOA*. Under the *YOA*, Canada had one of the world's highest rates of youth custody and one of the lowest rates of youth diversion.[28] Accordingly, a primary objective of Parliament in passing the *YCJA* was, as articulated in the preamble, to create "a youth justice system that reserves its most serious interventions for the most serious cases and reduces the over-reliance on incarceration for non-violent young persons."[29]

The *YCJA* establishes a separate system of criminal justice for young people. It defines a young person as one who was 12 years old or older but under the age of 18 at the time of the offence in question. Accordingly, for the purposes of the review board system, NCRMD accused who committed their index offence before the age of 18 continue to be "young people" under the *YCJA* even after turning 18.[30]

---

19 *Ibid*, s 672.54.
20 *Ibid*.
21 *Ibid*.
22 *Winko*, *supra* note 3.
23 *Ibid* at para 46.
24 *Criminal Code*, *supra* note 5, s 672.54.
25 *Ranieri (Re),* 2015 ONCA 444 at paras 19–20; *Carrick (Re),* 2015 ONCA 866 at para 15; *Nelson v British Columbia (Adult Forensic Psychiatric Services),* 2017 BCCA 40 at para 26.
26 *Criminal Code, supra* note 5, s 672.72.
27 RSC 1985, C Y-1.
28 Bala et al, *supra* note 3 at 132.
29 *Ibid* at 136.
30 *YCJA*, *supra* note 4, s 2; *JF (Re),* [2015] ORBD No 1352 at para 6.

The Act provides for the designation of courts as "Youth Justice Courts"[31] and assigns such courts exclusive jurisdiction over any offence alleged to have been committed by a young person. The separate system of youth criminal justice established by the Act recognizes a set of principles applicable to youth criminal justice,[32] creates unique procedures for young people charged with offences,[33] provides for distinct and lesser forms of punishment,[34] and protects the privacy of young people charged with criminal offences.[35]

The *YCJA* expressly incorporates the *Criminal Code* mental disorder regime described above into the youth criminal justice system. Section 141(1) of the *YCJA* provides that section 16 and Part XX.1 of the *Criminal Code* apply to young people, with any necessary modifications, except to the extent they are inconsistent with or excluded by the *YCJA*.

Section 141 goes on to set out a number of modifications to the *Criminal Code* applicable where a young person is found NCRMD. These include distinct measures for providing notice to the accused[36] and separate provisions for where NCRMD youth may be detained following the verdict.[37]

Section 141(6) of the *YCJA* sets out special considerations that must be taken into account by a review board in making dispositions pertaining to young people. This provision requires a review board to consider any submissions made by a parent[38] and mandates that a young person's age and special needs must be considered in any disposition decision:

> Before making or reviewing a disposition in respect of a young person under Part XX.1 (mental disorder) of the *Criminal Code*, a youth justice court or review board shall consider the age and special needs of the young person and any representations or submissions made by a parent of the young person.

Neither the *Criminal Code* nor the *YCJA* provides guidance as to how the court or review board should take the age or special needs of the young person into account. This section has not received judicial consideration in any reported case. Accordingly, there is little direction as to how this requirement should be applied.

This lack of direction regarding section 141(6) is significant because the implications of the age of an accused for disposition decisions are not immediately clear. The *YCJA* definition of "young person" includes all NCRMD accused who commit index offences prior to turning 18, a status the accused retains even after entering adulthood. Once an NCRMD youth turns 18, however, it is not obvious how age would distinguish that accused from an accused of the same age with an index offence committed later in life.

This is partly because a key rationale for treating young people differently from adults in the criminal justice system generally would seem to have little application in the NCRMD context. A central principle of youth criminal justice in Canada is that young people who commit criminal acts bear less culpability and moral responsibility for those acts

---

31 *YCJA*, *supra* note 4, s 13; Sherri Davis-Barron, *Canadian Youth & the Criminal Law* (Markham: LexisNexis, 2009) at 78.

32 *YCJA*, *supra* note 4, s 3; Davis-Barron, *supra* note 31 at 148–152.

33 *YCJA*, *supra* note 4, ss 23–37; Davis-Barron, *supra* note 31 at 179–203.

34 *YCJA*, *supra* note 4, ss 38–82; Nicholas Bala and Sanjeev Anand, *Youth Criminal Justice Law* (Toronto: Irwin Law, 2009) at 469–471.

35 *YCJA*, *supra* note 4, ss 110–129; Bala and Anand, *supra* note 34 at 450–456.

36 *YCJA*, *supra* note 4, s 141(2).

37 *Ibid*, s 141(11).

38 *YCJA*, *supra* note 4; section 2 of the YCJA defines "parent" broadly to include "any person who is under a legal duty to provide for the young person or any person who has, in law or in fact, the custody or control of the young person."

than do adults because of their lack of maturity, moral sophistication, and experience.[39] Inherent in the NCRMD verdict, however, is that the accused, regardless of age, bears *no* culpability or moral responsibility for the offence because of their mental state at the time the criminal act was committed. Where the offender is already not responsible for their actions due to mental disorder, the degree of responsibility cannot be further reduced because of age. This contradiction resonates in review board decision-making. The role of the review board is to assess the threat the accused poses to the public. While age may play a role in this analysis, culpability does not. As such, the review board has no capacity to consider how age may impact blameworthiness. Instead, unlike other facets of the youth criminal justice system, it is conceivable that age could be viewed to increase the danger posed by a young NCRMD accused, heightening rather than mitigating the impact on the accused's liberty interests.

