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YOUTH JUSTICE LEGISLATION IN CANADA

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INTRODUCTION

Youth crime in general, and violent youth crime in particular, is a significant source of concern to many Canadians. In part, the concern is connected with an impression that crime committed by young people is on the rise, though police statistics indicate that by 2006, the youth crime rate had fallen by 25% from its peak in 1991, and that, following a rapid decline in the 1990s, the number of crimes committed by young people has been relatively stable for the past decade. The drop in youth crime rates since 1991 has mainly been the result of a decrease in property crime. Violent crimes in which the alleged perpetrator is a young person have increased in recent years, by 12% from 1997 to 2006, and by 30% from 1991 to 2006.(1) That said, according to the most recent statistics, violent crime involving young people remained stable in 2007 as compared to 2006, at a rate of 1,537 violent crimes per 100,000 young people.(2)

In attempts to address the concerns of Canadians and to react to the youth crime problem, lawmakers have, from time to time, proposed amendments to youth justice legislation. This document provides an overview of the principal legislative provisions that govern the way in which the police, the courts and the correctional systems must deal with those between 12 and

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(1) Andrea Taylor-Butts and Angela Bressan, "Youth Crime in Canada, 2006," *Juristat*, Canadian Centre for Justice Statistics, Statistics Canada, Cat. No. 85-002-XIE, Vol. 28, No. 3, http://dsp-psd.communication.gc.ca/Collection-R/Statcan/85-002-XIE/85-002-XIE.html. The increase in violent crime may be largely attributable to minor acts of aggression between peers (such as schoolyard fights) with which, according to criminal justice experts, the criminal justice system would not have become involved in the past. In 2007, nearly 60% of young people arrested for a violent crime were suspected of common assault, the least serious form of assault.

(2) Mia Dauvergne, "Crime Statistics in Canada, 2007," *Juristat*, Canadian Centre for Justice Statistics, Statistics Canada, Cat. No. 85-002-X, Vol. 28, No. 7, July 2008, http://www.statcan.gc.ca/pub/85-002-x/85-002-x2008007-eng.pdf. According to police statistics, in 2007, young people were suspected in 39,747 violent crimes out of the total of 306,559 violent crimes reported. The crime rate is calculated per 100,000 young people in the 12- to 17-year-old age group who are suspected of a criminal offence and who have been officially charged, those against whom the police have recommended to the Crown that charges be laid, and those whose files have not resulted in charges.

17 years of age when they are charged with a crime. The first section briefly traces the evolution of Canadian legislation in the area. The second section describes the philosophy and principles underlying the *Youth Criminal Justice Act* (YCJA), which currently governs criminal and justice matters affecting young people in Canada. The third section briefly outlines the sentences imposed on those convicted of an offence as a young person. The final section deals with the possible consequences of a conviction under the YCJA, specifically how criminal records are established and kept and how bodily substances may be taken in order to store a young person's DNA in the National DNA Data Bank administered by the RCMP.

THE HISTORY OF YOUTH JUSTICE FROM 1908

The approach to young offenders has greatly changed over time. The following section briefly traces the evolution of youth justice in Canada since 1908, when the first legislation dealing specifically with children and young people in conflict with the law was passed.(3)

A. *The Juvenile Delinquents Act* of 1908

For most of the 20th century, young people in conflict with the law were seen as not-yet-mature beings in need of "aid, encouragement, help and assistance," in the words of the *Juvenile Delinquents Act* (JDA)(4) that came into force in 1908.(5) According to the JDA, "every juvenile delinquent shall be treated not as a criminal, but as a misdirected and misguided child."(6) The response was therefore to protect the young offender by focusing on the factors that gave rise to the criminal behaviour rather than punishing the offence that brought the young person into contact with the justice system. The JDA also established special courts for young people in conflict with the law and detention centres that were specifically designed for them.

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(3) Detailed information on the evolution of juvenile justice in Canada can be found at Department of Justice Canada [Justice], "The Evolution of Juvenile Justice in Canada," International Cooperation Group, 2004, http://www.justice.gc.ca/eng/pi/icg-gci/jj2-jm2/jj2-jm2.pdf.

(4) S.C. 1908, c. 40, repealed.

(5) See the wording of section 38 of the JDA: "This Act shall be liberally construed in order that its purpose may be carried out, namely, that the care and custody and discipline of a juvenile delinquent shall approximate as nearly as may be that which should be given by his parents, and that as far as practicable every juvenile delinquent shall be treated not as a criminal, but as a misdirected and misguided child, and one needing aid, encouragement, help and assistance."

(6) Justice (2004).

Under the JDA, the idea that the punishment should fit the crime gave way to an approach that sought to address the specific needs of the young person. A young offender could therefore remain under the supervision of the criminal justice system until those in authority decided that the offender had been rehabilitated. The sentence could also change midstream, depending on the progress the young person was making. As a result, justice was often uneven and arbitrary, and the sentence was not necessarily commensurate with the wrongdoing.

