

YOUTH DIVERSION

“Youth would be an ideal state if it came a little later in life.”

-Herbert Henry Asquith (1852 - 1928)

Introduction

The *Youth Criminal Justice Act (YCJA)* came into force on April 1, 2003. It replaced the *Young Offenders Act (YOA)*. A major objective of the *YCJA* is to reduce the use of the youth court through the increased use of extrajudicial measures. Parliament was concerned about the over-use of the youth court for less serious charges and concluded that many charges could be dealt with more quickly and effectively through extrajudicial measures. “Extrajudicial measures” are defined in s. 2 of the *Act* as measures other than judicial proceedings used to deal with a young person alleged to have committed an offence. Extrajudicial measures include “extrajudicial sanctions,” which are defined in s. 2 of the *Act* to be a sanction that is part of a program set out in s. 10 of the *Act*.

The *YCJA* is significantly different from the *YOA* regarding non-court responses to alleged offences by young persons. The *YOA* permitted the use of alternative measures but provided little direction as to the appropriate use of alternative measures, the types of measures and their objectives. In contrast, the *YCJA* provides principles to guide decisions regarding the use of extrajudicial measures, sets out objectives for extrajudicial measures, and identifies specific types of extrajudicial measures.

Crown Attorneys have a key role in ensuring that Parliament achieves its objective of reducing the use of the youth court, where appropriate. Counsel should be mindful of their prosecutorial duties in light of the requirements and considerations in Part 1 of the *YCJA* (sections 4-12).

Options for Crown Attorneys

- **Withdrawal of the charge**

Crown Attorneys may determine that, although there is sufficient evidence to proceed with a prosecution of the charge, withdrawal of the charge is appropriate. It may be clear, for example, that after considering the principles and objectives in sections 3, 4 and 5 of the *Act*, and the factors

related to the seriousness of the offence, discussed below, the process of apprehension, detention and charging has been a sufficient response from the youth criminal justice system, and no further action is required. Crown counsel should also refer in this regard to the factors listed in the Decision to Prosecute policy.

- **Referral to a community program or agency**

A referral to a community program or agency, with the consent of the young person, may be appropriate in cases where it is clear that the young person needs assistance with a problem that may have contributed to the commission of the offence. Rather than prosecuting the young person for a minor offence, Crown counsel may conclude that the matter can be addressed more appropriately outside of the criminal justice system and a referral can be made to the appropriate program or agency. For example, a young person who has committed a minor offence may require help from a substance abuse program. While the *Act* does not expressly codify this referral power for prosecutors, as it does for the police, it is within the Crown's discretion to make such referrals. Prior to making such referrals, however, Crown counsel may wish to consult individuals and experts who have relevant information about existing community programs. Please see "rules of Conferencing" approved by the Attorney General on May 2, 2003 at Appendix I.

- **Crown caution**

Section 8 of the *Act* states that the Attorney General may establish a program authorizing prosecutors to administer cautions to young persons instead of starting or continuing judicial proceedings under the *YCJA*. No formal program has yet been established in Newfoundland and Labrador.

A Crown caution is a formal warning from the prosecutor that, although there are sufficient grounds to prosecute the offence, the prosecutor will not be proceeding with the charge. The caution advises the young person to avoid involvement in crime in the future.

While a Crown caution can be provided verbally to the young person by the prosecutor, a Crown caution letter should also be provided to the young person. A notice to the parent or guardian that the young person has been cautioned, as well as a copy of the caution letter, should also be provided to the parent or guardian of the young person wherever possible. Once Crown

counsel has confirmed that the young person has received the caution, and has documented the file accordingly, the charge or charges should be withdrawn.

- **Extrajudicial sanctions**

Extrajudicial sanctions are the most serious response within the range of extrajudicial measures. Unlike the other types of extrajudicial measures, an extrajudicial sanction requires the young person to accept responsibility for the act that forms the basis of the offence, and to comply with the terms and conditions of the sanction. Failure to comply can result in the prosecution of the offence. The history of a young person's involvement in extrajudicial sanctions can be raised during the young person's sentencing for a subsequent offence in certain circumstances.¹

An extrajudicial sanction can be used only if the young person cannot be adequately dealt with by a warning, caution or referral under sections 6, 7, or 8, because of the seriousness of the offence, the nature and number of previous offences committed by the young person or any other aggravating circumstances. The additional conditions that must be satisfied under s. 10(2) of the *YCJA* before an extrajudicial sanction can be used are virtually identical to the conditions that had to be satisfied under s. 4(1) of the *YOA* before an alternative measure could be used.

By virtue of s. 165(5) of the *YCJA*, any program of alternative measures authorized under the *YOA* was deemed, as of the coming into force of s. 165(5) of the *YCJA*, to be a program of extrajudicial sanctions authorized for the purposes of the *YCJA*. Like alternative measures under the *YOA*, extrajudicial sanctions programs under the *YCJA* include letters of apology, essays, anti-shoplifting educational programs, victim-offender reconciliation programs, personal service to the victim, and community service.

General Principles for the Use of Extrajudicial Measures

In addition to the principles set out in Section 3 of the *YCJA*, which apply to the entire *Act*, Crown counsel must be mindful of the following principles in Section 4 when considering whether to use an extrajudicial measure and in determining which extrajudicial measure option to use:

- Extrajudicial measures are often the most appropriate and effective way to address youth crime;
- Extrajudicial measures allow for effective and timely interventions focused on correcting offending behaviour; and
- Extrajudicial measures should be used if they would be adequate to hold the young person accountable.

