

# CHAPTER TWO: YOUTH JUSTICE

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## CHAPTER TWO: YOUTH JUSTICE

### I. INTRODUCTION

#### A. *LSLAP and Youth Justice*

LSLAP students cannot represent persons less than 18 years of age. If the client is a young person, aged 12 to 17 years, he or she should be referred to the Legal Services Society (LSS). The LSS provides legal services for young persons, regardless of income. See **Section III.C: Right to Counsel**. LSLAP students may not be able to represent clients with serious criminal records. However, clients who only have a juvenile record are considered first-time offenders for the purposes of this restriction.

#### B. *History of Legislative Changes*

Before the 19<sup>th</sup> century, there was little legal recognition of the special needs of children and youth. Children convicted of offences were punished the same as adults. The 19<sup>th</sup> century saw a growing understanding of childhood. In 1857, the first Canadian act to separate youth offenders from adults was enacted. In 1908, the Juvenile Delinquents Act, S.C. 1908, c. 40 [JDA] was enacted. The JDA created a juvenile justice and corrections system with a *parens patriae* philosophy. Juvenile offenders were believed to be similar to those who were abandoned or neglected. Under the JDA, children were subject to “delinquency proceedings” for violating federal, provincial, or municipal law. These courts operated informally to avoid technicalities from interfering with treatments considered to be in the child's best interests. The JDA was an improvement over the harsh treatment inflicted on youths; however, it was applied arbitrarily or discriminatorily depending on the juvenile's race, class and gender.

By the 1960s, the JDA was undergoing public criticism, particularly for its highly discretionary regime which gave judges, police, and correctional officials broad powers to deal with youths according to their own perceptions of a child's “best interests”. Thus, Parliament enacted the Young Offenders Act, R.S.C. 1985, c. Y-1 [YOA], which governed juvenile criminal law from 1984 to 2003. The Act applied to youths charged with specific offences under the Criminal Code, R.S.C. 1984, c. C-46 [CC] and other federal law. While the YOA considered the individual circumstances of young offenders, it also purported to better protect society against violent youths. The Act also gave more recognition of juvenile legal rights, established a uniform national age jurisdiction, safeguarded against the infringement of the basic rights guaranteed under the Canadian Charter of Rights and Freedoms (Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982 c. 11 [Charter]), and increased protection for young offenders by creating the requirement of parental notification upon arrest, rights to legal representation, and the availability of the insanity defence to youth offenders.

As of April 1, 2003, the Youth Criminal Justice Act, S.C. 2002, c. 1 [YCJA] came into effect and replaced the previous YOA. The YCJA preserves many of the elements of the YOA; however, it focuses on three key objectives to better protect the public: (1) preventing youth crime by addressing underlying causes; (2) meaningful consequences for offences; and (3) increased focus on rehabilitation and reintegration for youth returning to the community (YCJA, s. 3). The YCJA also encourages judges to impose non-custodial sentences on young persons who are found guilty under the Act where it is consistent under the general principles. This does not mean that it seeks to prohibit custodial sentences, but rather to ensure that such measures are the last option.

A significant change is the inclusion of the victims' role in the process. While victims have no rights per se as they are not a party to criminal proceedings, the YCJA holds that victims will be heard and treated with courtesy, compassion, and respect for their privacy, and be minimally inconvenienced. Also, consequences will include educating the offender about the impact of the crime, and focusing on repairing the damage or paying back society in a constructive fashion. Parliament recognizes that victims *are* involved in the process, though not as legal parties to the proceedings. In some respects, B.C. legislation dealing with victims of crime has already incorporated a number of these principles, particularly in the Victims of Crime Act, R.S.B.C. 1996, c. 478.

The YCJA was amended by Bill C-10 (“The Safe Streets and Communities Act”) in 2012. The changes to the YCJA in Bill C-10 came into force on October 23, 2012.

One change to the YCJA in Bill C-10 is that individual deterrence and denunciation of unlawful conduct was added as a sentencing principle. It also sets out that youths are presumed to have diminished moral culpability or blameworthiness in comparison to adult offenders. Furthermore, Bill C-10 states that the youth justice system is intended to protect the public by holding youth offenders accountable through using proportionate measures, promoting rehabilitation and reintegration of youth offenders, and preventing crime by directing youths to programs that address underlying causes of their actions. Bill C-10 also sets out definitions for a “serious offence” and a “violent offence” which are broader than previous definitions given in the case law. B.C. has enacted complementary legislation for offences against provincial statutes or municipal bylaws. The Youth Justice Act, S.B.C. 2003, c. 85 came into force on April 1, 2004, replacing the Young Offenders (British Columbia) Act, R.S.B.C. 1996, c. 494.

## II. GOVERNING LEGISLATION AND RESOURCES

### A. *Legislation and Web Links*

Criminal Code, R.S.C. 1985, c. C-46 [CC].

Website: <http://laws-lois.justice.gc.ca/eng/acts/C-46/>

Youth Criminal Justice Act, S.C. 2002, c. 1 [YCJA].

Website: <http://laws-lois.justice.gc.ca/eng/acts/Y-1.5/index.html>

Youth Justice Act, S.B.C. 2003, c. 85 [YJA].

Website:

[http://www.bclaws.ca/EPLibraries/bclaws\\_new/document/ID/freeside/00\\_03085\\_01](http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_03085_01)

## **B. Books**

Youth Justice Manual, Loose-leaf service. (Canada Law Book)

Youth Criminal Justice Law, 2<sup>nd</sup> ed. Essentials of Canadian Law Series (Irwin Law 2009), Nicholas Bala and Sanjeet Anand.

A Guide to the Youth Criminal Justice Act, 2012 (LexisNexis Canada Inc. 2011), Lee Tustin and Robert E. Lutes.

