Section 38(2)(d) of the YCJA: Alternatives for Aboriginal Young Offenders
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 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.

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.

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.
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, YOUCAN, 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 lead to reduced involvement with the 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 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.

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Youth Navigators

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, refer 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.
Need a Court Worker?

NATIVE COUNSELLING SERVICES OF ALBERTA HAS COURTWORKERS TO HELP YOU OUT!