

Policy:

Youth Criminal Justice Act – Extrajudicial Measures

Policy Code:

YOU 1.4

Effective Date:

January 15, 2021

Cross-references:

[CHA 1](#) [CHI 1](#) [CRI 1](#)
[FIR 1](#) [HAT 1](#) [IMP 1](#)
[SEX 1](#) [VIC 1](#) [VUL 1](#)

The BC Prosecution Service supports the use of extrajudicial measures (EJMs) and recognizes that they can be the most appropriate and effective way to address harm done to the community and to allow young persons to be rehabilitated and accept responsibility for their criminal conduct. This position is consistent with the *Youth Criminal Justice Act* (YCJA), which specifically encourages the use of alternatives to judicial proceedings.

Under Part 1 of the YCJA, EJMs provide a means other than judicial proceedings to deal with a young person alleged to have committed an offence. EJMs available to Crown Counsel include a caution in the form of a letter (section 8), and an extrajudicial sanction (EJS).

An EJS is part of a program referred to in section 10 of the YCJA, which also sets out the statutory prerequisites for using EJSs.

Principles

Every young person alleged to have committed a criminal offence is potentially eligible to be considered for an EJM, even one who has been previously referred for or dealt with by an EJM or one who has been previously convicted of a criminal offence.

As stated in *Charge Assessment Guidelines* ([CHA 1](#)): “Justice does not require that every provable offence must be prosecuted. The resources of the criminal justice system are not unlimited. If reasonable alternatives are available, they should be pursued.”

Unless an offence is expressly excluded from EJM consideration by this policy or the provisions of the YCJA, or resorting to an EJM would be clearly contrary to the public interest, Crown Counsel should consider every reasonable alternative to prosecuting a young person. In doing so, Crown Counsel should pay particular attention to the circumstances of Indigenous young persons (First Nations, Métis, and Inuit).

In addition, Part 1 of the YCJA sets out important statutory principles and objectives specifically relating to EJMs, including a Declaration of Principles (section 4), a presumption that EJMs are deemed adequate for certain administration of justice offences (section 4.1), and a list of objectives for EJMs (section 5).

EJM Assessment

Prior to employing an EJM, Crown Counsel must be satisfied there is a substantial likelihood of conviction.

Limits on the use of EJMs

The following offences must not be considered for EJMs:

- first- or second-degree murder
- conspiracy to commit murder
- attempted murder
- aggravated sexual assault
- discharging a firearm with intent
- hostage taking
- kidnapping
- using a firearm in the commission of any indictable offence for which there is a mandatory minimum term of imprisonment, including section 85 of the *Criminal Code*, or any of the following:
 - sexual assault using a firearm (section 272(2)(a) or (a.1))
 - robbery using a firearm (section 344(1)(a) or (a.1))
 - extortion (section 346(1.1)(a) or (a.1))

For the following offences, EJMs may only be considered in exceptional circumstances and require the prior approval of a Regional Crown Counsel or Director and the consent of the Assistant Deputy Attorney General before any referral for, or resort to, EJMs:

- manslaughter
- criminal negligence causing death
- any other offence for which causing death is a legal ingredient of the offence

For the following offences, prior approval of a Regional Crown Counsel, Director, or their respective deputy is required before any referral for, or resort to, EJMs:

- aggravated assault
- arson
- breaking and entering a dwelling house
- child abduction in contravention of a custody order or without a custody order
- child pornography
- criminal negligence causing bodily harm
- crimes against children and vulnerable youth (*Child Victims and Witnesses* ([CHI 1](#)))
- crimes against a vulnerable victim for which the *Vulnerable Victims and Witnesses* ([VUL 1](#)) policy applies, including “serious personal injury” offences as set out in section 752 of the *Criminal Code*, as well as those involving significant risk of harm whether physical, sexual, psychological, or exploitive in nature
- criminal harassment (*Criminal Harassment* ([CRI 1](#)))
- driving offences under the *Criminal Code*, including driving while impaired, driving with excessive blood/alcohol concentrations, and failing to comply with demands under the part of the *Criminal Code* dealing with impaired driving offences (*Impaired Driving Offences* ([IMP 1](#)))
- extortion
- possession of a loaded restricted or prohibited firearm, or unloaded with ammunition, contrary to section 95 of the *Criminal Code* (*Firearms* ([FIR 1](#)))
- importing, exporting, transferring, or trafficking firearms or related items contrary to sections 99-104 of the *Criminal Code* ([FIR 1](#))
- making a firearm automatic, contrary to section 102 of the *Criminal Code* ([FIR 1](#))
- breach of a weapons prohibition, contrary to section 117.01 of the *Criminal Code* ([FIR 1](#))
- hate-motivated and hate-propaganda offences (*Hate Crimes* ([HAT 1](#)))
- offences involving a fatality which are not listed above
- offences not listed above for which there are mandatory minimum terms of imprisonment
- property offences involving a breach of trust