## **C. Websites**

Directory of Youth Justice Resources: [www.justice.gc.ca/eng/pi/yj-ij/information/dir-rep.html](http://www.justice.gc.ca/eng/pi/yj-ij/information/dir-rep.html)

Youth Criminal Justice Act FAQs: [www.law-faqs.org/wiki/index.php/Youth](http://www.law-faqs.org/wiki/index.php/Youth)

Department of Justice YCJA Explained: [Document20 www.justice.gc.ca/eng/pi/yj-ij/ycja-lsipa/ycja-lsipa.html](http://www.justice.gc.ca/eng/pi/yj-ij/ycja-lsipa/ycja-lsipa.html)

# **III. FEDERAL OFFENCES: YOUTH CRIMINAL JUSTICE ACT**

## **A. Who does the act apply to?**

### **1. Applicable Age**

“Child” is defined in Section 2(1) of the YCJA as a person who is, or, in the absence of evidence to the contrary, appears to be less than 12 years old. Section 13 of the CC states that no person under the age of twelve years will be convicted of an offence.

“Young person” is defined in Section 2(1) of the YCJA as a person who is, or, in the absence of evidence to the contrary, appears to be, 12 years old or older, but less than 18 years old.

### **2. Effect of Young Person Turning 18**

Section 14(5) states that the YCJA applies to persons 18 years old or older who are alleged to have committed an offence while a young person. Section

14(4) states that extrajudicial measures taken or judicial proceedings commenced against a young person may be continued after the person attains the age of 18 years.

### **3. Applicable Court for Young Person**

Under s. 2(5) of the Provincial Court Act, R.S.B.C. 1996, c. 379, the Provincial Court is designated as the Youth Justice Court for the purposes of the YCJA, and a provincial court judge is a Youth Justice Court judge. The superior court of British Columbia has concurrent jurisdiction as a youth justice court where the Crown is seeking an adult sentence for a young person.

#### ***B. Declaration of Principle***

The YCJA contains a declaration of principle. The principles that apply are set out in Section 3 of the YCJA. The youth criminal justice system is intended to protect the public by: i) holding young persons accountable through measures that are proportionate to the seriousness of the offence and the degree of responsibility of the young person, ii) promoting the rehabilitation and reintegration of young persons who have committed offences, and iii) supporting the prevention of crime by referring young persons to programs or agencies in the community to address the circumstances underlying their offending behaviour.

The criminal justice system for young persons must be separate from that of adults, must be based on the principle of diminished moral blameworthiness or culpability and must emphasize the following: i) rehabilitation and reintegration, ii) fair and proportionate accountability that is consistent with the greater dependency of young persons and their reduced level of maturity, enhanced procedural protection to ensure that young persons are treated fairly and that their rights, including their right to privacy, are protected, iv) timely intervention that reinforces the link between the offending behaviour and its consequences, and v) the promptness and speed with which persons responsible for enforcing this Act must act, given young persons' perception of time.

Within the limits of fair and proportionate accountability, the measures taken against young persons who commit offences should (i) reinforce respect for societal values, (ii) encourage the repair of harm done to victims and the community, (iii) be meaningful for the individual young person given his or her needs and level of development and, where appropriate, involve the parents, the extended family, the community and social or other agencies in the young person's rehabilitation and reintegration, and (iv) respect gender, ethnic, cultural and linguistic differences and respond to the needs of aboriginal young persons and of young persons with special requirements.

Special considerations apply in respect of proceedings against young persons and, in particular, (i) young persons have rights and freedoms in their own right, such as a right to be heard in the course of and to participate in the processes, other than the decision to prosecute, that lead to decisions that affect them, and young persons have special guarantees of their rights and freedoms, (ii) victims should be treated with courtesy, compassion and respect for their dignity and privacy and should suffer the minimum degree of inconvenience as a result of their involvement with the youth criminal justice system, (iii) victims should be provided with information about the proceedings and given an opportunity to participate and be heard, and (iv) parents should be informed of measures or proceedings involving their children and encouraged to support them in addressing their offending behaviour.

***C. Right to Counsel***

Under s. 25 of the YCJA, a young person has the right to retain and instruct counsel without delay, at any stage of the proceedings. A police officer must inform young persons of their right to counsel upon their arrest or detention. The Legal Services Society of British Columbia provides legal services for young persons, regardless of their income or their parents' income.

***D. Right to Notice***

Notice must be given to the parents as soon as possible in any of the following circumstances: (i.) the young person is arrested and detained in custody; (ii.) a summons or appearance notice is issued to the young person; (iii.) the young person is released on giving a promise to appear; or (iv.) upon the young person entering into a recognizance (s. 26 (1) and (2)). When the whereabouts of the parents of a young person are unknown, notice may be given to an adult relative or to any other adult, who is known by the young person and who is likely to assist the young person (s. 26(4)). When notice has not been given, the court may adjourn the proceedings until notice is given or may dispense with notice if the court thinks it would be appropriate (s. 26(11)).

Notice is not required if the person has attained the age of 20 at the time of his or her first appearance before a youth justice court (s. 26(12)).

The court may, if necessary, order the attendance of a parent at proceedings against a young person. A parent who then fails to attend may be held in contempt of court (s. 27).

***E. Alternatives to the Court Process***

**1. Extrajudicial Measures**

The principles applicable to the use of extrajudicial measures are set out in Section 4 of the YCJA. Extrajudicial measures are an alternative to the formal court process. There is a presumption that extrajudicial measures are adequate to hold a young person accountable for his or her offending behaviour if the young person has committed a non-violent offence and has not previously been found guilty of an offence. However, it may also be appropriate even if there has been a prior use of extrajudicial measures or a prior finding of guilt. Extrajudicial measures should be designed to A) provide an effective and timely response to offending behaviour, B) to encourage young persons to acknowledge and repair the harm caused, C) to encourage families of the young persons and the community to become involved in the design and implementation of those measures, D) to provide an opportunity for victims to participate in decisions, and E) to respect the rights and freedoms of young persons and be proportionate to the seriousness of the offence.

Both summary and indictable offences (in exceptional circumstances) may be considered for extrajudicial measures.

