Policy:		
Sentencing – Youths		
Policy Code:	Effective Date:	Cross-references:
SEN 2	January 31, 2025	SEN 1

The *Youth Criminal Justice Act* (YCJA) includes a sentencing regime for offences committed by youths aged 12 to 17. It emphasizes rehabilitation and reintegration, as well as accountability that is consistent with their reduced level of maturity.

This policy provides guidance regarding YCJA provisions respecting adult sentences and custodial continuation orders, and regarding sentencing considerations for Indigenous offenders and in circumstances of an Indigenous victim.

For information regarding adult sentencing, see the *Sentencing – Adults* (SEN 1) policy.

Adult sentences for youths

Legal requirements

A court may order that a youth receive an adult sentence if the following requirements are met (YCJA sections 64(1) and 72(1)):

- the youth was at least 14 years when the offence was committed
- the offence committed was subject to a maximum sentence of more than two years imprisonment had it been committed by an adult
- the Crown rebuts the presumption of diminished moral blameworthiness or culpability
- a youth sentence would not be of sufficient length to hold the youth accountable for their offending behaviour

Considerations

Even when the legal requirements are met, Crown Counsel should exercise restraint in seeking an adult sentence, considering:

- the declaration of principle (YCJA, section 3)
- the purpose and principles of sentencing (YCJA, section 38)
- the aggravating and mitigating factors, including whether there is evidence that the offence was motivated by bias, prejudice, or hate towards the victim

Whenever a youth is convicted of murder, attempted murder, manslaughter, or aggravated sexual assault, Crown Counsel must consult a Regional Crown Counsel, Director, or their respective deputy about whether to apply for an adult sentence.

Crown Counsel must have the approval of a Regional Crown Counsel, Director, or their respective deputy to apply for an adult sentence.

Notice and timing of application

Crown Counsel must give notice of an intention to seek an adult sentence before the young person enters a plea, or before the commencement of the trial with leave of the court (YCJA, section 64(2)). Crown Counsel makes the application for an adult sentence at the commencement of the sentencing hearing (YCJA, sections 64(1), 71).

Custodial extension orders

Applications may be made to extend the custodial portion of a youth sentence up to the expiry date of the community supervision portion of the sentence (YCJA, sections 98, 104). Crown Counsel should consider making an application for a continuation of custody order if they receive information from the provincial director (YCJA, section 2(1)) indicating that the release of a youth into the community poses a significant risk to public safety. Crown Counsel must consult a Regional Crown Counsel, Director, or their respective deputy before making such an application.

An application for continuation of custody should be made sufficiently early to permit the application to be adjudicated before the expiration of the custody portion of the sentence. In determining where to make the application, Crown Counsel should consider any concerns regarding remote attendance or transport of the youth and any ongoing local community concerns or interest in the matter. If practicable, the application should be made by the sentencing Crown Counsel before the original sentencing judge.

Indigenous Persons

Numerous government commissions and reports, as well as judgments of the Supreme Court of Canada, have recognized that discrimination experienced by Indigenous persons, whether

as a result of overtly racist attitudes or culturally-inappropriate practices, extends to all parts of the criminal justice system.

The history of colonialism, displacement, and residential schools in Canada has translated into lower educational attainment, lower incomes, higher unemployment, higher rates of substance abuse and suicide, and higher levels of incarceration for Indigenous persons.[1] The rates of victimization of Indigenous persons, especially for Indigenous women and girls, are also significantly higher than those for non-Indigenous persons.[2] These circumstances must inform the Crown's sentencing position in any case involving an Indigenous person as an offender or victim.