- robbery
- sexual assault offences contrary to section 272, not involving use of a firearm (using a weapon, causing bodily harm, choking, etc.) (*Sexual Offences Against Adults* ([SEX 1](#)))

EJS Procedure

Crown Counsel should adopt a principled and flexible approach to EJS referrals, bearing in mind that a referral for an assessment of the suitability of an EJS does not obligate Crown Counsel to approve the recommended program. This approach recognizes that it is sometimes difficult to determine the suitability of an EJS without obtaining an assessment from an EJS program.

Subject to any safety concerns or other policy guidance, Crown Counsel should complete the process of referral to an EJS before approving an Information and only approve an Information if an EJS plan is rejected.

Where an Information has already been sworn and an EJS has been successfully completed, Crown Counsel should withdraw the charges or enter a stay of proceedings.

At any point throughout the life of a prosecution file, Crown Counsel may reassess an earlier determination that the public interest required a prosecution if later satisfied it would not be contrary to the public interest to make a referral for an EJS. However, Crown Counsel must consider adverse consequences to victims and witnesses of making an EJS referral close to or on the scheduled trial date.

Caution Procedure

In cases involving minor offences, a caution in the form of a letter may be appropriate to address the public interest.

Before proceeding, Crown Counsel should consider whether the young person can adequately be dealt with by a caution. In making this determination, Crown Counsel should consider:

- the seriousness of the offence
- the personal circumstances of the young person
- the nature and number of previous offences committed by the young person
- any other aggravating and mitigating circumstances

Indigenous Young Persons

Numerous government commissions and reports, as well as the 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. The rates of victimization of Indigenous persons, especially for Indigenous women and girls, are also significantly higher than those for non-Indigenous persons. 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.”¹

Indigenous Accused Young Persons

As noted in CHA 1, at an early stage in the charge assessment process, Crown Counsel should try to determine whether the accused or victim identifies as an Indigenous person and, therefore, whether public interest considerations specific to Indigenous persons apply. To make this determination Crown Counsel should refer to any information contained within the Report to Crown Counsel or otherwise readily available to them.

In considering the use of an EJM for a young person who is Indigenous, Crown Counsel should bear in mind:

- the need to reduce overrepresentation of Indigenous persons as accused within the criminal justice system, particularly where factors such as those discussed in *R v Gladue*² have played a part in the Indigenous person coming into contact with the criminal justice system
- whether bias, racism, or systemic discrimination played a part in the accused coming into contact with the criminal justice system

Crown Counsel should specifically consider whether traditional or culturally-based Indigenous practices or programs are appropriate and available for EJMs within the community.

¹ *Ewert v Canada*, 2018 SCC 30 at para 57 and 58; *R v Barton*, 2019 SCC 33 at paras 198-200

² *R v Gladue* [1999] 1 S.C.R. 688

If there is a reasonable possibility that the public interest could be satisfied by referring a young person who is Indigenous to an EJM, Crown Counsel should do so, even when the Indigenous person has been previously referred for or dealt with by EJMs or has been previously convicted of a criminal offence and sentenced, including to a sentence of imprisonment. Whenever the public interest could reasonably be satisfied by resorting to EJMs, Crown Counsel should pursue that option.

Indigenous Victims

In considering the use of alternative measures in a case involving an Indigenous victim, Crown Counsel should bear in mind the overrepresentation of Indigenous women and girls as victims of violent offences, which is a public interest factor that weighs in favour of prosecution.

Youth Justice Committees and Conferences – Advice on EJMs

Section 18(2)(a)(i) of the YCJA allows for a youth justice committee to give advice on the appropriate EJM to be used in respect of a young person. Section 19(2) of the YCJA provides that a conference may be convened to give advice on an appropriate EJM. For the alleged offence, Crown Counsel should follow the EJM-approval requirements set out in this policy under ‘Limits on the use of EJMs’ prior to referring a matter to a committee or initiating a conference for advice on appropriate EJMs.

Victims’ Rights

The BC *Victims of Crime Act*, federal *Canadian Victims Bill of Rights*, and the YCJA establish rights for victims of offences in their interactions with the youth criminal justice system. In all YCJA proceedings, including the use of extrajudicial measures, Crown Counsel should be mindful of their obligation to consider the rights of victims under these statutes (*Victims of Crime – Providing Assistance and Information to* [VIC 1](#)).