Forms of extrajudicial measures available:

- To a Police Officer are: 1) to take no further action 2) to warn the young person 3) to administer a caution or 4) to refer the young person to a program or agency in the community.
- To Crown Counsel are: Section 8 of the YCJA allows Crown Counsel to administer a caution.

## **2. Extrajudicial Sanctions:**

Extrajudicial sanctions may be used where the seriousness of the offence, the nature and number of previous offences committed by the young person or any other aggravating circumstances make a warning, caution, or referral inadequate.(s. 10).

Extrajudicial sanctions may be used only if:

- a. they are part of a program of sanctions authorized by the Attorney General;
- b. the person considering them believes the extrajudicial sanctions are appropriate having regard to the needs of the young person and the interests of society;
- c. the young person, having been informed of the extrajudicial sanction, fully and freely consents to be subject to it;

- d. the young person has, before consenting to be subject to the extrajudicial sanction, been advised of his or her right to be represented by counsel and been given a reasonable opportunity to consult with counsel;
- e. the young person accepts responsibility for the act or omission that forms the basis of the offence that he or she is alleged to have committed;
- f. there is, in the opinion of the Attorney General, sufficient evidence to proceed with the prosecution of the offence.

This procedure commonly involves an interview with a youth worker (through the local probation office), who will recommend a plan to the prosecutor that may include conditions such as counselling, restitution, community service, victim offender mediation, or an apology. Section 10(3) precludes extrajudicial sanctions in circumstances where the young person denies culpability or expresses a desire to have the charges proceed against him or her in youth justice court. Statements accepting responsibility, made as a condition of being dealt with through extrajudicial sanctions, are not admissible in evidence in any subsequent civil or criminal proceedings (s. 10(4)).

## ***F. Court Process***

### **1. Compelling a Young Person's Appearance in Court**

The procedure for compelling a young person to attend court is generally the same as that for adults as set out in the CC. A Police Officer may release a young person on either an Appearance Notice or a Promise to Appear (and Undertaking). These documents will indicate a time, date and location for the Young Person's first appearance in Court. If the Information is not laid prior to this first appearance the Appearance Notice or the Promise to Appear will be rendered a nullity. The Undertaking, however, will continue in force as long as the charges are before the Court. The Ontario Court of Appeal in R. v. Oliveira, 2009 ONCA 219 held that a Promise to Appear and an Undertaking serve two distinct and separate purposes. The Court went on to explain that the purpose of the Promise to Appear is to secure the initial attendance of the Accused in Court. The Undertaking, in contrast, constitutes a promise by the Accused to comply with certain conditions in exchange for his release from custody pending the resolution of the charges. Alternatively, and after an Information has been laid, a young person will be compelled to Court by either a Summons or a Warrant. A Warrant is issued where: 1) Crown Counsel is either seeking the Detention of the young person or conditions of release for the young person, or 2) the whereabouts of the young person is unknown.

## 2. Time Limitations

The time limitation for commencing a prosecution is the same for adults and youth. The time limitations vary depending on the nature of the offence and are set out in the CC. See **Chapter 1: Criminal Law**.

## 3. Proof of Age

The age of the young person must be established. This is usually done at the early stages of the proceedings. There are a number of ways that this can be accomplished:

- a parent can testify as to the age of the young person (s. 148(1) YCJA),
- a birth or baptismal certificate can be evidence of the age of a young person (s. 148(2) YCJA),
- Defence Counsel may attest to having spoken with a parent or guardian, and on that basis, admit the age of the young person (s. 149 YCJA), or
- the Court may act on any other information it considers reliable to determine the age of a young person (s. 148(3) YCJA).

## 4. Proof of Notice

It must be shown that a young person's parent or guardian has been notified of the charges against the young person. See Section III (D) above.

## 5. Pre-Trial Detention

The law surrounding pre-trial detention is set out in s. 29 of the YCJA. A young person can't be detained in custody as a substitute for appropriate child protection, mental health or other social measures. A young person can be detained in custody where the Crown has proven, on a balance of probabilities, that:

1. The young person has either:
  - been charged with a serious offence (as defined in s. 2 YCJA), or
  - has a history that indicates a pattern of either outstanding charges or findings of guilt.
2. There is either:
  - a substantial likelihood that the young person will not appear in court, or
  - evidence that detention is necessary for the protection of the public having regard to all the circumstances including a

substantial likelihood that the young person will commit a serious offence, or

- evidence that the young person has been charged with a serious offence and detention is necessary to maintain confidence in the administration of justice having regard to the declaration of principle and all the circumstances, including: strength of the prosecution's case, gravity of the offence, circumstances surrounding the commission of the offence, and the young person is liable for a potentially lengthy custodial sentence.

3. There are no conditions which would reduce the likelihood that the young person would not appear in court, or offer adequate protection to the public, or maintain confidence in the administration of justice.

A young person may be placed in the care of a responsible person if a youth justice court is satisfied that: A) the young person is detainable, and B) the person is willing and able to take care of and exercise control over the young person, and C) the young person is willing to be placed in the care of that person. A person who agrees to care for a young person under s. 31(3) adopts a very serious responsibility. Wilful failure to comply with the terms of the care order may result in the responsible person being charged with an offence punishable with up to two years imprisonment (s. 139).

s. 30 of the YCJA provides that a young person who has been detained in custody prior to being sentenced must be placed in a youth facility. When that person attains the age of 20 years he shall be placed in an adult facility.

## **6. Pleas**

A young person may plead guilty or not guilty (s. 36). The plea of not guilty by reason of mental disorder is also available. Pleas must be entered before a youth justice court judge (not a judicial justice of the peace).

After a guilty plea is entered a youth justice court judge may order the preparation of: A) a pre-sentence report (s. 40), or B) a medical, psychiatric and/or psychological report (s. 34). The judge may also convene a Section 19 Conference.

Where a not guilty plea is entered a Trial Date is set.

## **7. The Trial Process**

The principles considered in the trial process are the same for young persons as for adults.