With this general overview in mind, part two of this article will describe the populations of NCRMD youth under the jurisdiction of the British Columbia and Ontario review boards in 2015 and 2016. It will discuss features such as age and sex, index offence characteristics, diagnoses, and time spent under review board jurisdiction. Part three will address how the review boards are approaching these accused in disposition hearings, with particular reference to their consideration of the factors identified in section 141(6) of the *YCJA*.

II. YOUNG PEOPLE BEFORE THE BRITISH COLUMBIA AND ONTARIO REVIEW BOARDS IN 2015 AND 2016

Presented below are the results of a review of the British Columbia and Ontario review boards' decisions from 2015 and 2016 involving young people. This section begins with an overview of cases before each review board, including the age and sex of the young people, the index offences that resulted in their NCRMD verdicts, the dispositions imposed upon them, and the time these accused had spent under review board jurisdiction at the time of the decision. This is followed by a closer look at those accused who have spent 10 or more years under the supervision of the review board.

A. Data and Methodology

The data described below was compiled through a review of British Columbia and Ontario review board decisions made in 2015 and 2016. The British Columbia decisions were obtained as part of a larger set of decisions provided directly by the review board. The relevant cases were identified and extracted from the larger set by reviewing all decisions delivered during this two-year period and selecting those involving young persons as defined in the *YCJA*.

The Ontario decisions were identified using an online commercial legal database in which Ontario Review Board decisions are published. The relevant Ontario decisions were identified by reviewing all decisions from 2015 and 2016 in which the name of the accused was anonymized. From these cases those that could be identified as involving an accused who was under the age of 18 at the time he or she committed the *actus reus*—the "guilty act"—of the index offence were selected.

For both provinces, all available decisions that could be identified as pertaining to young people were included in the data set. The data set includes a total of 28 decisions involving 18 young people for the British Columbia Review Board and 37 decisions involving 22 young people for the Ontario ReviewBoard.

39 *DB, supra* note 2 at paras 44 and 62.

B. Young People before the British Columbia and Ontario Review Boards: 2015–2016

Table 1: Young People before the Ontario and British Columbia Review Boards by Sex

	Male	Female	Total
British Columbia	15 (83.3%)	3 (16.7%)	18
Ontario	21 (95.5%)	1 (4.5%)	22
Total	**36 (90.0%)**	**4 (10.0%)**	**40**

In both provinces, young people before the review board were overwhelmingly male. This sex distribution is generally consistent with historical data about the general NCRMD population, in which males heavily outnumber females.[40] This finding is also consistent with the criminal justice system broadly, in which a substantial majority of offenders are male.[41]

All of the accused with a determinable age at the time of offence[42] committed their index offences when they were at least 15 years of age, but no older than 17.[43] The ages of the accused at the time of their hearings show consistency between the two provinces, with the greatest number between the ages of 18 and 24 at the time of hearing. The average age at the time of hearing was 23.1 in British Columbia and 25.7 in Ontario.

Table 2: Young People before the British Columbia and Ontario Review Boards by Age at Time of Hearing[44]

Age	British Columbia	Ontario	Total
<18	2 (11.1%)	0 (0.0%)	2 (5.0%)
18–24	10 (55.5%)	9 (40.9%)	19 (47.5%)
25–29	3 (16.6%)	5 (22.7%)	8 (20.0%)
30–35	1 (5.6%)	3 (13.6%)	4 (10.0%)
>35	2 (11.1%)	1 (4.5%)	3 (7.5%)
Not Indicated	0 (0.0%)	4 (18.2%)	4 (10.0%)
Average Age	23.1	25.7	24.4

40 Grant, *supra* note 3 at 428; Livingston et al, *supra* note 3 at 410; Jeff Latimer and Austin Lawrence, *The Review Board Systems in Canada: An Overview of Results from the Mentally Disordered Accused Data Collection Study* (Canada: Department of Justice, 2006) at 13; Sarah L Desmararais et al, "A Canadian Example of Insanity Defence Reform: Accused Found Not Criminally Responsible Before and After the Winko Decision (2010) 7:1 International Journal of Forensic Mental Health 1 at 6; Anne G Crocker et al, "The National Trajectory Project of Individuals Found Not Criminally Responsible on Account of Mental Disorder in Canada. Part 2: The People Behind the Label" (2015) 60:3 Can J Psychiatry 106 at 109.

41 Rebecca Kong and Kathy AuCoin, "Female Offenders in Canada" (2008) 28:1 Juristat 1 at 2; Olivia Choy et al, "Explaining the Gender Gap in Crime: The Role of Heart Rate" (2017) 55:2 Criminology 465 at 465.

42 For those accused for whom it was not possible to determine the precise age at the time of offence, other information was used to confirm that the accused was a young person at the time of the index offence.

43 For accused with multiple index offences committed at different ages, age at the time of the first index offence for which the accused had not been absolutely discharged was used.