Under the JDA, children under seven years of age were not considered sufficiently mature to fully understand the consequences of their actions. They could therefore not be held criminally responsible. But the JDA set 16 as the age of criminal majority,(7) so that as of that age, young people were subject to the same treatment and penalties as adults.(8) In addition, the JDA allowed judges to send anyone 14 or older accused of a serious crime to be tried in adult court.

In the opinion of some, the involvement of the criminal justice system under the JDA resembled "more of a social welfare exercise than a judicial process."(9) This approach, on which there was general agreement until the 1960s, was strongly criticized by some who felt that the JDA gave too much arbitrary power to legal authorities in the name of the welfare of the child and too little attention to a fairer and more equitable system. Young offenders were given indeterminate sentences that bore no relation to the seriousness of the offences. Some also decried the inconsistencies in the treatment of young offenders from province to province and the fact that young offenders had no basic rights and recourse in criminal law procedure, such as the right to consult a lawyer or to appeal a decision.

The process of reforming the JDA took a long time. It began in 1961, when a committee in the Department of Justice was given the task of examining youth crime,(10) and it ended in 1982 with the passage of the *Young Offenders Act*.

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(7) It is important to note that, at a province's request, the federal government could raise the age of criminal majority to 17 or 18. This is how Quebec and Manitoba established the age of criminal majority at 18 and Newfoundland (as it was then called) and British Columbia established it at 17.

(8) Jean Trépanier, "La justice des mineurs au Canada : remise en question à la fin du siècle," *Criminologie*, Vol. 32, No. 2, 1999.

(9) Justice (2004).

(10) Department of Justice, Committee on Juvenile Delinquency, *Juvenile Delinquency in Canada*, Queen's Printer, Ottawa, 1965.

B. The *Young Offenders Act* of 1984

When the *Young Offenders Act* (YOA)[11] came into force in 1984, it marked the beginning of a new era in dealing with young people in conflict with the law.[12] Its definition of a young offender was stricter than that found in the 1908 Act. Under the 1908 Act, the range of offences for which a young person could be prosecuted was very broad. Anyone from 7 to 15 years of age was a "juvenile delinquent" if he or she had committed an offence contained in the *Criminal Code*,[13] or in any federal or provincial act or regulation or municipal by-law, or who was guilty of "sexual immorality or any similar form of vice." Under the new YOA, a "young offender" was anyone from 12 to 17 years of age alleged to have committed an offence created by federal statutes or by regulations made thereunder (except Territorial ordinances). The new Act also set the threshold of criminal responsibility at 12, and standardized the age of criminal majority at 18 all across Canada. But, as in the 1908 Act, under the YOA a youth court could send cases to adult court if they involved young people aged 14 or older alleged to have committed a serious crime.

The YOA also moved away from the exclusively "protective" approach of the 1908 Act in favour of an approach that attempted to balance the protection of a young offender with accountability. The young person was still seen as not yet mature, but his or her responsibility in a given matter was recognized. A young offender was therefore no longer seen simply as the product of his or her environment, but also as an involved and accountable participant. This change in approach also gave rise to the establishment of fundamental procedural guarantees for young people in conflict with the law, such as the right to a lawyer and the right to appeal a decision.

From the time that it took effect, the YOA was criticized for not setting out clear principles to guide those with the task of upholding the law. Some claimed that this gave rise to disparity and injustice across the country. Another criticism of the YOA was that it placed more value on reintegration into society and rehabilitation than on public protection, particularly in cases in which young offenders were charged with serious crimes.

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(11) R.S.C. 1985, c. Y-1, repealed.

(12) Though passed in 1982, the *Young Offenders Act* (YOA) did not come into force until 1984, allowing time for a transition from the application of the JDA.

(13) R.S.C. 1985, c. C-46.

In response to these criticisms, the YOA was amended in 1986, 1992 and 1995. The amendments toughened the Act for young people charged with serious crimes. Among the amendments were lengthier sentences for murder, and the reversal of the onus of proof so that, in relevant cases, the young offenders would have to prove that they should not be tried in adult court.(14)

C. The *Youth Criminal Justice Act* of 2003

The *Youth Criminal Justice Act* (YCJA)(15) took effect in April 2003. Longer, more detailed and more complex than the Act that preceded it, the YCJA tries to address the problems identified in the Act it replaced, such as too great a reliance on court involvement and incarceration and too little consistency in the way the Act was enforced across the country. In addition to adding new sentences and replacing trials in adult court with a system of adult sentences that can be imposed on young people over 14 years of age, it has a preamble and principles that are intended to provide clear direction to those with the responsibility of imposing penalties on young people convicted of criminal offences. The objectives of deterrence, denunciation and incapacitation are not explicitly stated in the YCJA, though they are found in the adult criminal justice system. The YCJA also aims to provide justice more fairly and equitably through, for example, sentences that clearly vary with the gravity of the offence. This means lighter penalties for those convicted of minor offences and more serious penalties for those convicted of serious offences.