The law relating to the admissibility of statements made by adult accused persons to persons in authority also applies to youths (s. 146(1)). There are, however, specific provisions that ensure a young person both understands the consequences of making such a statement and is given the opportunity to seek and/or consult counsel (s. 146(2)). The right to counsel may be waived but must be done so either by a signed written statement or a recorded statement (s. 146(4) and (5)). A judge may rule inadmissible any statement given by a young person if satisfied that it was given under duress (s. 46(7)). Voluntary statements can be admitted into evidence, even where there has been a technical irregularity in complying with a young person's statutory protection, provided that the youth justice court is satisfied that the admission of the statement would not offend the principle that young persons are entitled to enhanced procedural protection to ensure that they are treated fairly and that their rights are protected (s. 146(6)).

Where a child is a witness at a youth court trial the judge or justice must instruct that child as to the duty to speak the truth and the consequences of failing to do so. Where a young person is a witness the judge or justice may instruct the young person as to this duty "if he/she considers it necessary" (s. 151).

There are special protections under the criminal code for witnesses who are under the age of 18 years. A justice/judge has the discretion under s. 486 CC to exclude members of the public from the courtroom if they are of the opinion that such an order is in the interest of public morals, the maintenance of order or the proper administration of justice. The "proper administration of justice" includes ensuring that the interests of witnesses under the age of eighteen years are safeguarded in all proceedings (s. 486(2)(a)). A witness who is under the age of 18 years may also be entitled to have a support person present in the courtroom while testifying (s. 486.1 CC), to testify outside the courtroom or to testify behind a screen (s. 486.2 CC). The child or young person must be advised of these options.

Section 16.1 of the Canada Evidence Act provides that a person under 14 years of age is presumed to have the capacity to testify. Any person who challenges the capacity of such a witness bears the burden of satisfying the court that there is an issue as to the witness' capacity to understand and respond to questions. It must be shown that the witness does not understand the duty of speaking the truth.

## ***G. Sentences***

### **1. Youth Sentences**

The purpose and principles of sentencing under the YCJA are set out in sections 3 and 38 of the Act. The purpose of sentencing is to hold a young person accountable for an offence through the imposition of just sanctions that have meaningful consequences for the young person and that promote

his or her rehabilitation and reintegration into society, thereby contributing to the long-term protection of the public (s. 38(1)). The principles of sentencing are set out in s. 38(2) and include:

- a. The sentence must not result in a punishment greater than that which would be imposed on an adult,
- b. The sentence must be similar to that which would be imposed in other regions,
- c. The sentence must be proportionate to the seriousness of the offence and the degree of responsibility of the young person for that offence,
- d. All available sanctions other than custody should be considered,
- e. The sentence must be one that is the least restrictive, the most likely to rehabilitate and that will promote a sense of responsibility in the young person and an acknowledgement of the harm done to the victim(s) and society.
- f. The sentence may have the objective to denounce unlawful conduct and deter the young person.

General deterrence is not a sentencing principle under the YCJA.

In determining a youth sentence, s. 38(3) requires a youth justice court to take into account the following:

- a. The degree of participation of the young person,
- b. The harm done to victims,
- c. Any reparation made by the young person,
- d. The time spent in detention by the young person,
- e. The previous finding of guilt of the young person, and
- f. Any other aggravating and mitigating circumstances.

A youth justice court shall, before imposing a youth sentence, consider a pre-sentence report prepared by a youth worker, representations made by the parties, other relevant information and recommendations submitted as a result of an s. 19 Conference (s. 42(1)). Mandatory minimum sentences under adult or provincial statutes do not apply to young persons. The maximum duration of youth sentences is set out in s. 42(14-16). A custodial sentence can't be used as a substitute for appropriate child protection, mental health or other social measures (s. 39(5)).

Sentencing options are set out in s. 42(2) YCJA. Non-custodial sentence options include:

- a. Judicial reprimand,
- b. Absolute discharge,

- c. Conditional discharge,
- d. Fine,
- e. Compensation and restitution,
- f. Community work service,
- g. Probation,
- h. Intensive support and supervision order (ISSO), and
- i. Non-residential programs

Where a conditional discharge, probation or ISSO is imposed, a court may include whatever reasonable conditions it considers advisable in the interest of the young person and the public.

Section 39(1) of the YCJA provides that a young person cannot be committed to custody unless:

- a. The young person has committed a violent offence,
- b. The young person has failed to comply with non-custodial sentences,
- c. The young person has committed an indictable offence for which an adult would be liable to imprisonment for a term of more than 2 years and has a history that indicates a pattern of either extrajudicial sanctions or of findings of guilt, or
- d. In exceptional cases where the young person has committed an indictable offence, the aggravating circumstances of the offence are such that the imposition of a non-custodial sentence would be inconsistent with the purpose and principles set out in section 38.

The youth justice court is required to consider all alternatives to custody that are reasonable in the circumstances and, if custody is imposed, reasons must be given as to why the court found a non-custodial sentence inadequate to achieve the purpose of sentencing as set out in s. 38(1) (s. 39(9)).

Prior to committing a young person to custody, the judge must consider a pre-sentence report (s. 39(6)). This requirement can be waived, with the consent of the prosecutor and the young person, and if the youth justice court is satisfied that it is unnecessary (s. 39(7)).

Custodial sentence options include:

- a. Deferred Custody and Supervision Order (s. 42(2)(p)). This is a custodial sentence served in the community. It is not available where a young person has committed an offence which causes or attempts to cause serious bodily harm. The maximum duration of this sentence is 6 months. If the young person breaches a condition of the DCSO, a warrant may be issued and, after a

hearing, the DCSO may be converted to a Custody and Supervision Order.