44 Where multiple decisions were available for a single accused, the age of the accused at the time of the most recent hearing was used.

Table 3: Young People before the British Columbia and Ontario Review Boards by Most Serious Index Offence

Most Serious Index Offence	Number of British Columbia Accused	Number of Ontario Accused	TOTAL
Murder	5 (27.8%)[45]	1 (4.5%)	6 (15.0%)
Attempted Murder	0 (0.0%)	2 (9.1%)	2 (5.0%)
Aggravated Assault	1 (5.6%)	0 (0.0%)	1 (2.5%)
Assault with a Weapon	5 (27.8%)	7 (31.8%)	12 (30.0%)
Assault	1 (5.6%)	3 (13.6%)	4 (10.0%)
Assaulting a Peace Officer	2 (11.1%)	1 (4.5%)	3 (7.5%)
Sexual Assault	1 (5.6%)	1 (4.5%)	2 (2.0%)
Robbery	0 (0.0%)	1 (4.5%)	1 (2.5%)
Arson	2 (11.1%)	1 (4.5%)	2 (5.0%)
Uttering Threats	0 (0.0%)	2 (9.1%)	2 (5.0%)
Criminal Harassment	0 (0.0%)	2 (9.1%)	2 (5.0%)
Possession of a Dangerous Weapon	1 (5.6%)	0 (0.0%)	1 (2.5%)
Breach of Undertaking	0 (0.0%)	1 (4.5%)	1 (2.5%)
TOTAL	**18**	**22**	**40**

Assaults were the most serious index offence for the majority of accused persons. This is in keeping with the general NCRMD population, where assaults have consistently been the most common index offences since 1992.[46] The overall percentage of cases with an index offence of murder[47] (15 percent) was also consistent with historical data for the NCRMD population generally.[48]

There are also differences between the two provinces. The NCRMD youth in British Columbia generally seem to have committed more serious index offences than those in Ontario. More than a quarter of the NCRMD youth in British Columbia committed an index offence of murder, compared to fewer than five percent in Ontario. Conversely, a higher proportion of NCRMD youth in Ontario had committed an index offence that did not involve physical violence, such as a breach of undertaking, criminal harassment, or uttering threats.

45 "Murder" is listed as a single category as the review boards do not consistently identify in these cases whether a murder is first or second degree.

46 Grant, *supra* note 3 at 427; Livingston et al, *supra* note 3 at 411; Latimer and Lawrence, *supra* note 40 at 17; Desmarais et al, *supra* note 40 at 6; Crocker et al, *supra* note 40 at 110.

47 While it is not possible to distinguish between first- and second-degree murder (see note 45, *supra*), it does not appear that any of these cases involved index offences of manslaughter with the possible exception of one British Columbia case in which the index offence was not directly identified. The facts of this case were consistent with murder, but could also have supported a charge of manslaughter.

48 Grant, *supra* note 3 at 427; Livingston et al, *supra* note 3 at 410; Latimer and Lawrence, *supra* note 40 at 17; Desmarais et al, *supra* note 40 at 6; Crocker et al, *supra* note 40 at 110.

Table 4: Young People before the British Columbia and Ontario Review Boards by Diagnosis

Diagnosis	British Columbia	Ontario	Total
Schizophrenia[49]	6 (33.3%)	12 (54.5%)	18 (45%)
Other Psychosis[50]	7 (38.9%)	2 (9.1%)	9 (22.5%)
Other	5 (27.8%)	8 (36.4%)	13 (32.5%)

Approximately two-thirds of the accused in both provinces had a diagnosis of schizophrenia or another form of psychosis. The prevalence of schizophrenia is consistent with historical data about the broader NCRMD population.[51]

Table 5: Young People before the British Columbia and Ontario Review Boards by Outcome of Most Recent Review Board Hearing

Outcome	British Columbia	Ontario	Total
Detention	10 (55.6%)	17 (77.3%)	27 (67.5%)
Conditional Discharge	7 (38.9%)	5 (22.7%)	12 (30.0%)
Absolute Discharge	1 (5.6%)	0 (0.0%)	1 (2.5%)

Both review boards detained the young people at a high rate. In both British Columbia and Ontario, more than half of the accused were detained in the most recent decision. Conversely, only one young person was absolutely discharged in either province over the entirety of 2015 and 2016.

Table 6: Young People before the British Columbia and Ontario Review Boards by Time under Review Board Jurisdiction as of date of hearing[52]

Time	British Columbia	Ontario[53]	Total
0–4 years	9 (50.0%)	7 (31.8%)	16 (40.0%)
5–9 years	4 (22.2%)	8 (36.4%)	12 (30.0%)
10–14 years	3 (16.7%)	4 (18.2%)	7 (17.5%)
15–19 years	3 (16.7%)	2 (9.1%)	5 (12.5%)
20–25 years	1 (5.6%)	1 (4.5%)	2 (5.0%)

While half of the NCRMD youth in British Columbia had been under review board jurisdiction for fewer than five years, the largest cohort in Ontario, more than 35 percent, had been under review board jurisdiction for five to nine years. The average period of time under review board jurisdiction (from time of verdict) in Ontario was 7.45 years, and 6.06

49 The following diagnoses were included in this category: paranoid schizophrenia; chronic disorganized schizophrenia; schizophrenia.

