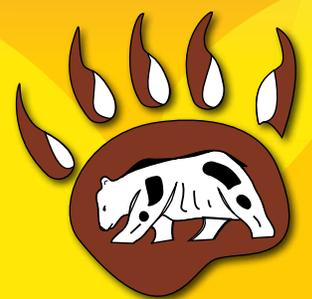




Section 38(2)(d)

of the YCJA:

*Alternatives for Aboriginal  
Young Offenders*



## What is the *Youth Criminal Justice Act*?

There are special laws in Canada that apply to young people aged 12-17 when they are said to have broken the law. These laws are part of the *Youth Criminal Justice Act (YCJA)* which says that youth should be treated differently than adults. It also helps guide judges as they sentence youth.

When the *YCJA* was created in 2003, new goals were set to deal with youth offences. Instead of bringing youth unnecessarily into the criminal justice system, it advocates for alternative ways of dealing with youth offences.

While changes made to these laws in 2012 include protecting society and preventing youth crime, these goals do not take away from making sure youth experience change and growth and re-enter the community well. While the *YCJA* determines that custody should only be used as a last resort for young offenders, it provides opportunities to deal with youth offences outside the courts.

## What is Section 38(2)(d) of the *Youth Criminal Justice Act*?

Similar to sentencing rules found in the *Criminal Code of Canada*, Section 38(2)(d) of the *YCJA* says that courts should consider all reasonable options other than custody when sentencing a young person, particularly when the young person is Aboriginal. This means that the courts must also consider the circumstances of an Aboriginal youth's life as well as craft a sentence that respects their Aboriginal values and culture.

It is important that the courts know about the underlying circumstances of a youth's life before placing conditions on them. If this is neglected, both the conditions and sentencing may be unsuccessful and not allow the youth to re-enter the community as a healthy and contributing member.

Along with helping youth change and re-enter the community well, the *YCJA* focuses on reducing the high number of youth in custody in Canada. In fact, under the *YCJA* there are only certain situations where a judge can sentence a youth to custody. These situations usually involve youth who have committed serious offences or who are repeat offenders.

## Why are alternatives to custody important for youth?

There are many reasons why alternatives to custody are important for young offenders. From the high rate of youth in custody to the need for better accountability and rehabilitation, the *YCJA* says custody should be the last resort for young offenders.

While custody may be necessary for youth who have committed serious offences and for repeat offenders, community based

alternatives to custody offer opportunities for youth to take ownership and responsibility for the offence, make amends, and build relationships that help them be more accountable for their actions. This accountability can help young offenders make better decisions in the future.

## What alternatives to custody are available for youth?

Some alternatives to custody for youth are:

### 1. **Extrajudicial Measures:**

These measures deal with youth offences outside the courts and are intended for first-time and non-serious offences. They include police cautions, apology letters, making restitution and amends to the victim(s), and community service. A part of extrajudicial measures requires that youth determine what they will do differently next time. If this includes addressing underlying issues such as drug or alcohol abuse, counselling for these issues is important.

If extrajudicial measures are used, the youth agrees to follow specific conditions while in the community. If they follow each condition, their charge will be dropped and they will not have a criminal record. However, if they do not follow their conditions, they will have additional consequences including the possibility of custody.



## 2. Non-residential Orders:

This is an alternative where youth serve their sentence in the community. According to this order, youth are required to attend programs that are specified by a Youth Attendance Centre. The youth can serve up to a maximum of 240 hours over a 6 month period in the community.

Self-improvement of the young offender is one of the main goals of this order. Programs may include counselling, employability programs, cultural programming such as attending ceremonies, and skills training.

## 3. Deferred Custody:

Deferred custody is another option where youth can serve their sentence in the community unless a breach of conditions

happens. If a youth does not follow their conditions, they will have to go back before a judge who may decide they should serve the rest of their sentence in custody.

Youth can get help in the community to successfully keep their conditions. Organizations such as the Youth Criminal Defence Office (YCDO) assist youth to understand and obey their conditions. If a youth has additional challenges, such as FASD, that make understanding the court process and documents more difficult, the YCDO can help create orders that are easier to understand for youth with FASD. When youth with FASD have help navigating the process, they have a better chance of successfully completing their conditions.