- b. Custody and Supervision Order (s. 42(2)(n)). The maximum duration of a CSO is two years, or three years if an adult maximum sentence is life imprisonment. Two thirds of the sentence must be served in custody while the remaining one-third is served under a community supervision order. The level of custody (open custody or secure custody) must be specified by the youth justice court (s. 88 and Order in Council 267/2003). The provincial director sets the mandatory and optional condition of the community portion of the CSO (s. 97). In R. v. R.R.J., 2009 BCCA 580, the British Columbia Court of Appeal held that pre-sentence detention is not part of the sentence imposed. The Court explained that the judge must consider time already served in custody when sentencing a young person but he/she may still choose to impose the maximum period of custody and supervision available under the statute.
- c. Custody and Supervision Order (s. 42(2)(o)). A custody term of a maximum of three years can be imposed where a young person is convicted of either attempted murder, manslaughter or aggravated sexual assault. There is no minimum time period that must be spent in custody. The time spent in custody is left up to the Judge's discretion.
- d. Custody and Supervision Order (s. 42(2)(q)). Young persons convicted of murder can be committed to custody for longer periods of time. A young person convicted of 1<sup>st</sup> degree murder can serve a custodial sentence of 10 years (no more than 6 years can be served in continuous custody). In the case of 2<sup>nd</sup> degree murder a sentence of 7 years can be imposed (no more than 4 can be served in continuous custody).
- e. Intensive Rehabilitative Custody and Supervision Order (s. 42(2)(r) and 42(7)). These orders are rare and are usually imposed when a young person has serious mental health issues.

A youth justice court may convene a conference under section 19 for recommendations as to an appropriate sentence (s. 41 and 19). Conferences can be an effective means of coordinating services, broadening the range of perspectives on a case, and arriving at more creative and appropriate resolutions. Conferences can be composed of a number of different people, including the victim the accused, his/her parents, members of the justice system, and community resource professionals. The conference may elicit advice on decisions such as a suitable extrajudicial measure, a condition for release from pre-trial detention, appropriate sentencing and plans for

reintegrating the young person back into the community after release from custody.

The YCJA allows for a delay in the imposition of a custody order where appropriate. In these instances, the probation order commences prior to the custody order and stipulates that the custody sentence begin immediately after the designated period of delay (s. 42(12)).

While in custody a young person, with the assistance of a youth worker, must plan of his/her reintegration into the community, including the preparation and implementation of a reintegration plan that sets out the most effective programs for the young person in order to maximize his/her chances for reintegration in the community (s. 90(1)).

Section 76(2) YCJA prohibits young persons under the age of 18 years from serving any portion of their custodial sentence in either a provincial correctional facility for adults or a penitentiary. A young person who is serving a youth custodial sentence may be transferred to an adult correctional facility if the Court considers it to be in the best interests of the young person or in the public interest (s. 92). A young person who turns 20 years old while serving a custodial sentence will be transferred to an adult facility (s. 93). A young person who has reached the age of 20 at the time the custodial youth sentence is imposed will be committed to a provincial correctional facility for adults (s. 89(1)).

## **2. Adult Sentences**

Crown Counsel may make an application to the youth justice court for an order that a young person is liable to an adult sentence if the young person is or has been found guilty of an offence for which an adult is liable to imprisonment for a term of more than 2 years and that was committed after the young person attained the age of 14 years (s. 64(1)). Where a young person, over the age of 14 years, commits a serious violent offence (murder, attempt murder, manslaughter or aggravated sexual assault) Crown Counsel must consider whether it would be appropriate to seek an adult sentence and if he/she chooses not to make such an application he/she is required to advise the court of that decision (s. 64(1.1)). Provinces can choose to fix an age greater than 14 years but not greater than 16 years for the purpose of this requirement to consider an adult sentence.

The youth justice court shall order that an adult sentence be imposed if crown counsel has satisfied the Court that:

- a. The presumption of diminished moral blameworthiness or culpability of the young person is rebutted (s. 72(1)(a)), and
- b. A youth sentence would not be of sufficient length to hold the young person accountable for his /her behaviour (s. 72(1)(b)).

Although youths can be sentenced as adults the sentencing guidelines are not strictly the same as those that would be utilized in sentencing an adult. In R. v. Pratt, 2007 BCCA 206, the British Columbia Court of Appeal recognized that the court must consider the principles of sentencing in s. 3 YCJA when sentencing a youth, including a youth who receives an adult sentence.

### **3. Reintegration Leave**

The Provincial Director may, subject to any terms or conditions that he/she considers desirable, authorize a young person committed to custody in a youth facility the opportunity to have leave from the facility. There are two categories of leave:

- a. Reintegration Leave: This leave is granted for medical, compassionate or humanitarian reasons or for the purpose of rehabilitating the young person or reintegrating the young person into the community. The maximum length of time is 30 days (s. 91(1)(a)).
- b. Day release: This leave is to allow a youth to attend an educational facility, to attend work, to assist his/her family, to participate in programming related to school and/or work or to attend an outpatient treatment program or other program that provides services to address the needs of the young person(s). 91(1)(b)).

Reintegration leaves are also available to a young person serving an adult sentence in a youth facility.

### **4. DNA Sample**

When a young person is found guilty of certain designated offences (see s.487.04 of the CC), an order may be made for the young person to provide samples of one or more bodily substances for the purpose of forensic DNA analysis, under ss. 487.051 and 487.052. The resulting DNA data is stored in a DNA databank, which is maintained by the RCMP.

The DNA Identifications Act, S.C. 1998, c. 37, has been amended so as to limit the retention of DNA samples taken from a young person. DNA samples taken from young persons can be retained for shorter periods of time than those taken from adults (s. 9.1) and shall be promptly destroyed when the record relating to the offence is expunged (s.10.1).

## ***H. Review of Sentences***

### **1. Custodial Sentences**

An annual review is mandatory for all custodial sentences over one year. This review is to take place without delay at the end of one year from the date of the earliest youth sentence imposed and the end of every subsequent year from that date (s. 94 (1) and (2)).