The YCJA clearly establishes that a sentence must be "proportionate to the seriousness of the offence and the degree of responsibility of the young person for that offence."(16) In this sense, the YCJA reaffirms the responsibility of young people in conflict with the law; it also sets accountability as an objective that must guide all sentences imposed by youth courts as well as measures taken outside the court process (extrajudicial measures).

The following section discusses a number of the provisions of the Act, starting with the preamble and principles that apply to the YCJA as a whole.

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(14) The 1992 amendments set the maximum sentence for murder at five years. Other amendments in 1995 imposed sentences of ten years for first degree murder and seven years for second degree murder.

(15) S.C. 2002, c. 1.

(16) YCJA, subsection 38(2).

PREAMBLE AND PRINCIPLES OF THE *YOUTH CRIMINAL JUSTICE ACT*

The *Youth Criminal Justice Act* is based on certain values and principles. The preamble to the Act states that the youth criminal justice system should take the interests of victims into account, foster responsibility and ensure accountability through meaningful consequences and effective rehabilitation and reintegration, and reduce the over-reliance on incarceration for non-violent young persons. Other principles stated throughout the Act include these:

- The youth justice system seeks to prevent crime by addressing the circumstances underlying a young person's offending behaviour, rehabilitate young persons who commit offences and reintegrate them into the community and ensure that a young person is subject to meaningful consequences for his or her offence.

- The intent of the youth criminal justice system is to promote the long-term protection of the public.

- Young offenders should be held accountable for their behaviour by making them acknowledge the consequences of their offences and by encouraging them to repair the harm done to victims and the community.

- Non-violent offences should be dealt with outside the court process whenever possible, and serious consequences should be saved for the most serious offences.

- The parents of young offenders as well as the community as a whole should be, as appropriate, involved in the measures taken for the social integration of young offenders.

- The expectations of victims should be taken into consideration, and victims should suffer the minimum degree of inconvenience as a result of their involvement with the youth criminal justice system.

- Gender, language and ethnic background must be respected when deciding how to hold a young person accountable, while the overriding principle remains that a sentence must be proportionate to the seriousness of the offence and the degree of responsibility of the young person for that offence.[17]

(17) YCJA, subsections 3, 5, and 38.

The first principle mentioned in the Act is that the youth criminal justice system is intended to prevent crime by addressing the circumstances underlying a young person's offending behaviour. The consequences of this are many, including a separate justice system that takes into account the greater dependency and reduced maturity of young people and also an emphasis on extrajudicial measures that are thought to allow for effective and timely interventions focused on correcting offending behaviour. The YCJA contains many principles, and taking all of them into account while fashioning an appropriate outcome for the young offender, the victim, and society at large can be a complex endeavour.

SENTENCES

The rules governing sentencing under the YCJA seek to balance two principal objectives: the rehabilitation of the young person and the long-term protection of the public.(18) The Act therefore tends to deal differently with young people who have committed non-violent offences and those who have committed serious offences and represent a greater danger to the public. This dual approach is clearly shown in the provisions governing extrajudicial measures, in the sentences specifically designed for young offenders and in adult sentences.

A. Extrajudicial Measures

When the YOA was in effect, most young people brought before the courts were charged with non-violent offences.(19) While the YOA provided for alternative measures, such measures were rarely made available. In 1997, for example, they were used in only 25% of cases.(20) This is partially explained by the fact that the YOA was not clear enough in setting out-of-court resolutions as a goal, in describing the available options and in establishing the cases in which the approach was valid. The YCJA includes the alternative measures found in the previous Act and adds others under the heading of extrajudicial measures. Under the YCJA, the

(18) YCJA, s. 38.

(19) See Department of Justice, *YCJA Explained – Reference – Tables*, "Principal Charge in Majority of Cases in Youth Court (Canada, 1998–99)," http://www.justice.gc.ca/eng/pi/yj-jj/repos-depot/4ref-ren/02tables/4020001a.html.

