

**ANOTHER KICK AT THE CAN:  
SPECIAL CONSIDERATIONS FOR BAIL UNDER THE  
YOUTH CRIMINAL JUSTICE ACT**

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**INTRODUCTION**

Prior to the introduction of the *Youth Criminal Justice Act* (the “YCJA”) in 2003, the federal government faced great criticism over the operation of the youth justice system under the *Young Offenders Act* (the “YOA”). In an attempt to restore credibility, the federal government introduced numerous amendments to the YOA. Unfortunately, the amendments failed to improve the YOA’s credibility with the public. In 1997, as a result of this discontent, the Standing Committee on Justice and Legal Affairs submitted a report to the House of Commons that contained numerous recommendations for overhauling the YOA. In 1998, based partly on the recommendations of the Standing Committee, the federal government announced a new strategy for youth justice in Canada. What transpired was a series of hearings, consultations, drafts and debates that, only a short 6 years later, resulted in the YCJA coming into force on April 1, 2003, thereby replacing the YOA. Essentially, the premise of the YCJA is to provide “the legislative framework for a fairer and more effective youth justice system.”<sup>1</sup>

Many of the provisions in the YCJA are built on the former YOA. However, that being said, there are some important reforms that were introduced in the YCJA that were strictly implemented to address what Parliament saw as the weaknesses of the YOA. Most relevant to this paper is the weakness that was identified as an over-utilization of pre-trial detention under the YOA.<sup>2</sup> In response to this concern, the YCJA made the following changes:

- a) pre-trial detention is not to be used as a substitute for child protection, mental health or other social measures;

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<sup>1</sup> Department of Justice Canada, “The Youth Criminal Justice Act: Summary and Background” (31 January 2006), online: Department of Justice Canada <<http://www.justice.gc.ca/en/ps/yj/ycja/explan.html>>.

<sup>2</sup> *Ibid.* Note: According to the Department of Justice Canada, Canada has the highest youth incarceration rate in the Western World, including the United States of America.

- b) if the young person could not be sentenced to custody if convicted, the judge is required to presume that pre-trial detention of the young person is not necessary for the protection or safety of the public; and
- c) if a young person would otherwise be detained, the judge is required to inquire as to whether a responsible adult is available who would be willing to take care of the young person as an alternative to pre-trial detention.<sup>3</sup>

It is these aforementioned changes and their effect in Youth Courts that will be explored in this paper.

## **BAIL**

### **Importance of Getting Bail**

Beyond the simple fact that most rational people would prefer to be out of custody rather than in, there are practical reasons that bail may have an important impact on a young person and how the matter proceeds. To begin with, a person detained is in some instances faced with a pre-trial detention period that is longer than what might reasonably be expected to be imposed in sentencing. This creates a great deal of pressure to consider a plea to a matter that might otherwise be appropriate for trial.

Second, a release on bail can provide an opportunity for a young person to make a new start or prove that the event was out of character. The decision to continue with the prosecution, the plea that might be considered or the sentence that might prove appropriate can all be significantly influenced by the behavior of the young person while on bail.

### **Principles Applicable to Bail**

It is important to keep in mind that Parliament dictated in the *YCJA* that the interpretation of the legislation itself must be guided by principles set out in the statute.<sup>4</sup> Those principles very positively suggest that very few people, more particularly those people who are alleged to be

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<sup>3</sup> Department of Justice Canada, *supra* note 1.

<sup>4</sup> *R. v. J.S.*, 2005 ABQB 511 at para. 15 (CanLII) [hereinafter referred to as *J.S.*].

young offenders and particularly those young offenders who retain the presumption of innocence, should be detained for any substantial period of time.<sup>5</sup>

### **Is Detention Possible?**

A review of the principles and requirements of section 29 of the *YCJA* is the starting point for considering whether detention is even possible. The section states that detention is not to be used “as a substitute for appropriate child protection, mental health or other social measures.”<sup>6</sup> In addition the court, when considering detention for public safety reasons, “must presume that detention is not necessary unless the young person could receive a custody sentence on conviction.”<sup>7</sup> Note however, that the *YCJA* permits the use of custody for violent offences, youth who have failed to comply with past community-based sentences or youth with a history of indictable offences for which an adult would receive more than two years jail.<sup>8</sup>

Having noted the above, it is often the reality that the lack of other special measures are precisely the reason bail is not granted. In a bail setting, this predicament can sometimes be a useful lever to convince others (parents, social workers, probation officers, crown counsel) that the court expects everyone to make extraordinary efforts to find alternatives to custody. By indirect means then, one should not be shocked, shocked to find that social work is going on in here (with apologies to the writers of *Casablanca*). In fact, section 3(1)(c) of the *YCJA* states “within the limits of fair and proportionate accountability, the measures taken against young persons who commit offences should...where appropriate, involve the parents, the extended family, the community and social and other agencies in the young person’s rehabilitation and reintegration...”.