# Who does Section 38(2)(d) apply to?

## Aboriginal Youth

Section 38(2)(d) applies to *all young offenders* in Canada. However, because there is a greater number of Aboriginal youth in custody, it is an important section for Aboriginal youth and their communities. Using alternatives to custody can help reduce this overrepresentation.

This section of the *YCJA* focuses on finding sentences that help youth learn from their actions, instead of punishment for wrongdoing. It also supports approaches that attempt to discover why Aboriginal youth are before the courts and help address underlying issues.

Many of these additional ways of dealing with youth offences involve the wider community. Families and community members are often encouraged to be part of the process and to provide support and encouragement for youth on their journey. A number of these measures also invite Aboriginal communities to be actively involved in the change, growth, and healing of their youth.

## Youth with FASD

Due to the unique nature of Fetal Alcohol Spectrum Disorder (FASD), youth with FASD may have difficulty understanding what happens in court, court orders, and sentencing conditions. Because they may not fully understand what is happening, it may be challenging to obey rules and conditions. As a result, there is often a high number of youth with FASD in the youth justice system.

Section 38(2)(d) is an important section for all youth, but particularly for Aboriginal youth and those with FASD. Because courts are asked to find reasonable sentencing options other than custody, this section can help reduce the number of youth with FASD in custody.

This section makes sure that youth with FASD are sentenced in ways that help them. As they may already struggle with challenges in life, it is unhelpful to put more pressure on them through custody

and other sentencing conditions. For example, because many youth with FASD experience unemployment, requiring them to pay fines may not be a condition they can keep.

However, by finding a helpful and meaningful sentence that works for each individual, youth have a chance to take responsibility for their actions, change, and grow. In order to do so, youth justice courts must be aware of a youth's background and circumstances, including whether the youth has FASD and any challenges they face as a result.

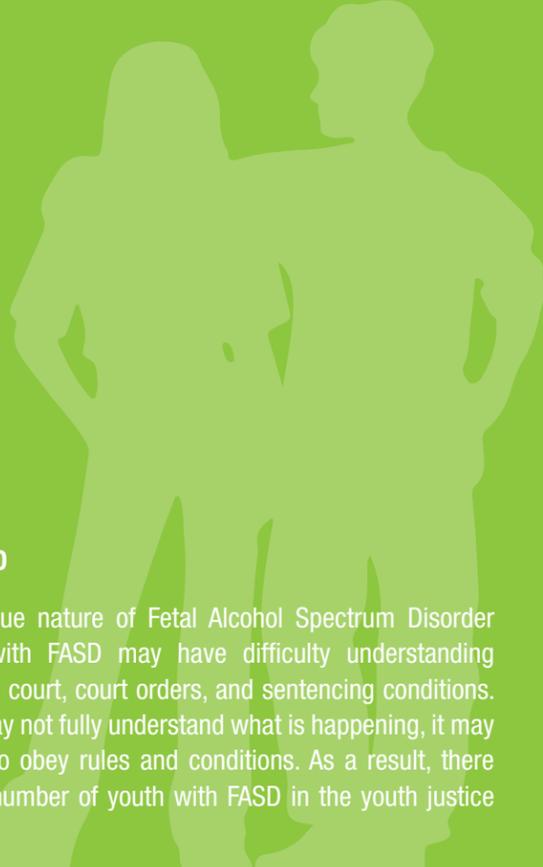
Youth with FASD should also understand the conditions of their sentence. If they do not, they are less likely to keep the conditions and more likely to breach, acquire more charges, and even spend time in custody.

The goal is to find conditions that hold youth with FASD accountable for their actions and provide the right structure for them to successfully complete their sentence. Section 38(2)(d) of the *YCJA* helps provide this structure because judges have access to options outside of the courts that may be more helpful.

# How Section 38(2)(d) is being used to divert youth from custody

The *YCJA* offers a variety of sentencing options. As community programs are often more successful than custody in dealing with youth offences, these approaches are favored by the *YCJA*. However, depending on each situation, sentencing options range from an absolute discharge where no conviction is recorded for the youth, to time spent both in custody and under supervision in the community.

Each situation and youth is assessed individually to find out what will work best for them so that they can be accountable to the victim(s) and community and experience healing and change.



# Native Counselling Services of Alberta: Restorative Justice Programs for Youth

The availability of relevant programs and supports and services in the community for youth is an essential part of finding alternatives to custody. In many cases, these alternatives are also an important contributing factor to the youth successfully experiencing long-term change and healing. This is even more important when addressing the unique needs of Aboriginal youth and youth with FASD.