(20) Department of Justice Canada, Canadian Youth Justice Renewal Strategy, 1999. In comparison, alternative measures were employed in 53% of cases in the United States, 57% in the United Kingdom and 61% in New Zealand in the same year.

administration of these measures is shared between the police and the Crown: the police are responsible for warnings and referrals, while the Crown is responsible for cautioning programs.(21)

One of the objectives of the YCJA is to remedy the lack of sentencing guidelines in the YOA in order to have less court involvement for minor offences. Official crime statistics seem to show that the YCJA has met these expectations. The number of cases heard in youth court in 2006–2007 was 26% lower than the number in 2002–2003, the year before the YCJA went into effect. All provinces and territories saw their numbers drop: the greatest reductions were in the Northwest Territories (52%), Newfoundland and Labrador (47%) and Yukon (45%).(22)

1. The Presumption of Extrajudicial Measures

For all offences, police and prosecutors must first determine whether an extrajudicial measure will be sufficient to make the young person accountable and ensure the long-term protection of the public.(23)

Whenever a young person has committed a non-violent offence and has not previously been convicted of an offence or had previously committed an offence for which an extrajudicial measure was used, the YCJA requires police or prosecutors to use extrajudicial measures except in exceptional cases.(24)

2. Types of Extrajudicial Measures

Police or prosecutors wishing to use the extrajudicial measures available must, in all cases, have reasonable grounds for believing that the young person has committed an offence. They have complete discretion in deciding which extrajudicial measure they deem to be appropriate in each case.(25) The YCJA establishes five types of extrajudicial measures that range from a warning to an order placing the young offender in an intensive rehabilitation program.

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(21) Under the YOA, alternative measures were administered solely by the Crown.

(22) Complete data is available at Canadian Centre for Justice Statistics, *Youth Court Statistics, 2006–2007*, 85-002-XIF, Vol. 28, No. 4, May 2008.

(23) YCJA, ss. 3 and 4.

(24) YCJA, paras. 4(*c*) and (*d*).

(25) Committees of citizens (known as youth justice committees) or conferences may make recommendations on extrajudicial measures (YCJA, ss. 18 and 19).

B. Sentences Specific to Young Offenders

As a reaction to the high rate of custodial sentences imposed on young people convicted of minor offences, a statement was added to the preamble to the YCJA declaring the intent to reduce the over-reliance on incarceration for non-violent young persons. Under the previous Act, about 80% of all custodial sentences were for non-violent offences.(26) Canada was known for having the highest rate of incarceration for young offenders between 12 and 17 of any western country. Since the YCJA came into force, the youth incarceration rate has decreased. In 2006–2007, 16.6% of convicted young offenders were placed into custody, compared to 27% in 2002–2003. But there are significant variations between provinces and territories: Manitoba has the lowest rate (8%), followed by Quebec (10.5%) and Alberta (12.4%). At the other end of the scale are Yukon (34%), the Northwest Territories (22.1%)(27) and Ontario (20.8%).(28) The number of young people in custody on any given day has also decreased. In 2005–2006, 7.5 young people per 10,000 were in custody at any given time, compared to 12.6 per 10,000 in 2002–2003. It is important to note that this rate has been going down for at least a decade: in 1996–1997, 18 per 10,000 young people were incarcerated.(29)

1. Non-custodial Sentences First and Foremost

For all offences except murder,(30) a court sentencing a young offender under the YCJA must first consider the many options that do not involve custody.(31) Section 42 of the Act sets out a wide range of sentences,(32) such as a formal reprimand from the judge, community service, restitution, compensation or placement in an intense program of support and supervision.

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(26) Department of Justice Canada [Justice], *The Youth Criminal Justice Act Explained*, "Youth Sentencing," May 2002, http://www.justice.gc.ca/eng/pi/yj-jj/repos-depot/3modules/04you-ado/3040301a.html.

(27) Canadian Centre for Justice Statistics (2008). The manual procedures used in the Northwest Territories have led to the number of custodial orders being under-reported.

(28) Complete data is available in Canadian Centre for Justice Statistics (2008), p. 21.

(29) Shelly Milligan, *Youth Custody and Community Services in Canada, 2005–2006*, Canadian Centre for Justice Statistics, 85-002-X, Vol. 28, No. 8, July 2008.

(30) Murder is the only offence for which incarceration is mandatory under the Act (YCJA, s. 42).

(31) YCJA, subsection 39(2).

(32) The YCJA contains several more options than the YOA.

2. Custody as a Last Resort

The YCJA seeks to limit custody to cases of young offenders who are violent or who otherwise represent a danger to the public. In sentencing a young person under the YCJA, a court can choose incarceration only in the four following cases:

- The young person has committed a violent offence.(33)
- The young person has failed to comply with two or more non-custodial sentences.
- The young person has committed an indictable offence for which an adult would be liable to imprisonment for a term of more than two years and has a history that indicates a pattern of findings of guilt.
- The case is an exceptional one, where the aggravating circumstances warrant a custodial sentence.(34)

C. Adult Sentences for Young Offenders

1. Background

The *Juvenile Delinquents Act* of 1908 allowed young offenders of more than 14 years of age to be sent to adult court. If convicted, they were subject to an adult sentence. The YOA contained the same provision until 1995. In that year, the YOA was amended to include the presumption that young people of 16 or 17 years of age accused of murder, attempted murder, manslaughter or aggravated sexual assault would be tried as adults (and, therefore, that an adult sentence would be imposed upon conviction).(35)

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(33) *R.* v. *C.D.*; *R.* v. *C.D.K.*, [2005] 3 S.C.R. 668, para. 17. Noting the lack of a legal definition, the Supreme Court of Canada has defined "violent offence" as: "an offence in the commission of which a young person causes, attempts to cause or threatens to cause bodily harm."

