



OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

GUIDELINE FOR FEDERAL PROSECUTORS

September 24, 2012

COMING INTO FORCE OF THE *SAFE STREETS AND COMMUNITIES ACT*¹ (Amendments to the *Youth Criminal Justice Act*)

Purpose

[1] The purpose of this guideline is to advise federal prosecutors of the coming into force on **October 23, 2012**, of Part 4 of the *Safe Streets and Communities Act* (“the Act”). This Part of the Act includes changes to the *Youth Criminal Justice Act* (YCJA) that will significantly impact the practice of Crown counsel who conduct youth prosecutions, most notably in relation to bail and sentencing.

Overview of Key Changes²

[2] Part 4 results in the following changes of particular relevance to Crown counsel conducting youth prosecutions:

¹ This Act, also known as Bill C-10, received Royal Assent on March 13, 2012. The Act can be found by clicking on the following hyperlink. For the amendments to the YCJA, scroll down to Part 4, beginning at clause 167.

<http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=5124131&File=176>
² This guideline highlights the changes of key importance to the daily practice of Crown counsel who conduct youth prosecutions. Part 4 of the Act should be reviewed in its entirety for a comprehensive account of the amendments.

This document is a guideline issued pursuant to s. 3(3)(c) of the *Director of Public Prosecutions Act* to federal prosecutors and persons retained to act as federal prosecutors within the meaning of s. 7 of the Act.

Policy shift

- Changes the emphasis of the guiding principles in s. 3 of the Act so that Crown counsel can now argue during youth court proceedings that protection of the public is a paramount consideration in the prosecution of young persons, (para. 4);

Bail

- Alters the procedures during bail hearings, and expands the situations where Crown counsel can seek to detain young persons, (paras. 5-7);

Sentencing

- Adds specific deterrence and denunciation as sentencing objectives that may apply to young persons who are to receive youth sentences, (para. 8);
- Expands the eligibility criteria for youth custodial sentences under s. 39, (paras. 9-10);
- No longer requires Crown counsel to apply for, and be granted, a judicial determination under s. 42(9) of the YCJA that an offence is a serious violent offence in order to prevent the imposition of a deferred custody and supervision order,³ (para. 11);
- Requires Crown counsel to **consider** seeking adult sentences for all young persons found guilty of murder, attempt murder, manslaughter, or aggravated sexual assault, who were at least 14 at the time of the commission of the offence, (paras. 12-16);
- Requires Crown counsel to satisfy the youth justice court that the principle of the diminished moral blameworthiness of the young person has been rebutted before the judge can impose an adult sentence; (para. 19);

Publication and Records

- Expands the circumstances that permit publication of the identities of young persons dealt with under the YCJA, and places the onus on Crown counsel to satisfy the youth justice court of the propriety of lifting the ban, (para. 20); and
- Requires police to keep records of extrajudicial measures imposed on young persons, which will enable Crown counsel to have a more complete picture of the past criminal conduct of a young person, (para. 21).

Application of Amendments

[3] The most significant amendments, such as changes to the sentencing principles and to the eligibility criteria for custodial sentences, apply only to young persons who committed the offences after the coming into force of this legislation.⁴ However, the other amendments in Part

³ This is a certain type of youth sentence.

⁴ As per clause 195, the following changes do not apply to young persons who committed the offence before the coming into force of these amendments:

- The broader definition of a violent offence in s. 2, which expands eligibility for custody under s. 39(1)(a) of the Act;

4 apply to young persons who committed offences before the coming into force of this legislation if proceedings had not commenced before October 23rd.

Background

Policy Shift

[4] The Act amends s. 3 of the YCJA (the Declaration of Principle) to emphasize the paramount principle of protection of the public and to codify that the youth criminal justice system must be based on the principle of the diminished moral blameworthiness of young persons.⁵

Bail

[5] The Act creates a new stand-alone bail regime under the YCJA, which also expands the circumstances in which Crown counsel can seek the detention of young persons at the pre-trial stage. From a practical perspective, this new bail regime simplifies the process for Crown counsel, since they will generally no longer need to refer to, and consider, s. 39 of the YCJA or s. 515 of the *Criminal Code*, to determine the Crown position on bail in a youth case.