50 The following diagnoses were included in this category: psychotic disorder nos; drug-induced psychotic state; psychosis; schizophreniform psychosis; psychosis (unspecified type); drug-induced paranoid psychosis; schizoaffective disorder; unspecified psychotic disorder.

51 Grant, *supra* note 3 at 430; Livingston et al, *supra* note 3 at 411.

52 Time since NCRMD verdict.

53 Does not include the four accused for whom age could not be determined.

years in British Columbia. Table 6 also reveals that a significant percentage, 35 percent, had been under review board jurisdiction for 10 or more years.

These accused, with a decade or more under the supervision of the review board, will be examined more closely below. In the table that follows, characteristics of each of these accused, including age, sex, index offence, and diagnoses are indicated.

C. NCRMD Youth with 10 or More Years under Review Board Jurisdiction

Table 7: Accused with 10+ Years under Review Board Jurisdiction

	Prov.	Years Under RB	Sex	Age	Offence	Diagnosis	Disposition
1	BC	21	M	37	Murder	Schizophrenia/ Cannabis Use Disorder	Custody
2	BC	18	M	36	Murder	Paranoid Schizophrenia	Conditional Discharge
3	BC	15	M	33	Murder[54]	Paranoid Schizophrenia	Custody
4	BC	10	M	27	Assault with a Weapon	Schizophrenia/ Mild Mental Retardation/ Asperger's Disorder/ Polysubstance Abuse Disorder/ Obsessive-Compulsive Disorder	Custody
5	BC	10	M	25	Possession of a Weapon	Complex Neuropsychiatric Syndrome	Conditional Discharge
6	ON	20	M	36	Assault	Unspecified Psychotic Disorder/ Personality Disorder	Custody
7	ON	17	M	35	Sexual Assault	Bisexual Pedophilia/ Developmental Disability/ Frontal Lobe Dysfunction	Custody
8	ON	15	M	33	Assault with a Weapon	Schizophrenia/ Cannabis/Alcohol Abuse/ Learning Disorder NOS	Conditional Discharge
9	ON	14	M	32	Assault with a Weapon	Personality Disorder NOS/ Mental Retardation/ ADHD	Custody
10	ON	11	M	28	Assault with a Weapon	Obsessive Compulsive Disorder	Conditional Discharge
11	ON	11	M	27	Assault with a Weapon	Impulse Control Disorder/ ADHD/ Conduct Disorder/ Mental Retardation/ Antisocial Personality Disorder	Custody
12	ON	10	M	28	Assault with a Weapon	Schizophrenia/ Obsessive Compulsive Disorder	Conditional Discharge

Three noteworthy observations can be made from this table. First, the majority of these accused were detained following their most recent hearing. While it cannot be ascertained whether all of these accused had been detained for the entirety of their decade or more under review board jurisdiction, it is clear that the NCRMD verdict has led to substantial restrictions on the liberty of these accused for an extended period of time.

54 In this case, the review board does not directly identify the index offence, but the facts provided are consistent with murder.

Secondly, while the index offences in most of the cases from both provinces are serious, there is a notable difference between British Columbia and Ontario in this regard. Whereas the majority of the British Columbia accused had an index offence of murder, *none* of the Ontario accused did. All of the Ontario index offences were a form of assault, most often assault with a weapon. While this may be expected due to the absence of murder as the index offence in Ontario in the scope of this article, it is significant that this rarity of murder has not led to a smaller number of accused remaining under review board jurisdiction for an extended period of time or, as noted above, a lesser average time spent under review board jurisdiction.

Finally, there is also a notable difference in the diagnoses for these accused in British Columbia and Ontario. While four of the five British Columbia accused in this group had a schizophrenia diagnosis, only two of the seven Ontario accused carried this diagnosis. This is particularly surprising given the much higher percentage of Ontario NCRMD youth in the larger sample diagnosed with schizophrenia.

While this data set is very small, the differences between these two populations suggest that the duration of an NCRMD youth's time under review board jurisdiction and time in detention may be driven by different factors in the two provinces. In British Columbia, it appears that the severity of the index offence may play a larger role in review board decision-making, whereas in Ontario, the data suggests that the nature of the accused's mental illness may be of greater significance. The low number of accused with a schizophrenia diagnosis who have been under review board jurisdiction for 10 years or more may be attributable in part to the availability of treatment for those accused. The potential for progress may not have been possible in the case of accused persons with other diagnoses, such as developmental disability. If the British Columbia Review Board is indeed more sensitive to index offence severity, while the Ontario Review Board is more responsive to demonstrated progress in treatment, this distinction may have important implications for the equitability of treatment of NCRMD youth between provinces and for decision-making by young people and their counsel in deciding whether to seek an NCRMD verdict.

III. CONSIDERATION OF CASES INVOLVING YOUNG PEOPLE BY THE REVIEW BOARDS

Despite the seemingly clear direction given in section 141(6) of the *YCJA*, neither provincial review board appears to be giving special consideration to cases involving young people. As discussed above, that section imposes two obligations on a review board. First, the review board is obliged to "consider the age and special needs of the young person," and, secondly, the review board is required to consider "any representations or submissions made by a parent of the young person."

