

Policy:

***Youth Criminal Justice Act – Adult Sentences***

Policy Code:

**YOU 1.1**

Effective Date:

December 18, 2023

Cross-references:

[DIR 1](#)

This policy provides guidance to Crown Counsel on seeking an adult sentence for a young person being prosecuted under the *Youth Criminal Justice Act* (YCJA).

### Legal Requirements

Pursuant to sections 64(1) and 72(1) of the YCJA, a court may order that a young person receive an adult sentence if all of the following requirements are met:

- the young person had attained the age of 14 years when the offence was committed
- the young person committed an offence for which an adult would be liable to imprisonment for a term of more than two years
- the presumption of diminished moral blameworthiness or culpability of the young person is rebutted
- a youth sentence would not be of sufficient length to hold the young person accountable for their offending behaviour

### Considerations

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

- the declaration of principle in section 3 of the YCJA
- the purpose and principles of sentencing in section 38 of the YCJA
- whether there is an evidentiary basis to meet the test in section 72(1) of the YCJA
- Crown Counsel bears the onus for meeting the section 72(1) test (section 72(2) YCJA)

- the aggravating and mitigating factors, including whether there is evidence that the offence was motivated by bias, prejudice, or hate towards the victim

Crown Counsel must have approval from a Regional Crown Counsel, Director, or their respective deputy to seek an adult sentence.

Crown Counsel must consult a Regional Crown Counsel, Director, or their respective deputy about the appropriateness of seeking an adult sentence whenever a young person is charged with:

- murder
- attempt murder
- manslaughter
- aggravated sexual assault

### Notice and Hearing of Application

Crown Counsel must give notice to the youth justice court of the Crown's intention to seek an adult sentence either before a young person enters a plea, or, with leave of the court, before the commencement of the trial (section 64(2) YCJA).

The court will hear the Crown's application for an adult sentence at the commencement of the sentencing hearing (sections 64(1), 71 YCJA).

### Direct Indictment

Direct indictments are legally permissible in proceedings under the YCJA.<sup>1</sup> Crown Counsel wishing to prefer a direct indictment should follow the process laid out in the *Direct Indictment* ([DIR 1](#)) policy.

### 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

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<sup>1</sup> *R v S.J.L.*, 2009 SCC 14

substance abuse and suicide, and higher levels of incarceration for Indigenous persons.<sup>2</sup> The rates of victimization of Indigenous persons, especially for Indigenous women and girls, are also significantly higher than those for non-Indigenous persons.<sup>3</sup> These circumstances must inform the Crown’s sentencing position in any case involving an Indigenous person as an accused 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.”<sup>4</sup>

### Indigenous Accused

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.<sup>5</sup> It should be given a “fair, large and liberal construction and interpretation.”<sup>6</sup>

As the Supreme Court of Canada noted in *Gladue*, “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.”<sup>7</sup>

In sentencing proceedings concerning an Indigenous young person, Crown Counsel should:

- ensure that the court is aware the young person 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
- consider requesting a *Gladue* Report or a pre-sentence report addressing the young person’s Indigenous background if adequate information concerning the young person, the community, or unique systemic or background factors would not otherwise be available to the court

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2 *R v Ipeelee*, 2012 SCC 13

3 *Victimization of Aboriginal People in Canada, 2014*, Statistics Canada, 2016

4 *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

5 *R v Ipeelee*, 2012 SCC 13 at para 59

6 *Interpretation Act*, R.S.C. 1985, c. I-21, s. 12, as amended

7 *R v Gladue*, [1999] 1 SCR 688 at para 73

In deciding whether to seek an adult sentence, Crown Counsel must apply the principles established in *R v Gladue* and, in particular, consider:

- the unique systemic and background factors that may have played a part in bringing the Indigenous young person before the courts
- the types of sentencing procedures and sanctions that may be appropriate for the young person because of their particular Indigenous heritage or connection
- the contents of a *Gladue* Report or any other related information or evidence submitted concerning the young person, the community, or unique systemic or background factors that may have played a part in bringing the young person before the court

Crown Counsel should also consider:

- the remoteness of the community in which the young person resides
- the local conditions for employment and education in the young person's community
- the unique cultural connections or traditions within the young person's community, which may include an urban Indigenous community such as Indigenous housing, friendship centres, or Indigenous organizations
- 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,<sup>8</sup> including whether an adult sentence should be sought for an Indigenous young person. Crown Counsel should address these issues in an application to seek an adult sentence for an Indigenous young person.

### Indigenous Victims

Crown Counsel should ensure that their sentencing positions reflect 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.<sup>9</sup> Crown Counsel should remind the court of the obligation to:

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8 *R v Gladue*, [1999] 1 SCR 688 at para 66

9 *R v Barton*, 2019 SCC 33 at para 198

- give primary consideration to the objectives of denunciation and deterrence in cases that involve the abuse of a person who is vulnerable because of personal circumstances, including because the person is Indigenous and female (section 718.04 *Criminal Code*)
- consider the increased vulnerability of female persons when they are victims of intimate partner violence offences, giving particular attention to the circumstances of Indigenous female victims (section 718.201 *Criminal Code*)