The continuing consequences of colonialism for Indigenous persons in Canada "must be remedied by accounting for the unique systemic and background factors affecting Indigenous peoples, as well as their fundamentally different cultural values and world views."[3]

Indigenous offenders

Section 38(2)(d) of the YCJA requires that "all available sanctions other than custody that are reasonable in the circumstances should be considered for all young persons, with particular attention to the circumstances of [Indigenous] young persons." This is a remedial provision, designed to address the serious problem of over-representation of Indigenous persons in Canadian prisons and penitentiaries and to encourage restorative approaches to sentencing.[4] It should be given a "fair, large and liberal construction and interpretation."[5]

As the Supreme Court of Canada noted, "for many if not most [Indigenous] offenders, the current concepts of sentencing are inappropriate because they have frequently not responded to the needs, experiences, and perspectives of [Indigenous] people or [Indigenous] communities."[6]

In sentencing proceedings concerning an Indigenous youth, Crown Counsel should:

- ensure that the court is aware the youth identifies as an Indigenous person
- not oppose any reasonable request to adjourn proceedings to allow for appropriate materials to be prepared, including the preparation of a *Gladue* report, or the marshalling of related information or evidence

1 *R v Ipeelee*, 2012 SCC 13
2 *Victimization of Aboriginal People in Canada, 2014*, Statistics Canada, 2016
3 *Ewert v Canada*, 2018 SCC 30 at paras 57-58; *R v Barton*, 2019 SCC 33 at paras 198-200, also *BC First Nations Justice Strategy*, February 2020
4 *R v Ipeelee*, 2012 SCC 13 at para 59
5 *Interpretation Act*, R.S.C. 1985, c. I-21, s. 12, as amended
6 *R v Gladue*, [1999] 1 SCR 688 at para 73

- consider requesting a *Gladue* report or a pre-sentence report addressing the youth's Indigenous background

In formulating a sentencing position with respect to an Indigenous young person or considering whether to seek an adult sentence, Crown Counsel should apply the principles established in *Gladue* and, in particular, consider:

- the unique systemic and background factors that may have played a part in bringing the Indigenous youth before the courts
- the types of sentencing procedures and sanctions that may be appropriate for the youth because of their particular Indigenous heritage or connection
- the contents of a *Gladue* Report or any other related information or evidence submitted concerning the youth, the community, or unique systemic or background factors that may have played a part in bringing the youth before the court
- whether culturally-appropriate resources are available in the community which may reduce or eliminate the need for a custody order against an Indigenous offender
- whether bias, racism, or systemic discrimination may have played a part in the offender initially coming into contact with the criminal justice system or becoming the subject of the continuation of custody order application
- historical factors and current realities facing Indigenous youths, including the overrepresentation of Indigenous youths in custody[7]
- the need to reduce the overrepresentation of Indigenous persons within the criminal justice system, particularly when *Gladue* factors have played a part in the Indigenous person's coming into contact with the criminal justice system

Crown Counsel should also consider:

- the remoteness of the community in which the youth resides
- the local conditions for employment and education in the youth's community
- the unique cultural connections or traditions within the youth's community, which may include an urban Indigenous community such as Indigenous housing, friendship centres, or Indigenous organizations

7 Statistics Canada, Indigenous over-representation in the criminal justice system, March 17, 2023; online at https://open.canada.ca/data/en/dataset/1dc3cac2-f425-47b6-a027-f5c050967098

- the availability of appropriate rehabilitative programming and community support, regardless of locality
- any collateral consequences arising from the commission of the offence, the conviction, or the sentence imposed

All these considerations bear on the ultimate question of what is a fit and proper sentence,[8] including whether an adult sentence should be sought for an Indigenous youth, and should be addressed by Crown Counsel in their sentencing submissions.

Indigenous Victims

Crown Counsel should ensure that, in considering seeking an adult sentence or a continuation of custody, their position reflects the gravity of the problem of violence against Indigenous persons in our society, particularly Indigenous women and girls, and the serious injustices they have faced, and any ongoing risk the offender poses to Indigenous persons, particularly Indigenous women and girls.[9]

8 *R v Gladue*, [1999] 1 SCR 688 at para 66
9 *R v Barton*, 2019 SCC 33 at para 198