(34) YCJA, subsection 39(1).

(35) Nicholas Bala, *Youth Criminal Justice Law*, Irwin Law, Toronto, 2003, pp. 137–38. During the same period, an increasing number of American states instituted automatic transfer to adult court for a number of serious offences. In some states, young people of 16 or older when the crime was committed are even liable for the death penalty. In the United Kingdom, children of 10 and older charged with murder and young people of 14 and older charged with the most serious crimes are tried in adult court.

The statistics show that only a small number of young people were tried in adult court under the YOA.[36] A large proportion of them were accused of non-violent offences. For example, from 1996 to 1999, "about 40% of the transfers were for non-violent offences."[37]

2. Current Rules in the *Youth Criminal Justice Act*

The YCJA included a number of changes, including these:

- The elimination of transfers to adult court. All proceedings are now conducted in youth court, which, however, can impose adult sentences.

- The age at which adult sentences are presumed to be applicable is set at 14 years of age. But provinces may set the age at 15 or 16.[38]

The YCJA allows a youth court to impose adult sentences in certain circumstances:

- when the young person is found guilty of an offence for which an adult would be liable to imprisonment for a term of more than two years;

- when the young person is at least 14 when the offence was committed;

- when the young person is found guilty of murder, attempted murder, manslaughter, aggravated sexual assault or the third in a series of serious offences involving violence, there is a presumption that a conviction will bring with it an adult sentence,[39] but the presumption may be challenged if the court is persuaded that the length of a youth sentence would be sufficient to hold the young person accountable.[40]

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(36) Fifty-two young people were tried in adult court in 1999–2000; 91 in 1998–1999; and 79 in 1997–1998. See Mark Sudworth and Paul deSouza, "Youth Court Statistics, 1999/00," *Juristat*, Canadian Centre for Justice Statistics, Statistics Canada, Cat. No. 85-002-XPE, Vol. 21, No. 3, p. 7; Denyse Carrière, "Youth Court Statistics, 1998/99 Highlights," *Juristat*, Canadian Centre for Justice Statistics, Statistics Canada, Cat. No. 85-002-XIE, Vol. 20, No. 2, p. 7; and Dianne Hendrick, "Youth Court Statistics 1997–98 Highlights," *Juristat*, Canadian Centre for Justice Statistics, Cat. No. 85-002-XIE, Vol. 19, No. 2, p. 6.

(37) Justice (2002).

(38) Quebec has set at 16 the age at which adult sentences are presumed to be applicable.

(39) YCJA, s. 62.

(40) YCJA, s. 72.

The courts have addressed this presumption, and in 2008, in *R.* v. *D.B.*,[41] the Supreme Court of Canada rendered a decision similar to those of the Quebec[42] and Ontario[43] courts of appeal in this matter. It held that requiring young people to challenge the presumption that an adult sentence applies, rather than having the Crown attempt to prove that an adult sentence is justified, violates section 7 of the *Canadian Charter of Rights and Freedoms*.

Lastly, the YCJA allows the publication of the name of a young offender who has been given an adult sentence.[44] This is an exception to the general rule that forbids the publication of information revealing the identity of a young person, a rule that has been in effect since the 1908 Act.[45]

a. Place of Detention

The youth court decides the appropriate place of detention. It does so after a hearing. Unless the court is convinced that it would not be in the best interests of the young person or would jeopardize the safety of others, a young person of 18 years of age or older at the time he or she is sentenced will serve the sentence in an adult facility.[46]

b. Length of Sentence and Conditional Release

Though tried in youth court, young people accused of serious crimes are liable to adult sentences. These sentences vary according to the nature of the offence. For example:

- for murder, the minimum sentence is life imprisonment (compared to a maximum sentence of 10 years for a youth sentence);[47]
- for aggravated assaults, the maximum prison sentence is 14 years (compared to a maximum sentence of two years for a youth sentence);[48] and

(41) 2008 SCC 25.

(42) *Quebec (Minister of Justice)* v. *Canada (Minister of Justice)*, [2003] R.J.Q. 1118.

(43) *R.* v. *B.(D.)*, (2006), 206 C.C.C. (3d) 289.

(44) YCJA, para. 110(2)(*a*).

(45) YCJA, subsection 110(1). The Canadian youth justice system has always operated on the principle that publishing the identity of a young person would adversely affect his or her reintegration into society, would be prejudicial to him or her and, therefore, would compromise long-term public safety.

(46) YCJA, subsection 76(2).