A young person may be entitled to an optional review. When the youth sentence is for less than one year a young person may request a review 30 days after the sentence is imposed or after serving one third of the sentence, whichever is greater (s. 94(3)(a)(i) and (ii)). When the youth sentence exceeds one year a young person may seek a review after serving six months of the sentence (s. 94(3)(b)). In either case the review will only take place where the youth justice court is satisfied that there are grounds for such review (s. 95). Possible grounds for review are as follows:

- The young person has made sufficient progress to justify a change in the sentence,
- The circumstances that led to the youth sentence have changed materially,
- There are new services or programs available that were not available at the time of the youth sentence,
- The opportunities for rehabilitation are now greater in the community, or
- Any other grounds the youth justice court considers appropriate (s. 94(6)).

A progress report must be prepared for the purposes of review (s. 94(9)). A youth justice court, after review, may confirm the sentence or it may release the young person from custody and place the young person on conditional supervision (s. 94(19)). The terms of the condition supervision will be imposed by the youth justice court in accordance with s. 105.

## **2. Non-Custodial Sentences**

Non-custodial sentences can be reviewed after six months have elapsed from the sentence being imposed or earlier with leave of the court. The application for review can be made by the provincial director, the young person, the young person's parent or by crown counsel (s. 59(1)). The grounds for review are:

- That the circumstances that led to the youth sentence have changed materially,
- That the young person is unable to comply with or is experiencing serious difficulty in complying with the terms of the youth sentence,

- The young person has contravened a condition of an order without reasonable excuse,
- The terms of the youth sentence are adversely affecting the opportunities available to the young person to obtain services, education or employment, or
- Any other ground that the youth justice court considers appropriate (s. 59(2)).

A progress report may be ordered for the purposes of such a review (s. 59(3)). A youth justice court, after conducting a review, may confirm the youth sentence, terminate the youth sentence or vary the youth sentence (s. 59(7)). The varied sentence cannot be more onerous than the original youth sentence (s. 59(8)). The time to complete a community work service order or a restitution order may be extended for up to 1 year (s. 59(9)).

### *I. Appeals*

Under the YCJA, young persons and the Crown have the same rights of appeal as adults under the CC (s. 37(1) and (5)). However, a young person cannot appeal a sentence review decision, whether mandatory or optional (s. 37(11)).

### *J. Special Concerns*

#### **1. Public Hearings**

Youth justice court hearings are open to the public. A justice may, however, exclude any person from all or part of the proceedings if the justice consider that the person's presence is unnecessary to the conduct of the proceedings and the justice is of the opinion that:

- Any information presented to the justice would be seriously injurious or seriously prejudicial to the young person, a witness or a victim, or
- It would be in the interest of public morals, the maintenance of order or the proper administration of justice to exclude any member of the public (s. 132).

#### **2. Publication of a Young Person's Identity**

Section 110(1) YCJA states that no person shall publish the name of a young person, or any other information that would result in the identification of a young person. This ban does not apply:

- Where the information relates to a young person who has received an adult sentence,

- Where the information relates to a young person who has received a youth sentence for a violent offence and the youth justice court has ordered a lifting of the ban, and
- Where the publication of information is made in the course of the administration of justice and not for the purpose of making the information known in the community.

Once a young person attains the age of eighteen years he/she may apply to lift the ban on publication for the purpose of permitting that person to publish information that would identify him/her as having been dealt with by the YCJA. The ban will only be lifted if the youth justice court is satisfied that the publication would not be contrary to the young person's best interests or the public interest (s. 110(6)).

### **3. Fingerprints and Photographs**

The Identification of Criminals Act, R.S. 1995, c. I-1, applies to young persons. Fingerprints and photographs of a young person can only be taken in circumstances in which an adult would be subject to the same procedures (YCJA, s. 113).

### **4. Records: Access and Disclosure**

Sections 114 to 129 of the YCJA govern the records relating to young people which are kept in relation to the youth justice court process. These provisions set out who may keep records in relation to a young person who is charged under the Act, and restrict access and control the disclosure of information contained within these records.

Records that arise out of proceedings under the YCJA may be kept by:

- A youth justice court, a review board or any court dealing with matters arising out of proceedings under the YCJA (s. 114),
- An investigating police force may keep a record relating to any alleged offence or any offence committed by a young person (s. 115(1)),
- An investigating police force may keep a record of any extrajudicial measures that they use to deal with young persons (s. 115(1.1)),
- A department or an agency of any government in Canada for the purpose of investigation, use in proceedings against the young person, sentencing, and considering the young person for extrajudicial measures (s. 116(1)).

Who has access to these records is set out in sections 117 to 124 YCJA. Except as authorized by the YCJA no person is to be given access to a record, kept under sections 114 to 116, and no information contained in it may be given to any person, where to do so would identify the young person as a person dealt with under the Act (s. 118(1)). Sections 119(1-2) list the persons to whom access to records may be granted and the time limits within which access can be granted. These time limits vary in length depending on the treatment of the young person by the court. After the applicable access period has ended a person must apply to a youth justice court judge to gain access to the records and the application must meet the requirements set out in s. 123(1). The group of persons to whom access will be granted with respect to extrajudicial sanctions has special limitations (s. 119(4)).

Not all records concerning young persons are governed by the same rules with respect to access. Under s. 120 YCJA RCMP records may be accessed by:

- the young person to whom the record relates,
- the young person's counsel,
- a government of Canada employee for statistical purposes,
- any person with a valid interest in the record if a judge is satisfied that access is desirable in the public interest for research or statistical purposes,
- the Attorney General or a peace officer for the purpose of investigating an offence,
- the Attorney General or a peace officer to establish the existence of an order in any offence involving a breach of an order, and
- any person for the purposes of the Firearms Act.

Sections 125 to 127 of the Act deals with disclosure of the information in a record. These rules outline who may disclose information which is in their possession, to whom they may disclose the information, and when such disclosure will be permitted. Before any information is disclosed, the young person must have an opportunity to be heard unless reasonable, but unsuccessful, efforts have been made to locate the young person.

## **5. Victims**

Amendments have been made to the CC to enhance the role of the victim in the criminal trial process. The YCJA also aims to enhance the victim's role. This is demonstrated by the references to victim's rights in the general principles of s. 3 and the fact that consideration of the harm done to victims and reparations are relevant in youth sentencing (s. 38(3)).