[6] Under the new bail regime, a young person who is charged with a **serious offence**,⁶ or is charged with an offence other than a serious offence, but has a history that indicates a pattern of either outstanding charges or findings of guilt, can be detained, provided Crown counsel satisfies the judge or justice, on a balance of probabilities, that:

- There is a substantial likelihood that the young person would not appear in court when required;
- Detention is necessary for the protection or safety of the public (including any victim of or witness to the offence), having regard to all of the circumstances, including a substantial likelihood that the young person will, if released from custody, commit a serious offence; or
- The young person is charged with a serious offence and detention is not justified under either of the above categories, but exceptional circumstances warrant detention, and the detention is necessary to maintain confidence in the administration of justice, in light of the s. 3 principles and all of the circumstances.⁷

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- Paragraph 3(1)(a) of the Act, which gives greater emphasis to the principle of public protection;
 - The sentencing principles of denunciation and specific deterrence;
 - The expanded eligibility for custody under s. 39(1)(c); and
 - The new rules under s. 75 of the Act that expand the circumstances where the identity of a young person can be published.

⁵ *Supra* note 1, clause 168.

⁶ A serious offence is defined as an indictable offence under an Act of Parliament that has a maximum prison sentence of five years or more.

⁷ The new s. 29(2)(b)(iii) of the YCJA identifies some of those circumstances to include the strength of the case, the seriousness of the offence, the circumstances surrounding its commission, including whether a firearm was used, and the fact that the young person, upon a guilty finding, could receive a lengthy custodial sentence.

[7] Crown counsel must also satisfy the judge or justice, on a balance of probabilities, that no condition, or combination of conditions, of release, would (depending on which justification the judge or justice relies on above), reduce sufficiently the risk that the young person would not appear in court when required, adequately protect the public, or maintain confidence in the administration of justice.

Sentencing

i. New Sentencing Principles

[8] The Act amends s. 38(2) of the YCJA to include denunciation and specific deterrence as possible sentencing objectives for young persons who are sentenced under the YCJA. However, these two new sentencing principles are subject to the principle of proportionality,⁸ and reliance on them is discretionary: The Act states that, subject to proportionality, the sentence **may** have the following objectives: (i) to denounce unlawful conduct, and (ii) to deter the young person from committing offences.

ii. Increased Eligibility for Custodial Sentences

[9] The commission of a violent offence is one of the conditions that can lead to a custodial youth sentence under s. 39 of the YCJA. The term ‘violent offence’ has now been defined in s. 2 of the YCJA and broadened beyond the case law definition⁹ to capture offences where the young person **endangers the life or safety of another person by creating a substantial likelihood of causing bodily harm**. As a result, Crown counsel will be in a position to seek custodial sentences for young persons in a broader range of circumstances under s. 39(1)(a) of the YCJA.

[10] The eligibility for custody under s. 39(1)(c) has also been expanded so that young persons who commit indictable offences for which adults could receive more than two years in prison and have a history that indicates a pattern **either of extrajudicial sanctions**¹⁰ or of findings of guilt, **or of both**, under the YCJA or the *Young Offenders Act* (YOA), are now eligible for custody under this paragraph.

iii. New procedures regarding deferred custody and supervision orders

[11] Crown counsel are no longer required to apply for, and be granted, a judicial determination that an offence is a serious violent offence in order to prevent the young person from receiving a deferred custody and supervision order, but these sentences nevertheless remain prohibited for young persons who are found guilty of offences in which they caused or attempted to cause serious bodily harm.

⁸ *Supra* note 1, clause 172.

⁹ In *R. v. C.D.; R. v. C.D.K.* [2005] 3 SCR 668, at para. 87, Bastarache J. for the Court defined a violent offence for purposes of s. 39(1)(a) of the YCJA as an offence in the commission of which a young person causes, attempts to cause or threatens to cause bodily harm.

¹⁰ Extrajudicial sanctions are the most serious kind of extrajudicial measure. Extrajudicial measures are equivalent to alternative measures for adults.

iv. Adult Sentences

Presumptive Offences

[12] The concept of presumptive offences has been repealed, so that it is no longer presumed that young persons who commit the most serious offences, such as murder, attempt murder, manslaughter, or aggravated sexual assault, will receive adult sentences, provided they were at least 14 at the time of the commission of the offence.