### **Show Cause - Section 515 of the Criminal Code**

Once it is found that detention is a possible consideration, youth court bail hearings begin with an analysis of whether detention is warranted under one of the three grounds provided for in

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<sup>5</sup> *J.S.*, *supra* note 4 at para. 16.

<sup>6</sup> *Youth Criminal Justice Act*, S.C. 2002, c. 1, s. 29.

<sup>7</sup> Moyer, Sharon & Maryanna Basic, “Crown Decision-Making Under The *Youth Criminal Justice Act*” (26 June 2007), online: Report to the Department of Justice of Canada <<http://www.justice.gc.ca/en/ps/yj/research/moyer-basic/decision/table.html>>.

<sup>8</sup> *Ibid.* See also section 39 (1) of the *YCJA*.

section 515 of the *Criminal Code* (the primary, secondary and tertiary grounds). Stated briefly, will the accused appear in court as required, is there a continued concern for public safety or is the denial of bail necessary to maintain public confidence in the administration of justice are the factors to consider. The onus is generally on the crown to ‘show cause’ why the accused should not be released on an undertaking without conditions. There are circumstances where the onus reverses and it is up to the accused to show cause why, on a balance of probabilities, they do not pose a threat to the public and will show up for court, although the applicability of the reverse onus provision has been called into question as being inconsistent with the *YCJA* and inapplicable to youth bail matters.<sup>9</sup>

While in matters involving adults the show cause hearing determines whether the accused will be detained, the *YCJA* mandates that the court consider one further option, the placement of a young person in the care of a responsible person.

### **Placement of Young Person in the Care of Responsible Person - Section 31 of the YCJA**

Section 31 of the *YCJA* mandates that the court inquire as to the availability of a responsible person and the accused young person’s willingness to be placed with that person. The detained youth can be released to a responsible person if he or she would be detained in the absence of that person and if both the youth and the person agree.<sup>10</sup> Note, that there is no requirement that the young person is going to reside with the responsible person.<sup>11</sup>

Specifically, section 31 of the *YCJA* states the following:

Placement of young person in care of responsible person	<b>31.</b> (1) A young person who has been arrested may be placed in the care of a responsible person, instead of being detained in custody if a youth justice court or a justice is satisfied that
	(a) the young person would, but for this subsection, be detained in custody under section 515 (judicial interim release) of the <i>Criminal Code</i> ;

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<sup>9</sup> Government of Nova Scotia, “*Youth Criminal Justice Act – Nunn Commission Recommendations*” (19 December 2006), online: Nova Scotia Public Prosecution Service <[http://www.gov.ns.ca//pps/publications/ca\\_manual/ProsecutionPolicies/YCJApolicyNunnRecsMTSwpd.pdf](http://www.gov.ns.ca//pps/publications/ca_manual/ProsecutionPolicies/YCJApolicyNunnRecsMTSwpd.pdf)>, attaching *R. v. M.T.S.* (16 February 2006), Nova Scotia (N.S.Prov.Ct.) at para. 37 (Burrill J.) [hereinafter referred to as *M.T.S.*], *M.T.S.* citing *R. v. W.S.C.*, [2003] S.J. No. 810 at para. 38.

<sup>10</sup> Moyer, Sharon & Maryanna Basic, *supra* note 7.

<sup>11</sup> *R. v. D.D.S-T.*, 2005 BCPC 573 (CanLII) [hereinafter referred to as *D.D.S-T.*].

