

Policy:

**Youth Criminal Justice Act – Custodial Extension Order**

Policy Code:

**YOU 1.2**

Effective Date:

December 18, 2023

Cross-references:

This policy provides guidance on orders that a young person remain in custody beyond the expiry of the custodial portion of their youth sentence.

Crown Counsel may receive information from various sources, including from the provincial director, director, or case manager at a youth custody centre, youth probation officer, medical practitioner, or investigative agency, indicating there are concerns that the release of a young person into the community poses a significant risk to public safety. In such a case, Crown Counsel should consider making an application for a continuation of custody order.

Crown Counsel can apply for a custodial extension order pursuant to sections 98 or 104 of the *Youth Criminal Justice Act* (YCJA). These sections aim to protect the public from the risk of serious harm being caused by the young person if they are released from custody. These sections serve different purposes and contain different tests.

Applications under section 98 can be brought in relation to any youth custodial sentence, whereas applications under section 104 can only be brought in relation to certain custody and conditional supervision orders. Custodial extension orders cannot exceed the original expiry date of the community supervision portion of the sentence.

Crown Counsel should be cognizant of the availability of these orders and make an application in appropriate circumstances.

### Considerations

Crown Counsel must consult a Regional Crown Counsel, Director, or their respective deputy before making an application to extend the custodial portion of a youth sentence.

In determining where to make the application, Crown Counsel should consider:

- any concerns about remote attendance or transport of the young person

- any ongoing local community concerns or interest in the matter
- Crown or court continuity concerns

If there are no concerns regarding transport of the young person or ongoing community interest, the application would ideally be made:

- in the original sentencing jurisdiction
- before the original sentencing youth justice court judge
- by the Crown Counsel who conducted the original sentencing hearing

Crown Counsel should commence an application for continuation of custody sufficiently early to permit the application to be adjudicated before the expiration of the custody portion of the sentence.

## 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.<sup>1</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>2</sup> These circumstances must inform the Crown's position in relation to any application for continuation of custody 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.”<sup>3</sup>

---

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

## Indigenous Offenders

Crown Counsel should consider the historical factors and current realities facing Indigenous persons when determining whether to apply for a continuation of custody order against an Indigenous offender.

In deciding whether to make an application for a continuation of custody order, Crown Counsel should consider:

- whether culturally appropriate resources are available in the community which may reduce or eliminate the need for an application for a continuation of 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
- the overrepresentation of Indigenous young persons in custody<sup>4</sup>
- 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

## Indigenous Victims

Crown Counsel should ensure that their position on an application for continuation of custody 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.<sup>5</sup> Crown Counsel should be mindful of this concern if the offender is likely to commit an offence against an Indigenous person if released from custody.

---

4 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>

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