Crown counsel should also remain cognizant of the principle in s. 4(d) of the *YCJA*, which states that extrajudicial measures should be used if they are adequate to hold a young person accountable for his or her offending behaviour.

Determining whether an extrajudicial measure would be adequate to hold the young person accountable requires Crown Attorneys to determine whether an extrajudicial measure can provide meaningful consequences that are proportionate to the seriousness of the offence and to the degree of responsibility of the young person and that promote the young person's rehabilitation. Additional factors to consider in making this determination are discussed below.

Under s. 4 (c), extrajudicial measures are presumed to be adequate to hold a young person accountable if the young person has committed a non-violent offence and has not previously been found guilty of an offence. This presumption is a strong direction from Parliament that Crown Attorneys are expected to use extrajudicial measures rather than the court to deal with non-violent offenders who have not previously been found guilty of an offence. However, Crown Attorneys may find that there are circumstances related to the seriousness of the offence that rebut the presumption in some cases.

Further, under s. 4 (d), extrajudicial measures may be used even if the young person has previously been dealt with by extrajudicial measures or has previously been found guilty of an offence. The use of another extrajudicial measure in these circumstances does not mean that the previous extrajudicial measure was a failure, or that another extrajudicial measure would not be adequate to hold the young person accountable for the current offence.

Section 5 of the *YCJA* further provides that extrajudicial measures should be designed to:

- Provide an effective and timely response to offending behaviour;
- Encourage young persons to acknowledge and repair the harm caused to the victim and the community;
- Encourage the involvement of families and the community;
- Provide an opportunity for victims to participate and to receive reparation;
- Respect the rights and freedoms of young persons; and
- Be proportionate to the seriousness of the offence.

Determining Whether an Extrajudicial Measure Would Be Adequate to Hold a Young Person Accountable

In determining whether any of the following four extrajudicial measures are adequate to hold a young person accountable (withdrawal of the charge; referral to a community program; Crown caution;² or extrajudicial sanction), Crown counsel must consider sections 3, 4 and 5, and also assess: (a) the seriousness of the offence; and (b) the nature and number of previous offences or any other aggravating circumstances.

Factors related to the seriousness of the offence, and the history of previous offences or any other aggravating circumstances

- whether the offence is summary or indictable;
- whether the offence involved the use of, or threatened use of, violence reasonably likely to result in harm that is more than transient or trifling in nature. An offence involving bodily harm is not necessarily too serious to be dealt with by extrajudicial measures. However, the more serious the harm, the less likely that it should be dealt with by extrajudicial measures;
- the potential or actual harm or damage to the victim (physical, psychological or financial) and/or to society;

- whether the incident affected the sexual integrity of a person;
- whether a weapon was used or threatened to be used in the commission of the offence. As youth cases have demonstrated (water balloons and spit-balls have been found to be weapons), it is important to consider the actual danger represented by the weapon;
- whether the offence is a property offence. If so, did the young person intentionally cause or attempt to cause substantial property damage or loss? Should the young person have reasonably foreseen that substantial property damage would be caused by the offence?
- whether the offence is an administration of justice offence, such as breach of probation. If so, would the non-compliance (e.g., failure to attend school; violation of curfew) have been an offence outside the context of a probation order? If not, it should be considered less serious and more likely to be dealt with appropriately through extrajudicial measures or through a review of the original sentence to determine whether the conditions should be changed;
- the role of the young person in the incident. For example, if the young person was the leader who planned and directed the offence, then his/her degree of responsibility is greater. However, this factor is secondary to the seriousness of the offence;
- whether the young person was a victim in the commission of the offence (e.g., a sexually exploited juvenile prostitute). If so, it is more likely that an extrajudicial measure should be used;
- whether the young person has a history of committing offences. If so, what is the nature and number of previous offences? Although a history of offences may indicate that a more serious consequence is required to hold the young person accountable, this factor is secondary to the seriousness of the current offence;
- whether the young person has already displayed remorse (e.g., through voluntary reparation to the victim or to the community) or agreed to do so;

- If the young person were to proceed through the court system, what is the likelihood that the sentence would be more severe than what is available through extrajudicial measures? If the sentence is expected to be less severe, Crown Attorneys should consider whether proceeding to court would be an effective use of Crown and judicial time and resources.

Extrajudicial sanctions: specific considerations

There is no limit to the number of times that a young person may be dealt with through extrajudicial sanctions.

If the Crown determines that a less serious extrajudicial measure is inappropriate, Crown counsel should still consider whether an extrajudicial sanction would be adequate to hold the young person accountable for his or her offending behaviour. Crown Attorneys must also remain cognizant of the principle that an extrajudicial measure is presumed adequate to hold a young person accountable if the young person has committed a non-violent offence and has not previously been found guilty of an offence. It is important to bear in mind, however, that presumptions are rebuttable. In applying the factors above and the relevant principles under the *YCJA*, Crown counsel will sometimes conclude that a sanction is not appropriate to hold the young person accountable in the circumstances.

When Crown counsel imposes a sanction on a young person, the young person's file should be documented accordingly.

A young person's refusal to consent to, or failure to follow through on, an extrajudicial measure regarding substance abuse treatment should not be interpreted as an unwillingness to participate in extrajudicial measures in general, or as an indication that an extrajudicial measure would not be adequate to hold the young person accountable for the offence. The refusal or failure could be a factor in choosing a particular measure but it should not be considered a bar to all extrajudicial measures.

Where there is partial compliance with the extra judicial sanction the Crown Attorney should consider whether it is in the interests of justice to proceed with the prosecution.

¹ See s. 9 *YCJA*

² There is currently no Crown caution program in this province.