(47) S. 235 of the Code and YCJA, subpara. 42(2)(*q*)(i).

(48) S. 268 of the Code and YCJA, para. 42(2)(*n*).

- for sexual assaults, the maximum prison sentence is 10 years (compared to a maximum sentence of two years for a youth sentence).(49)

A young person who has been sentenced as an adult is subject, generally,(50) to the same rules of conditional release as adults, wherever he or she is held.(51)

CONSEQUENCES OF A FINDING OF GUILT FOR A YOUNG OFFENDER

A. Young Offenders and Criminal Records

A criminal record can have a number of negative consequences. Such a record may, among other things, harm a person's ability to obtain employment, travel to other countries, and obtain a security clearance. Contrary to some popular beliefs, criminal records of young offenders are not "wiped clean" or "sealed" when the offenders turn 18. As can be seen below, the YCJA sets out specific periods during which criminal records remain active, and they may extend beyond the time when the young offenders legally become adults.

Sections 114 to 116 of the YCJA set out the records that may be kept concerning an offence alleged to have been committed by a young person. A youth justice court, review board or any court dealing with matters arising out of proceedings under the YCJA may keep a record of any case that comes before it arising under the Act. In addition, a record that includes a copy of any fingerprints or photographs of the young person may be kept by any police force responsible for investigating the offence. Records may also be kept by a department or agency of any government of Canada for such things as administering a youth sentence or an order of the youth justice court.

If an adult sentence is imposed and has been upheld on appeal or the time for an appeal has expired, the record is dealt with as a record of an adult. The record will be kept by the Canadian Police Information Centre and will be accessible to a number of law enforcement agencies. If the offender wishes to obtain a pardon and thereby at least partially seal the criminal record, the *Criminal Records Act*(52) will govern the procedure.

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(49) S. 271 of the Code and YCJA, para. 42(2)(*n*).

(50) For murder, for example, the time before eligibility for parole is different for young offenders: 5 to 10 years as opposed to 10 to 25 years for adults (sections 745 and 745.1 of the *Criminal Code*).

(51) YCJA, section 77.

(52) R.S.C. 1985, c. C-47.

Sections 118 to 129 of the YCJA govern the access to youth criminal records. The "default position" is this: except as authorized or required by the Act, no person shall 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 to whom it relates as a young person dealt with under the Act. For this reason, only those people who are authorized under the YCJA may have access to records or receive the information contained within them.(53) Those authorizations are found in sections 117–129 of the YCJA.

The question then becomes one of how long records concerning young offenders are kept available, which often depends on the type of offence in question and the verdict. While a young person may have access to the record at any time, for all others there are time limits on access. A youth record may be made available for inspection by authorized persons until it is sealed. The periods of access range from a few months to five years.(54) If the timeframes set out in the Act have expired and the youth court record is considered "sealed," access to the record is still possible, but only by a court order issued pursuant to section 123 of the YCJA. A youth court judge may grant access if disclosure is necessary for "the proper administration of justice" and is not prohibited by other legislation.

If a subsequent offence is committed during the access period, the period starts running again and the record for the first offence is accessible as long as the record for the second offence is accessible. If the young person is convicted of an offence committed when he or she is an adult before the requisite crime-free period for a youth record has expired, those youth records shall be dealt with as the record of an adult.(55)

Section 119 of the YCJA deals with when records that may be kept can be disclosed, to whom, and to what extent. In all cases, the record keeper must exercise its discretion as to what part of the record can be disclosed in the circumstances.(56)

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(53) YCJA, s. 118(1).

(54) YCJA, s. 119(2).

(55) YCJA, ss. 119(9)(*b*) and 120(6)(*a*).

(56) *F.N. (Re)*, [2000] 1 S.C.R. 880. The entities that may have access to a youth record include the young offender, his or her counsel, and parents or adults whom the court has permitted to assist the young person during any of the proceedings; the Crown prosecutor; any victim of the offence; the Attorney General of the province; any peace officer dealing with the case; a judge, court, or review board dealing with the case; the director of a correctional facility, if the young person is in custody; someone participating in extra-judicial measures concerning the young person's case, such as a community justice facilitator; someone doing an official criminal records check to determine whether to grant security clearances for purposes of government employment; and someone collecting information for Statistics Canada. Even if a requesting party is not listed in section 119, disclosure may be made to another person "deemed by a youth court judge to have a valid interest" in the record, provided disclosure "is desirable in the interest of the proper administration of justice."

In addition to the individuals and agencies listed in section 119, other entities may have access to information in a youth record, depending upon the circumstances. For example, a peace officer may disclose to any person any information contained in a court or police record that needs disclosing in the conduct of the investigation of an offence.(57) In addition, in the course of any proceedings, the Attorney General may disclose any information contained in police records or court records to a person who is co-accused, with the young person, of the offence for which the record is kept.(58) No information may be disclosed, however, after the end of the period of access to records set out in subsection 119(2). Section 127 also permits court-authorized disclosure of information about a young person where that person poses a risk of serious harm to others and the disclosure of the information is relevant to the avoidance of that risk.