[13] Now, if the offence is a serious violent offence, (now defined as murder, attempt murder, manslaughter, or aggravated sexual assault), committed by a young person who was at least 14 at the time of the commission of the offence, the Crown **must consider** whether it would be appropriate to apply for an adult sentence.¹¹

[14] In such cases, prior to deciding whether to apply for the adult sentence, Crown counsel with carriage of the file must consult the Chief Federal Prosecutor (CFP) or his/her delegate.

[15] In cases where the Crown must consider whether to apply for an adult sentence, as outlined above, but ultimately decides not to do so, the Crown must advise the youth justice court before the young person enters a plea or, with leave of the court, before the trial.¹² Crown counsel must ensure that the file is appropriately documented so that it is clear that Crown counsel considered the appropriateness of an adult sentence in all cases where it is now obliged to do so.

[16] Otherwise, if the Crown intends to apply for an adult sentence, the Crown must give notice of that intention to the young person and the youth justice court before the young person enters a plea or, with leave of the court, before the start of the trial.

Factors Relevant to Whether Crown counsel should Apply for an Adult Sentence

[17] The YCJA does not explicitly identify the factors Crown counsel should consider in deciding whether to apply for an adult sentence.¹³ However, given that the amendments now oblige Crown counsel to consider applying for an adult sentence any time a young person is found guilty of a serious violent offence, the seriousness of the offence is obviously a factor to be considered.¹⁴

¹¹ *Supra* note 1, clause 176.

¹² *Supra* note 1, clause 176.

¹³ *R. v. D.B.*, 2008 SCC 25, provides some guidance as to the factors during the discussion of diminished moral blameworthiness, see for example, paras. 41, 44, 47, 54, 62-65 and 76-77.

¹⁴ *Supra* note 1, clause 176 (the new s. 64(1.1)).

[18] Other relevant factors when deciding whether to apply for an adult sentence, provided the young person meets the basic eligibility requirements for an adult sentence,¹⁵ include the following:

- the age, maturity, character, background and previous record of the young person;
- the level of intelligence, sophistication, and dependency (including the capacity for moral judgment) of the young person;
- the role of the young person in the commission of the crime;
- the harm done to victims, and whether it was intentional or reasonably foreseeable;
- the adequacy of a youth sentence to hold the young person accountable, to protect the public and to serve the goal of rehabilitation;
- the availability of treatment and resources in the youth system versus the adult system;
- the fact that the identity of the young person will automatically be made public when a young person receives an adult sentence,¹⁶
- the importance of general deterrence, which is a sentencing principle only when a young person receives an adult sentence; and
- any other factors that the Crown considers relevant.

Test for an Adult Sentence

[19] The s. 72 test for the imposition of an adult sentence has been modified so that, before ordering the imposition of an adult sentence, the youth justice court must now **be satisfied, among other things, that the presumption of the diminished moral blameworthiness of the young person has been rebutted.**¹⁷ The Crown bears the onus of satisfying the youth justice court in this regard.¹⁸

¹⁵ The young person must be found guilty of an offence for which an adult could receive more than two years in prison and the young person must have been at least 14 at the time of the commission of the offence. *Supra* note 1, clause 176.

¹⁶ YCJA, s. 110(2)(a).

¹⁷ *Supra* note 1, clause 182. This is essentially a codification of *DB*, *supra* note 13. *DB* provides some guidance regarding the factors and evidence Crown counsel can adduce to rebut the presumption of diminished moral culpability in a given case, such as the age, maturity and capacity for moral judgment of the young person in question. The factors the Crown may wish to raise in seeking to rebut the presumption of diminished moral blameworthiness will often be the same factors referred to above under Factors Relevant to Whether Crown counsel Should Apply for an Adult Sentence.

¹⁸ *Supra* note 1, clause 183.

Publication and Records

i. Publication

[20] When a young person receives a youth sentence for a violent offence, the youth justice court is now obliged to consider lifting the publication ban on her or his identity if the court determines that the young person poses a significant risk of committing another violent offence and publication is required to protect the public.¹⁹ The Crown bears the onus of satisfying the youth justice court as to the appropriateness of lifting the ban.

ii. Records

[21] As a result of the amendments, police forces must keep records of any extrajudicial measures²⁰ that they use to deal with young persons.²¹ Crown counsel should advise police forces of this new obligation and ensure that the Crown has the complete record in appropriate cases.

¹⁹ Clause 185.

²⁰ See ss. 2 and ss. 6-10 of the YCJA.

²¹ *Supra* note 1, clause 190.