Section 141(6) is only expressly mentioned in one of the 65 reviewed decisions.[55] As will be discussed below, even in that case the Ontario Review Board seems to misinterpret the provision. Most of the decisions reviewed do not mention the *YCJA* at all. The majority of British Columbia decisions make no reference to the Act. In Ontario, only five of the 37 decisions make any reference to the *YCJA*.

55 *JF (Re)*, *supra* note 30 at para 6.

One Ontario decision referred to section 141(6) of the *YCJA*. In that case, it was addressed as follows, under the heading "Initial Matters":[56]

> Mr. Nikota, as representative of the Crown, appropriately drew attention to s. 141 of the Youth Criminal Justice Act ("YCJA") which relates to these proceedings, since at the time of the occurrence of the index offences, F.(J.) was a young offender and the following were therefore addressed:
>
> (1) The non-publication order which was initially made in regard to this matter continues.
>
> (2) It was confirmed with the parents that they had both received notice of the hearing. Further, it is indicated on the notice of hearing that they had been sent copies of it.
>
> (3) The parents, in accordance with s. 141(6) of the YCJA, were given the opportunity to make submissions to the panel, especially with regard to their son's age and special needs. At the end of the hearing, neither parent wished to make a statement.

Aside from being the only reference to section 141(6) in any of the 65 decisions reviewed, this is concerning for two reasons. First, this mention of the provision is the only reference to it anywhere in the decision, suggesting that the panel believed it could address the section as an "initial matter" without any consideration in its analysis. Secondly, even here the review board interprets the provision to mean only that the young person's parents may make submissions regarding his age and special needs. Clearly, this is incorrect. The review board's obligation is to consider the age and special needs of the young person *and* the submissions of the parent. The obligation to consider age and special needs exists regardless of whether a parent makes submissions, and the submissions of a parent are not limited to these issues.

Of course, the review board is not obliged to identify each legislative provision it considers, and the failure to do so in this case does not mean that it is not being applied in substance. However, with few exceptions, there is no basis to believe the review boards are applying this provision at all.

Beginning with the obligation to consider "any representations or submissions made by a parent of the young person," there is no recognition of this requirement in any of the 65 decisions, aside from the one referred to above. While parents do sometimes attend review board proceedings,[57] there is no acknowledgment that parents hold a different status than in a hearing pertaining to an adult. Notably, in two of the British Columbia decisions, parents were granted special status, but this was done pursuant to section 672.5(4) of the *Criminal Code* which applies to all review board hearings:

> The court or review board may designate as a party any person who has a substantial interest in protecting the interests of the accused, if the Court is of the opinion that it is just to do so.

While section 672.5(4) of the *Criminal Code* applies to hearings involving youth, it seems unnecessary to designate a parent as a party using this provision. In cases involving young people, parents are already entitled to receive copies of anything received by the accused and entitled to any notice owed to the accused. Further, as noted above, the review board

---

56 *Ibid*.

57 See, for example, *ibid* at para 5.

is obligated to consider any submissions made by the parent. There may be circumstances in which it is appropriate for a parent to be a party to review board proceedings rather than simply the beneficiary of the rights granted in the *YCJA*. However, the absence of any analysis in these cases of the distinction between these statuses or acknowledgment of a parent's entitlements under the *YCJA* suggests a lack of awareness of these entitlements.

The review boards fare little better in satisfying the obligation to consider "the age and special needs of the young person." While the "special needs" of the accused are arguably considered in every disposition hearing, neither review board consistently gives the required consideration to the accused's age. In many cases, even determining the age of the accused at the time of offence or time of hearing is challenging. Where age is discussed, it is often mentioned only as part of the summary of the accused's background and circumstances with no consideration in the review board's analysis. The Ontario Review Board's decision in *CG (Re)* is a representative example. Under the heading "Background," the review board explained:

> G.(C.)'s personal background and history are set out in detail in the Hospital Report entered as exhibit 1 at the hearing and need not be repeated here. Briefly stated, he is 19 years of age, having been born in a refugee camp in Uganda on September 10, 1995. He is the eldest in a sibline [*sic*] of six. He came to Canada with his mother and sister when he was six years of age. [58]

While the review board acknowledges the age of the accused, it is not referred to or "considered" anywhere else in the decision. Notably, in the first paragraph of the "Analysis and Conclusion" section of the decision, the review board sets out the factors it *has* taken into consideration in making its decision:

> In arriving at this conclusion, we take into consideration, the index offence, history of non-compliance with medication, history of aggressive behaviour, history of substance use, ongoing delusions concerning the victim, and a limited insight into the index offence, his mental illness and the need for treatment. G.(C)'s risk is both physical and psychological in nature.