	(b) the person is willing and able to take care of and exercise control over the young person; and
	(c) the young person is willing to be placed in the care of that person.
Inquiry as to availability of a responsible person	(2) If a young person would, in the absence of a responsible person, be detained in custody, the youth justice court or the justice shall inquire as to the availability of a responsible person and whether the young person is willing to be placed in that person's care.
Condition of placement	(3) A young person shall not be placed in the care of a person under subsection (1) unless
	(a) that person undertakes in writing to take care of and to be responsible for the attendance of the young person in court when required and to comply with any other conditions that the youth justice court judge or the justice may specify; and
	(b) the young person undertakes in writing to comply with the arrangement and to comply with any other conditions that the youth justice court judge or the justice may specify.
Removing young person from care	(4) A young person, a person in whose care a young person has been placed or any other person may, by application in writing to a youth justice court judge or a justice, apply for an order under subsection (5) if
	(a) the person in whose care the young person has been placed is no longer willing or able to take care of or exercise control over the young person; or
	(b) it is, for any other reason, no longer appropriate that the young person remain in the care of the person with whom he or she has been placed.
Order	(5) When a youth justice court judge or a justice is satisfied that a young person should not remain in the custody of the person in whose care he or she was placed under subsection (1), the judge or justice shall
	(a) make an order relieving the person and the young person of the obligations undertaken under subsection (3); and
	(b) issue a warrant for the arrest of the young person.
Effect of arrest	(6) If a young person is arrested in accordance with a warrant issued under paragraph (5)(b), the young person shall be taken before a youth justice court judge or a justice without delay and dealt with under this section and sections 28 to 30.

In summary, section 31(1) of the *YCJA* enables an accused young person to be placed into the care of a “responsible person” if, but for this section, the young person would be detained. If the

court is contemplating the release of a young person into the care of a responsible person, it should be made clear on the record that the criteria for detention have been met, but for this section.<sup>12</sup>

### **The Requirements of the Responsible Person and the Young Person - Section 31(1) of the YCJA**

Under section 31(1) of the *YCJA*, there are three pre-requisites to an accused young person being placed in the care of a responsible person. The first pre-requisite is that the accused young person would be detained under section 515 of the *Criminal Code*. The second pre-requisite, being more complex, requires some discussion which is expanded upon below. The third pre-requisite is that the accused young person is willing to be placed in the care of the responsible person.

#### **Responsible Person Willing and Able**

The second requirement is compound in that it requires the *responsible person* to be *willing and able* to not only take care of the young person but to also *exercise control* over the young person. As “responsible person” is not defined in the *YCJA*, courts have held that the ordinary dictionary meaning is an appropriate one to refer to when determining whether an individual falls into this category. For example, in *R. v. D.(J.)*, 2005 ONCJ 491 at para. 51 (CanLII), the Honourable Judge Kukurin stated:

In the case of J.S.[the accused young person’s aunt], the preliminary determination is whether she is a “responsible” person in the dictionary sense. There are several concepts that are reported in dictionary definition of the word “responsible”. These concepts include the discharge of a duty, debt or obligation, the ability or capacity to do so, maturity and discrimination, and answerability or accountability.

In terms of “willing and able”, courts have held that the question of willingness is generally easy to determine.<sup>13</sup> Conversely, however, courts have held that the question of ability is more

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<sup>12</sup> *Supra* note 9 at 3.

<sup>13</sup> *R. v. D.(J.)*, 2005 ONCJ 491 at para. 50 (CanLII) [hereinafter referred to as *D.J.*].

problematic as it is not only the ability to care for an accused young person but it is also the ability to exercise care and control over the accused young person that are essential.<sup>14</sup>

In *R. v. R.R.B.* 2004 BCPC 566 at paras 35-36 (CanLII), Chief Judge Baird Ellan canvassed the requirement of “able to exercise control”. Even though affidavit evidence of the accused young person’s mother was put forward indicating her willingness and availability to take responsibility for the accused young person, the court had difficulty in ordering a section 31 placement. Her Honour took particular note that the parents were not able to prevent the accused young person from being involved in the offence he was presently facing, nor incidents giving rise to a prior conviction. The issue the court struggled with was that a placement, in this particular situation, would place the accused young person back into the same environment that he was in at the time of the offences that were before the court. As section 31(1)(b) of the *YCJA* requires that a person in whose care the young person is placed be not only willing but also able to exercise control over the young person, the court was not satisfied that the accused young person’s parents, at that moment, harboured the requisite ability to exercise control over the young person.