The "destruction" of youth records offers more protection to young persons than pardons for adult convictions. If a young person is found guilty of an offence and the court directs an absolute discharge or the youth sentence has ceased to have effect, the young person is deemed not to have been found guilty or convicted of the offence, except that:

- the young person may plead *autrefois convict* (previously convicted) to a subsequent charge related to the offence, meaning that the young person argues that, having already been found guilty, he or she cannot be found guilty more than once of an offence based on the same set of facts;
- a youth justice court may consider the finding of guilt in considering an application under subsection 63(1) (application for youth sentence) or 64(1) (application for adult sentence);
- any court or justice may consider the finding of guilt in considering an application for judicial interim release or in considering what sentence to impose for any offence; or
- the National Parole Board or any provincial parole board may consider the finding of guilt in considering an application for conditional release or pardon.(59)

The termination of a youth sentence removes any disqualification under any Act of Parliament to which the young person is subject for the offence.(60) Certain application forms (such as applications for government employment) must not contain a question which would

(57) YCJA, s. 125(1).

(58) YCJA, s. 125(2)(*a*).

(59) YCJA, s. 82(1).

(60) YCJA, s. 82(2).

require the young person to disclose the offence after the termination of the youth sentence.(61) Finally, a finding of guilt under the YCJA is not considered a previous conviction under any Act of Parliament for which a greater punishment is prescribed because of a previous conviction. There are two exceptions to this provision: a finding of guilt may be used to establish that an offence is a presumptive offence (i.e., it is a third serious violent offence) or to determine the adult sentence to be imposed.(62)

B. Young Offenders and the National Sex Offender Registry

The National Sex Offender Registry was established in 2004 to contain information concerning those offenders who have been convicted of a designated "crime of a sexual nature."(63) The registry is based upon the type of crime that has been committed and not on any characteristics of the offender. As a result, young offenders who commit a crime of a sexual nature are eligible to be placed on the sex offender registry. One difference between young and adult offenders, though, is that section 7 of the *Sex Offender Information Registration Act* states that a sex offender who is under 18 years of age has the right to have an appropriate adult chosen by them in attendance when they report to a registration centre and when information is collected.

Subsection 490.011(2) of the *Criminal Code* sets out some other special provisions for young persons. It states that the sex offender registry sections of the *Criminal Code* do not apply to a young person unless they are given an adult sentence within the meaning of the *Youth Criminal Justice Act* or have been convicted of the offence in question in ordinary court under the *Young Offenders Act*. An "adult sentence" in the YCJA means any sentence that could be imposed on an adult who has been convicted of the same offence as the young person. Thus, if a "youth sentence" is imposed under section 42, 51 or 59 or any of sections 94 to 96 of the YCJA, no order to submit the required information to the sex offender registry can be imposed. A conviction in "ordinary court" under the YOA means there must have been a transfer to an adult court and this is a prerequisite before an order to supply information to the sex offender registry can be made.

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(61) YCJA, s. 82(3).

(62) YCJA, s. 82(4).

(63) *Sex Offender Information Registration Act*, S.C. 2004, c. 10 and *Criminal Code*, R.S.C. 1985, c. C-46, ss. 490.011 to 490.032.

In both cases, the term “young person” includes any person who is charged either under either the YCJA or under the YOA with having committed an offence while he or she was a young person. Given that the YOA was in force between 1984 and 2003, sex offender registry orders for offences committed under that statute will most likely be made against now-adult offenders for historical offences.(64)

C. Young Offenders and Firearms

Prohibition orders concerning firearms for young offenders parallel the system used for adult offenders in the *Criminal Code*. Section 51 of the YCJA refers to sections 109 and 110 of the Code, which deal with mandatory and discretionary prohibition orders, respectively. Subsection 51(1) of the YCJA states that, when a young person is found guilty of an offence referred to in any of paragraphs 109(1)(*a*) to (*d*) of the *Criminal Code*, the youth justice court shall, in addition to imposing a sentence under section 42 (youth sentences), make an order prohibiting the young person from possessing any firearm, crossbow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition, or explosive substance. The offences referred to in section 109 include an indictable offence in the commission of which violence against a person was used, threatened or attempted and for which the person may be sentenced to imprisonment for 10 years or more; certain firearms offences, including ones committed where the person was already prohibited from possessing such a firearm; criminal harassment; and violation of certain provisions of the *Controlled Drugs and Substances Act*.(65) The mandatory prohibition order begins on the day it is made and lasts for at least two years.