The review board does not state that this list is exhaustive. However, the intention of this paragraph is clearly to set out the factors taken into account in reaching the decision. It is noteworthy that the review board does not include age, a statutorily-mandated consideration, among these factors. In this case in particular, the failure to consider the age of the accused is important. It seems to have led the review board to ignore the circumstances of his childhood in a refugee camp and potential links between an unsettled and possibly traumatic upbringing and the mental illness associated with his offending behaviour at such a young age. In this sense, this passage also serves to highlight the difficulty of considering age where blameworthiness is not in issue, discussed above. While the circumstances of the accused's upbringing would very likely be considered mitigating circumstances if the accused was being sentenced, their relevance is less clear in the review board context. Whether and how they affect the level of danger posed by the accused is uncertain. It is conceivable that his age could be found to have no impact on dangerousness, or to make him more dangerous, justifying a more restrictive disposition contrary to the purposes of the *YCJA*.

While the vast majority of the review board decisions considered as part of this study do not take age into account, there are a small number that do. In one 2016 British Columbia decision the review board notes that "[w]e have taken into account that [the accused] is a very young man and that his presentation has improved during his most

58 [2015] ORBD No 1848 at para 7.

recent committal...” In another 2016 decision from British Columbia, the term of the accused’s disposition was shortened to coincide with his birthday in the hope that he could be discharged before transitioning to an adult facility. In one Ontario decision, the review board noted of a 26-year-old accused that it was “mindful… that this is a young man who entered the forensic system at the age of 16. Tragically he had a very traumatic childhood and… has never had the opportunity to live in a pro-social setting.”[59] These fleeting acknowledgements of the significance of age stand out because it is so unusual that age is considered at all, despite the requirement in the *YCJA*. Even in these rare cases, there is no recognition on the part of the review board that this consideration is mandatory.

For the reasons outlined above, it is evident that both the British Columbia and Ontario review boards consistently fail to apply section 141(6) of the *YCJA*. This is cause for concern, as it not only leaves review board decisions vulnerable to appeal but may also deprive youth of more favourable dispositions that may result from consideration of the mandated factors.

At a surface level, it does not seem to be a particularly challenging problem to resolve. The obligations imposed by section 141(6) are not especially onerous, requiring only that the review boards “consider” the identified factors. To comply with this provision, they simply need to identify the age of the accused in their reasons, and indicate whether this factor, the special needs of the accused, and any submissions by a parent have any effect on the disposition to be imposed. The provision does not presuppose that these factors will have an impact on the decision, nor does it require any material difference in outcome. In fact, given that most of the decisions considered for the purpose of this article involved accused in their 20s and 30s, it seems plausible that age would have little impact on most disposition decisions, as it is not a feature that distinguishes these accused from those found NCRMD as adults.

More important and more challenging, however, are the broader policy questions of whether this limited analysis satisfies the intention of the provision, and the *YCJA* generally, and more fundamentally whether young people in the forensic mental health system *should* be treated differently than adults. While a complete answer to this question is beyond the scope of this article, some preliminary observations are offered below.

IV. SHOULD NCRMD YOUTH BE TREATED DIFFERENTLY THAN ADULTS?

The question of whether NCRMD youth should be treated differently than adults is, in part, a medical question. Whether the age of an accused has a bearing on their treatment, the risk they pose to the public, or the degree to which their freedom needs to be restricted to ensure public safety are questions best informed by medical opinions about the individual in question, and will vary from case to case. The medical components of this question are beyond the scope of this article.

However, as the review board system lies at the intersection of law and medicine, it is important to consider whether there are legal and public policy considerations relevant to determining whether differential treatment is justified. I argue below that there are two: the need for heightened sensitivity to the liberty interests of the accused and the stronger disincentives to seeking an NCRMD verdict that may be present in cases involving young people.

59 *JG (Re)*, [2015] ORBD No 1916 at para 10.

The indeterminate duration of review board jurisdiction following an NCRMD verdict has a particularly significant impact on the liberty interests of young people. Those found NCRMD during adolescence risk being detained, or remaining under review board jurisdiction, for the entirety of their adult lives, an extraordinarily long period of time that could last 70 years or more. Further, the significance of detention during adolescence and young adulthood should not be overlooked. Missing out on normal developmental milestones during these periods due to detention would seem likely to have a significant effect on an accused person's ability to reintegrate into society later in life. Unruh, Gau, and Waintrup make this point with respect to young offenders generally:[60]

> Societal expectations of adolescents as they navigate the trajectory from adolescence to adulthood are to: (a) live independently, (b) establish a career path, (c) obtain and maintain competitive employment and/or continuing education, and (d) engage in healthy social relationships and leisure activities.... Juvenile offenders frequently incarcerated during [adolescence], released into society, and often viewed as adults miss the adolescent developmental process with no opportunity to practice the myriad of requisite skills and natural consequences experienced during the pathway to adulthood.

The importance of this life stage compounds the impact on the liberty interests of the accused. Further, it seems plausible that this may be particularly true of young people in the forensic mental health system, where these challenges may be exacerbated by mental illness.

The second reason why special consideration for young people under the jurisdiction of provincial review boards may be justified is the incentive structure created by the youth criminal justice system. The NCMRD verdict and its predecessor (the "not guilty by reason of insanity" verdict) have long been sought primarily by those facing particularly serious charges, which may be attributable to the outcome of an NCRMD verdict relative to the sentences for different offences.[61] Where an adult is charged with murder, for example, the indefinite detention resulting from an NCRMD verdict may seem an attractive option compared to the mandatory life-sentence[62] that follows a conviction. Conversely, an accused charged with a minor offence likely to result in a short term of imprisonment or a non-custodial sentence may be far less inclined to risk the possibility of an extended period of detention or supervision that follows an NCRMD verdict. As a result, the accused may be disinclined to raise the mental disorder defence, even where it is likely to succeed.