B.C. is at the forefront when it comes to victim rights' legislation, particularly in relation to the enactment of the Victims of Crime Act, which helps to

ensure victims' views and concerns will not go unnoticed. Refer to **Chapter 4: Victims** for more information.

## **6. Sex Offenders Information Registration Act**

In April, 2004, Parliament enacted the Sex Offenders Information Registration Act, S.C. 2004, c. 10 [SOIRA], to help police investigate sexual crimes by providing them with up-to-date information from convicted sex offenders. The Act imposes an ongoing reporting process for sex offenders to provide information regarding residence, telephone numbers, employment, education, and physical description.

Section 490.011(2) of the CC provides that the SOIRA applies to young persons only if they are given adult sentences. Section 7 of the SOIRA allows a sex offender who is under 18 years to choose an adult to be in attendance when they report to a registration centre where information is collected.

## **IV. PROVINCIAL OFFENCES: YOUTH JUSTICE (BRITISH COLUMBIA) ACT**

The original Young Offenders (British Columbia) Act, R.S.B.C. 1996, c. 494 [YO(BC)A] was proclaimed on May, 1984 to complement the federal Young Offenders Act. In April, 2004, the YO(BC)A was replaced with the Youth Justice Act, S.B.C. 2003, c. 85 [YJA]. The YJA imposes tougher sentences on young persons for gang activity, driving offences, and contraband activity within youth custody facilities. The YJA updates the provisions of the YO(BC)A in order to reflect new practices within the youth criminal justice system, as well as to render the provincial legislation more consistent with the federal YCJA. The YJA acts to narrowly expand custodial sentence options within the province, as well as to create a small number of new offences. Under the previous YO(BC)A, probation was the harshest sentence imposed on young persons, but under the new YJA, young persons may face jail time for six different offences.

### ***A. Definition of Young Person and the Effect of Age on Proceedings***

Under the YJA, “young person” is defined as a person who has reached 12 years of age but is less than 18 years of age (s. 1).

#### **1. Minimum Age**

Proceedings cannot be commenced against a person, nor can a person be found guilty, for any offence that person allegedly committed while under the age of 12 years (s. 2).

#### **2. Proof of Age**

The age of an accused can be proven by information recorded anywhere on a violation ticket (such as a traffic ticket) respecting the age of the person alleged to have committed an offence (s. 19).

### **3. Young Person Turning 18 After Offence Committed**

The YJA applies to any offence alleged to have been committed by a young person, even if he or she turns 18 before or after proceedings have been commenced (s. 3(2)).

### **4. Effect of Incorrect Presumption of Age on Proceedings**

Where proceedings are commenced against someone who is alleged to have been a young person at the time the offence was committed but it is later determined, prior to sentencing, that the person was not in fact a young person at the time of the alleged offence, the proceedings must either be dismissed if the person was under 12 at the relevant time, or continued if the person was over 18 at the relevant time (s. 20(1)). If proceedings are continued against an adult, they are valid regardless of the fact that the matter was dealt with under this Part of the YJA before the young person's age was determined (s. 20(2)).

If proceedings are commenced against someone who was not alleged to be a young person at the time the offence was committed, and it is determined at any time prior to sentencing that the person was a young person at the time of the alleged offence, the proceedings must be continued under the YJA (s. 20(3)). Any proceedings continued under s. 20(3) are valid despite the fact that the matter was not dealt with under the YJA until the person's age was determined (s. 20(4)).

## ***B. Jurisdiction of the Court***

The YJA applies to all offences under provincial legislation. All provincial offences are summary offences. In British Columbia, all youth offences are proceeded with in the Youth Justice Court.

## ***C. Judicial Proceedings - Excluded Provisions of the Offence Act***

Certain provisions of the Offence Act, R.S.B.C. 1996, c. 338, do not apply to proceedings under the YJA (s. 4(1) of the YJA). These include: ss. 57(2) (appearance of the defendant), 68(a) (absence of the defendant), 79 (costs), 88(2) (mandatory minimum fine for offences under the Motor Vehicle Act, R.S.B.C. 1996, c.318), and 112 (costs upon dismissal or abandonment of appeal).

**D. Specific Provisions**

**1. Notice to Parents**

If a young person is charged with an offence and is required to appear in court, the person who issued the process must immediately give written notice of the charge against the young person and the time and place of that young person's court appearance to a parent of the young person, if a parent is available. This section does not apply where proceedings are commenced by way of a violation ticket (s. 5(1) and (2)).

If a young person is going to be detained until his or her court appearance, the officer in charge at the time of the young person's detention must give written or oral notice of the arrest to a parent of the young person as soon as possible, if a parent is available. The notice must state the place of detention and the reason for the arrest of the young person (s. 5(3)).

If notice is not given under s. 5(1) or (3), the proceedings are still valid (s. 5(4)).

**2. Pre-trial Examination and Report**

Before a trial commences, the prosecutor is permitted to request that a youth probation officer examine the facts and circumstances, including the background of the young person. The probation officer must then submit a report to the prosecutor. This person is not compellable as a witness at trial (s. 6(1) - (4)).

If it is the opinion of the youth probation officer that it is in the best interests of the young person, and not contrary to the public interest, that an action other than prosecution is taken, then the officer must recommend it to the prosecutor. Where measures other than prosecution are taken, the young person may enter into an agreement with the officer who made the recommendation to help resolve his or her conflict with the law (s. 6(5) and (6)). These measures are similar to the extrajudicial sanctions under the YCJA.

**3. Pre-Sentence Report**

If a court considers it necessary, upon finding a young person guilty of an offence and before making a custody order, the court may require a youth probation officer to provide the court with a pre-sentence report respecting the facts and circumstances of the offence and the background of the young person. Alternatively, the court may dispense with a pre-sentence report if it is deemed unnecessary (s. 7(1) and (2)).