Subsection 51(3) of the YCJA states that, where a young person is found guilty of an offence referred to in paragraph 110(*a*) or (*b*) of the *Criminal Code*, the youth justice court shall, in addition to imposing a sentence under section 42 (youth sentences), consider whether it is desirable, in the interests of the safety of the young person or of any other person, to make an order prohibiting the young person from possessing any of the firearms or other items listed above. The offences referred to in section 110 include summary conviction offences or indictable offences with a maximum sentence of less than 10 years where violence against a

(64) See *R.* v. *S.E.D.*, [2008] B.C.J. No. 1237 (C.A.).

(65) S.C. 1996, c. 19.

person was used, threatened or attempted in the commission of the offence, and certain firearms offences where the person was not already prohibited from possessing such a firearm. The discretionary prohibition order begins on the day it is made and lasts for up to two years. Reasons must be given for imposing an order or not doing so and sections 113 to 117 of the *Criminal Code*, which refer to such things as the lifting of a prohibition order, apply to firearm prohibition orders made against young persons. Section 52 of the YCJA provides for a review of a firearms prohibition order. Prohibition orders are independent of any youth record. Thus, a firearms prohibition order may remain available for disclosure after the youth criminal record is sealed.(66)

D. Young Offenders and the National DNA Data Bank

The National DNA Data Bank started to operate in 2000 and maintains two types of indices: a crime scene index, which contains DNA profiles taken from bodily substances found at a crime scene, and a convicted offender index, which allows DNA profiles to be taken from offenders where a post-conviction order has been made.(67) The *Criminal Code* does not make a distinction between adults and youth in terms of the collection of DNA samples. Section 487.051 of the Code gives the court that finds an adult or a young offender guilty or not criminally responsible of certain offences the power to authorize the taking of bodily substances from these offenders for forensic DNA analysis. The offender may have been found guilty under either the *Youth Criminal Justice Act* or the *Young Offenders Act*. The 2006–2007 annual report of the National DNA Data Bank indicates that, out of 117,684 convicted offender samples received, 15,306 or 13% came from young offenders.(68)

Parliament has mandated the judiciary to exercise its discretion regarding DNA applications by balancing the privacy and security of the individual and the protection of society. In the realm of young offenders, the argument has been raised in the courts that young people are to be treated differently than adults and that the YCJA grants enhanced procedural protections for young people when a profile is ordered to be taken. In *R.* v. *R.C.*, the Supreme Court of Canada held that the *Criminal Code* DNA provisions must be read in conjunction with the

(66) YCJA, s. 119(10).

(67) *DNA Identification Act*, S.C. 1998, c. 37.

(68) Royal Canadian Mounted Police, *The National DNA Data Bank of Canada, Annual Report 2006–2007*, Ottawa, 2007, http://www.nddb-bndg.org/train/docs/annual_report_2006-2007_e.pdf.

principles enunciated in the YCJA when deciding to order a DNA sample.(69) While no specific provision of the YCJA modifies the *Criminal Code* provisions concerning DNA, the Supreme Court found that Parliament intended that this legislation would be respected whenever young persons entered the criminal justice system. Thus, the purposes and principles set out in the YCJA should be considered in determining whether an order to take a DNA sample should be granted. The Court also felt that protecting the privacy interests of young persons serves rehabilitative objectives and thereby contributes to the long-term protection of society.

A consequence of the sealing or destruction of youth criminal records relates to the National DNA Data Bank. Information in the convicted offenders index and stored bodily substances in relation to a young person who has been found guilty of a designated offence under the *Young Offenders Act* or under the *Youth Criminal Justice Act* shall be permanently removed or destroyed without delay when the record relating to the same offence is required to be destroyed, sealed or transmitted to the National Archivist of Canada under Part 6 of the *Youth Criminal Justice Act*.(70)

CONCLUSION

Since the YCJA came into effect in April 2003, debate has raged over the treatment that young people in conflict with the law should receive. Some say that the Act is too lenient in its provisions regarding repeat offenders and those who commit serious crimes. Others say that the Act places a greater emphasis on the protection of the public than on the rehabilitation and social reintegration of young people. On 4 September 2008, federal, provincial and territorial ministers of justice and public safety came to the conclusion that the YCJA is too complex and that areas of concern included “improving responses to serious and repeat youth offenders.”(71) The challenge for lawmakers is to design an approach that allows serious matters involving young people to be dealt with in a way that protects the public and meets victims’ needs while still recognizing that young people do not have the same degree of responsibility as adults, given their age and level of maturity.

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(69) *R.* v. *R.C.*, [2005] 3 S.C.R. 99.

(70) *DNA Identification Act*, ss. 9.1 and 10.1.

(71) Department of Justice Canada, “Federal/Provincial/Territorial Ministers Committed to Addressing Key Justice and Public Safety Issues Facing Canadians,” News release, 5 September 2008, http://www.justice.gc.ca/eng/news-nouv/nr-cp/2008/doc_32302.html.