The disincentives to seeking an NCRMD verdict are heightened in the case of young people for two reasons. First, access to records of youth convictions is strictly limited,[63] meaning that a youth record is less likely to lead to the ongoing negative repercussions that may result from an adult criminal record. Accordingly, the opportunity to avoid a conviction and the resulting record may be of less significance to a young person than an adult.

---

60 Deanne K Unruh, Jeff M Gau, and Miriam G Waintrup, "An exploration of Factors Reducing Recidivism Rates of Formerly Incarcerated Youth with Disabilities Participating in a Re-Entry Intervention" (2009) 18 Journal of Child and Family Studies 284 at 284.

61 Livingston et al, *supra* note 3 at 410–411; Latimer and Lawrence, *supra* note 40 at 17–19; 2006; Desmarais et al, *supra* note 40 at 6; Crocker et al, *supra* note 40 at 109–110; Stephen L Golding, Derek Eaves and Andrea M Kowaz, "The Assessment, Treatment and Community Outcome of Insanity Acquitees: Forensic History and Response to Treatment (1989) 12 International Journal of Law and Psychiatry 149 at 160; Simon N Verdun-Jones, "Tightening the Reins: Recent Trend in the Application of the Insanity Defence in Canada" (1991) 10 Med & L 304 at 304; Grant, *supra* note 3 at 441.

62 *Criminal Code*, *supra* note 5, s 745(a).

63 *YCJA*, *supra* note 4, Part 6.

Second, youth sentences are less punitive than adult sentences. The *YCJA* limits the use of incarceration, and even when young people are imprisoned, it is typically for far shorter periods of time than adults.[64] The maximum youth sentence for first-degree murder, for example, is 10 years, including six years in custody, and four years of supervision in the community.[65] Even when sentenced as an adult, young people are subject to a shorter period of parole-ineligibility than a true adult offender.[66] For serious offences including attempted murder, manslaughter, and aggravated sexual assault, the maximum sentence is three years.[67] Assault with a weapon, the index offence for six of the accused under review board jurisdiction for 10 or more years in this study, carries a maximum sentence of two years, of which only two-thirds can be served in custody.[68]

That young people face strong disincentives to pursuing NCRMD verdicts should be concerning. An NCRMD verdict is not a conviction and, as indicated by the special verdict, amounts to a finding that the accused was not criminally responsible for the index offence. Where an accused eligible for an NCRMD verdict is convicted, it should be viewed as a wrongful conviction and miscarriage of justice as would the conviction of a person who is factually innocent. Accused persons, whether adults or young persons, should not be disincentivized from pursuing NCRMD verdicts to which they may be entitled any more than innocent people should be encouraged to plead guilty to offences they did not commit.

Additionally, past studies have demonstrated that the recidivism rate for accused persons found that NCRMD is lower than for accused persons who are convicted, particularly those with mental illnesses.[69] This suggests that the forensic mental health system is more effective in rehabilitating and reintegrating NCRMD accused with mental illness than the correctional system. This record of relative success[70] gives reason to work to eliminate disincentives to accused seeking NCRMD verdicts, as it would seem to better serve the interests of both offenders and the general public that those eligible for NCRMD verdicts receive them.

A. The Need for Reform and Directions for Future Research

If, as suggested above, there is a justifiable basis for treating young people before the review board differently than adults, section 141(6) of the *YCJA* is inadequate for the task. This provision requires only that the review boards "consider" certain factors and does not alter the tests the review boards are mandated to apply in making disposition decisions. It imposes no limits additional to those which apply to adults on the ability of review boards to restrict the liberty of young people.

The standard applied by the review board in deciding whether an accused should remain under its jurisdiction is whether the accused represents "a significant threat to the safety

64 *Ibid,* Part 4.

65 *Ibid,* s 42(q)(i).

66 *Criminal Code*, *supra* note 5, s 745.1.

67 *YCJA*, *supra* note 4, s 42(o).

68 *Ibid,* s 42(n).

69 Yanick Charette et al, "The National Trajectory Project of Individuals Found Not Criminally Responsible on Account of Mental Disorder in Canada. Part 4: Criminal Recidivism" (2015) 60:3 Can J Psychiatry 127 at 128 and 133.

70 It should be acknowledged that this relative success may also be attributable to the fact that NCRMD accused remain under review board jurisdiction until the review board decides they are safe to be absolutely discharged. As a result, unlike in the correctional system, no NCRMD accused is released simply due to the passage of time despite concerns that the individual may still be dangerous. Any reform that limits the ability of the review board to detain or supervise accused persons for as long as it deems necessary could undermine this success.

of the public".[71] While age may play a role in this analysis, it offers little opportunity to consider the accused's status as a young person. In particular, there seems to be no scope to consider the impact of an order on an accused's liberty interests, and certainly no opportunity to make allowances for the different incentive structure affecting young people.