A youth probation officer is not a compellable witness unless it is for sentencing, a sentence review, or a sentence appeal in the particular case (s. 7(5)).

## ***E. Sentencing***

### **1. General**

Once a young person is found guilty of an offence, the court must impose one or more of the available sentences provided within the YJA, and no others (s. 8(1)). The sentence is effective as of the date it is imposed by the court, unless the young person is already serving a custodial sentence, in which case the new sentence will be imposed on the date of expiry of the previous custodial sentence (s. 9(1), (2)).

The possible sentences available to the court are as follows:

- absolute or conditional discharge, if there is no minimum penalty required for an adult convicted of that offence, and if it is in the best interest of the young person and not contrary to the public interest;
- a maximum fine of \$1,000;
- community work service hours to a maximum of 240 hours and to be completed within a specified period no longer than one year;
- probation for a maximum of 6 months;
- custody of not more than 30 days for specified offences under s. 8(2)(e) (for example, trespassing on school grounds under s. 177(2) of the School Act);
- custody of not more than 90 days for other offences specified under s. 8(2)(f) (for example, driving while prohibited or suspended under ss. 95(1), 102, or 234(1) of the Motor Vehicle Act); and/or
- a driving prohibition for an offence under the Motor Vehicle Act.

The court must not impose a sentence that results in punishment being imposed on a young person that is greater than the maximum punishment that could be imposed on an adult who has been convicted of the same offence (s. 8(5)).

### **2. Sentence Review**

A young person, a parent of the young person, or the Attorney General may apply for a review of the young person's sentence if the court deems it appropriate (s. 15(1)). The application may be made at any time after three months after the date the sentence was given, or with leave of the court at any time. In the case of custodial sentences under s. 8(2)(e) or (f), an application may be made once the greater of 15 days or 1/3 of the sentence has been served (s. 15(2)). Under a review, the court may vary, rescind, or confirm the sentence, or make an entirely new sentence, but the new or varied sentence must not be more onerous than the sentence under review (s. 15(8) and (9)).

The court may only review a driving prohibition made under s. 8(2)(g) or s. 8(3) if its terms are adversely affecting the young person's opportunities to obtain counselling, medical treatment, education, or employment (s. 15(3)).

Before reviewing a sentence, the court may require a youth probation officer to prepare a progress report that describes the performance of the young person for the period since the sentence was made (s. 15(6)).

If a sentence or finding of guilt is under appeal, the court must wait for the appeal to be disposed of before it may review the sentence (s. 15(10)).

### **3. Transfer of Sentence**

If the young person, or his or her parent, becomes a resident of a different province than the one in which the sentence was given, the Attorney General of the original province may make an application to the court, upon which the court may transfer the sentence to the Attorney General of the reciprocating province (s. 16(1), (3) - (5)). A sentence cannot be transferred until the time for an appeal against the sentence, or any finding upon which that sentence was based, has expired, or until all proceedings in respect of any appeal that has been taken have been completed, or any appeal has been abandoned (s. 16(2)).

## ***F. Appeals***

Appeals under the YJA are governed by the appeal provisions of the Offence Act (s. 18).

## ***G. Special Concerns***

### **1. Publication of a Young Person's Identity**

The provisions under Part 6 of the YCJA that ban the publication of a young person's identity apply to the YJA (s. 4(1)). See **Section III.J.2: Publication of a Young Person's Identity**.

## 2. **Records**

The provisions of the YCJA governing the records of young persons dealt with under that Act are deemed to apply to the YJA (s. 4(1)). The sections of the YCJA which apply to the YJA are ss. 114 to 116, ss. 118 to 127 and s. 129. See **Section III.J.4: Records: Access and Disclosure.**

## V. APPENDIX A – GLOSSARY

**Adult** – For the Youth Justice Act (BC), a person who has reached 18 years of age. For the Youth Criminal Justice Act, a person who is neither a young person nor a child (i.e. a person who is 18 years of age or older).

**Adult Sentence** - A sentence that could be given to an adult who is convicted of an offence.

**Attorney General/Crown** – The government agency or agents who prosecute offences under the Youth Criminal Justice Act, Youth Justice Act (BC) or Criminal Code.

**Child** - A person who is under the age of 12 years old or who appears to be under 12 years old, if there is no evidence to the contrary.

**Extrajudicial measures** - Measures other than criminal prosecution that are used to deal with a young person alleged to have committed an offence. Section 10 of the Youth Criminal Justice Act describes extrajudicial sanctions that are included under extrajudicial measures.

**Offence** – Contravention of a provincial or federal Act, regulation, rule, order, by-law or ordinance.

**Offender** – A person who has been found guilty of an offence by a court.

**Parent** – Any person who is under a legal duty to provide for the young person or who has, in law or in fact, custody or control of the young person. However, this does not include a person who has custody or control of the young person because of proceedings under the Youth Criminal Justice Act or Youth Justice Act.

**Publication** - The communication of information by making it known or accessible to the general public through any means, including print, radio or television broadcast, telecommunication or electronic means.

**Serious Offence** – An indictable offence under an Act of Parliament (i.e. Youth Criminal Justice Act or Criminal Code) for which the maximum punishment is imprisonment for five years or more.

**Violent Offence** – One of the following: (1) an offence committed by a young person that includes causing bodily harm as an element of the offence; (2) An attempt or a threat to commit an offence that includes causing bodily harm as an element of the offence; or (3) an offence during which a young person endangers the life or safety of another person by creating a substantial likelihood of causing bodily harm.

**Young Person** – In the Youth Justice Act (BC), a young person is someone at least 12 years old but less than 18 years old. In the Youth Criminal Justice Act, a young person is someone who, in the absence of contrary evidence, appears to be at least 12 years old but less than 18 years old. The YCJA also uses “young person” to refer to any person who is charged with having committed an offence while he or she was a young person or who was found guilty of an offence under the YCJA.

**Youth Sentence** – A sentence given under ss. 42, 51, 59 or 94-96 of the Youth Criminal Justice Act.