## Native Counselling Services of Alberta *Wrap Around Edmonton (WrapEd)*

Wrap Around Edmonton (WrapEd) is a restorative justice project that unites a number of non-profit agencies in Edmonton including REACH Edmonton, Native Counselling Services of Alberta (NCSA), Edmonton John Howard Society, The Africa Centre, YOU CAN, and the Edmonton Police Services, who are committed to providing support and resources to vulnerable Aboriginal youth and youth from refugee communities, particularly those at risk of being involved in gang activity.

Youth involved in the program may also experience other issues such as intergenerational trauma, FASD, homelessness, and mental illness. This eighteen-month program is available to youth prior to involvement in the youth justice system or may potentially be used as part of completing sentence conditions.

Youth workers from each agency collaborate to provide support and resources for youth in need. Through relationship-building, youth workers assist young people to determine their needs, set goals, and succeed. Youth workers build on the strengths of the youth by taking the strengths they discover and helping youth apply them to their needs.

Because self-determination is encouraged and supported, instead of being told what they need, youth prioritize their own needs. Since one goal of the program is to put youth first, each youth has a voice and is an important part of deciding their needs and how to meet each need. For example, youth help build the team who support them, whether that is a social worker, a parent, or someone else who provides support for them.

Typically, a WrapEd youth worker spends 3 months building a relationship with a youth, 8 months working with the youth, and the remaining time focuses on transitioning the youth back into the community. Youth workers usually visit the youth once a week and consistently talk to them during the week. Time spent with the youth may involve helping them navigate the court process and getting them involved in healthy programming.

Programming can include a wide variety of options as agencies involved in WrapEd work together to share resources. For example, NCSA WrapEd Youth Workers may notify other agencies involved of ceremonies being held (such as sweats) that youth may wish to attend. Other programming may include recreational and educational activities depending on the needs and interests of the youth.

## *Youth Navigators*

Youth Navigators is another restorative justice program for youth offered by NCSA. This program stresses relationship, interconnectedness, and self-determination, key principles of the Cree word *wahkohtowin* (“relationships” or “how we are related”).

In a system that has often been built on mistrust, this program is unique because youth are given a chance to change and practice daily all they have learned in their programs. Like WrapEd, it emphasizes the wraparound model that supports youth in all aspects of their lives, including school or work, artistic pursuits, parenting programs, and many more.

Youth workers build relationships with youth while helping them take responsibility for their actions and learn new tools to deal with the challenges they face. Many of the youth involved in this program are at-risk, vulnerable, and already involved in the youth justice system. They come to the program with significant challenges, including difficulty understanding the court process and conditions they may be expected to obey.

Youth Navigators work with youth who are referred to them. One of the goals is to help youth understand their interconnectedness with other people and how their actions affect others. Helping youth take responsibility for their actions in a way that fosters growth is important. Youth who have committed serious offences can also be involved in the program, although their time spent with the youth worker may look a bit different. The youth worker may spend time advocating for the youth and speaking to the underlying circumstances that have caused the youth to offend. They may also have lawyers involved and the youth may be subject to probation and additional conditions.

This approach focuses on the individuality of each youth and accommodating their unique needs. For example, the needs of a youth with FASD may differ from another youth. How they understand their interconnectedness with others and take responsibility for their actions may involve activities that work for them. Each youth with FASD is unique. Some may write a letter or draw a picture to communicate their experience. Others may be involved in different activities.

If the Crown approaches them, youth workers may also connect youth with youth justice committees in the community. However, prior to involvement in a youth justice committee, a Youth Navigator gets the opportunity to speak to issues experienced by the youth and advocate for them. This is often an opportunity for youth workers to speak to the underlying circumstances experienced by the youth. The youth justice committee is a very cooperative process. Once they have heard all the issues, the committee discusses what they have heard and then talk to the youth, supervisors, and family. After these discussions, they help develop a solution with all involved, including the youth.

Like other restorative justice programs offered by NCSA, this program creates a learning circle environment. This assists youth to see success if a different way. They can experience something, learn from it, and apply it. In this program, self-determination is important because it is understood that youth have the most knowledge about their needs and lives. They also have a contribution to make to healthy solutions that meet their needs.



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Printed February 2015



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