If the "significant threat" standard is met, the review board is required to detain or conditionally discharge the accused, making an order that is "necessary and appropriate."[72] It must take into account "the safety of the public, which is the paramount consideration, the mental condition of the accused, the reintegration of the accused into society and the other needs of the accused."[73] While these factors would seem to allow some additional opportunity to consider an accused's age and their status as a "young person," they offer little chance to consider the accused's liberty interest, and none to account for the incentives discussed above.

For these reasons, section 141(6) is insufficient to account for the unique position of young people found NCRMD. As such, legislative reform is needed. The *YCJA* does offer models for how this might be done; it includes, for example, comprehensive regimes for sentencing young people,[74] for custody and supervision,[75] and for detention prior to sentencing.[76] In fact, the review board context seems to be the only one in which young people are at risk of detention as a result of criminal acts (but given no meaningful special consideration), and are essentially treated as adults. Accordingly, it seems plausible that a similar system that better accounts for the unique circumstances of young people could be established for youth in the review board system.

To inform the direction of this legislative change, additional research is needed. More information is required, for example, about the progression of mental illness among young people in the forensic mental health system and its relationship with review board dispositions. Research is required about decision-making by accused young persons and their counsel in considering whether to pursue an NCRMD verdict; about diagnostic and other characteristics correlated with lengthy terms under review board supervision for young people; and about the trajectory of young people after leaving the review board system. Research is also required regarding the impact of lengthy periods of detention or review board supervision on the ability of young people to reintegrate into society.

At a more fundamental level, however, it is important to recognize that the challenges posed by these young people cannot be solved by changes to the *YCJA* or review board process alone. The illnesses suffered by many of these accused are severe, and there is good reason why the Ontario and British Columbia review boards are finding, year after year, that these accused pose a significant threat to public safety. While it may be possible to better account for the unique circumstances of these young people, and offer marginally greater levels of autonomy and independence in some cases, it is critical to acknowledge that many of these accused will require a highly restrictive and invasive level of supervision for the remainder of their lives.

It may be that more effective reform is possible by developing a broader understanding of the events and circumstances that lead to NCRMD verdicts and extended periods of review board supervision for young people. From the decisions reviewed for this article, it is evident that many of the young people under review board supervision suffered trauma

71 *Criminal Code*, *supra* note 5, s 672.54.
72 *Ibid.*
73 *Ibid.*
74 *YCJA*, *supra* note 4, Part 4.
75 *Ibid*, Part 5.
76 *Ibid,* ss 28–31.

and neglect long before committing their index offences. Intervention following the verdict may well often be too little too late. The opportunity to make a real difference in the lives of these young people may lie in reforms to child protection and welfare systems, educational institutions, and investment in the marginalized communities in which these children spend their formative years. As such, the most fruitful avenues of future research may be those that look carefully at the broader life circumstances and systemic issues that contribute to accused young people being found NCRMD in the first place and consider how these issues can be addressed.

V. CONCLUSION

The aim of this article was to begin to fill the gap in knowledge about young people under the jurisdiction of provincial review boards following NCRMD verdicts. It does so in two respects. First, it describes the population of young people who appeared before the British Columbia and Ontario review boards in 2015 and 2016 in terms of demographic, index offence, and diagnostic characteristics. Secondly, it discusses how both review boards have approached cases involving young people, as evidenced in their reasons.

While the characteristics of the combined population of NCRMD youth in the two provinces were largely consistent with the results of past research into the general NCRMD population in Canada, there were important differences between the two provinces. A significant proportion of these accused in both provinces had been under review board jurisdiction for 10 or more years.

Neither review board demonstrated much concern for the age of these accused, or their status as young persons under the *YCJA*. This is despite the direction in section 141(6) of that Act requiring review boards to consider the "age and special needs" of the accused in any disposition hearing involving a young person. While the failure of the review boards to comply with this mandatory provision of the *YCJA* is cause for concern as it renders disposition decisions vulnerable to appeal and may have a material impact on the outcome of disposition hearings, it is not clear precisely *how* this provision is intended to affect review board deliberations. In light of the standards mandated by the *Criminal Code*, there seems to be little scope for section 141(6) to materially affect the outcome of review board hearings or allow for consideration of the unique circumstances of young people subject to NCRMD verdicts.

The high proportion of NCRMD youth in both provinces who have spent a decade or more under the supervision of the review board suggests that the forensic mental health system may be underprioritizing the liberty interest of these accused. These accused are spending far longer in the review board system, often in custody, than the term of the maximum sentence available under the *YCJA*. This not only has a significant impact on the liberty interests of these accused but may be deterring young people from seeking NCRMD verdicts even where they may be entitled to them.

The direction provided in section 141(6) is clearly inadequate, but it seems unlikely that the *YCJA* in itself presents a meaningful opportunity to resolve the problems identified in this article. Changes to the *YCJA* and the review board process may allow for some marginal improvements in the lives of these young people but would do little to address the life-long marginalization and trauma that may be associated with their offending behaviour. A more fruitful approach may be to work to better understand the systemic issues and life experiences affecting these young people to assess whether it is possible to more effectively prevent these young people from being found NCRMD in the first place.