The relationship between the responsible person and the young person is crucial. In *D.J.*, *supra* the Honourable Judge Kukurin stated, with regards to section 31(1)(b) of the *YCJA*, that the requirements of the section, “are also part of the considerations, and essential ones, as to whether an individual is a responsible person in relation to an accused young person.”<sup>15</sup>

### **The Duty to Inquire - Section 31(2) of the YCJA**

In most circumstances it can be presumed that counsel for the accused young person will wish to request the court consider a release plan under section 31, but it is important to note that regardless of whether or not a potential responsible person is put forward by the accused young person, the language of section 31(2) unequivocally places the duty on the court to inquire as to the availability of a responsible person and whether the young person is willing to be placed in the care of that person.<sup>16</sup>

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<sup>14</sup> *D.J.*, *supra* note 13 at para. 50.

<sup>15</sup> *Ibid.* at para. 48.

<sup>16</sup> *R. v. E.A.K.*, [2003] S.J. No. 782 at para. 6. See also *R. v. T.S.*, 2006 ABQB 631 at para. 26 (CanLII) [hereinafter referred to as *T.S.*].

It should also be noted however, that while the court “shall inquire”, such placement of a young person is not mandatory (even where the conditions of section 31(1) are met) as the words used in the section simply say the young person “may” be so placed.<sup>17</sup>

### **The Section 31 Inquiry - How Does it Work?**

There is no established practice for proceeding with a section 31 inquiry and most often they occur quite informally and as part and parcel of the show cause hearing and, without a clear distinction being made as to the type of evidence being presented or the form of its presentation. That is not always the case though, and in circumstances where it is clear detention under section 515 of the *Criminal Code* is a strong possibility, crown and defence would be well advised to, at a minimum, discuss the form and substance of the section 31 inquiry, and may in fact wish to seek direction from the court on those points. The forms of proceedings range from submissions of counsel, through filing of affidavit material, to calling witnesses including full cross examination. In this context, it is probably worthwhile to remember that in judicial interim release hearings, “evidence” has the meaning as assigned in section 518(1)(e) of the *Criminal Code*: “the justice may receive and base his decisions on evidence considered credible or trustworthy by him in the circumstances of each case”.<sup>18</sup> Thus, it really comes down to what it takes to satisfy the court that the requirements of section 31(2) have been met.

### **Assessing Proposed Responsible Person**

Before proceeding under section 31 of the *YCJA* counsel needs to ensure that any proposed responsible person is:

- a) completely cognizant of the obligations that pertain to a responsible person and is subsequently willing to assume those responsibilities; and
- b) is able to care for and exercise control over the young person.<sup>19</sup>

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<sup>17</sup> *T.S.*, *supra* note 16.

<sup>18</sup> *Supra* note 9 at 3.

<sup>19</sup> *Ibid.* at 3.

## **Undertakings to a Responsible Adult**

The way in which the accused young person is “released” is different.<sup>20</sup> Arguably, a young person who is being “released” under section 31 of the *YCJA* is not being released in the same way as an accused young person who is being released under section 515 of the *Criminal Code*.<sup>21</sup>

Thus, the distinctive feature of the section 31 alternative, compared to section 515 of the *Criminal Code*, is that under section 31 of the of the *YCJA* there is an aspect of control of the conduct and whereabouts of the accused young person being released.<sup>22</sup>

In *R. v. T.S.*, 2006 ABQB 631 at para. 28, the court explored this difference in “release” between section 31(1) of the *YCJA* and section 515 of the *Criminal Code* and stated:

...[U]nder section 31(1) of the *YCJA*, the young person is under the care of a responsible person who has given an undertaking to the court to “take care of and exercise control over the young person”. Furthermore, by section 31(1)(c), the young person must agree to be in the care of the responsible person. This is a recognition by the young person that some of the liberties and choices they might otherwise enjoy as an individual who was being released under section 515 of the *Criminal Code* are being curtailed.

This distinctive feature then, is akin to a supervisory role which is appended to the responsible person by that person giving an undertaking.<sup>23</sup> The giving of undertaking is not only consistent with but also an integral part of the principles upon which the *YCJA* was built. Note, that the decision of *R. v. E. (K.M.)* 105 BCCA 151 (CanLII) supports the proposition that the section 31(1) inquiry of the *YCJA* is a distinct inquiry from the section 515 of the *Criminal Code*.

One should also note the undertakings enunciated under section 31(3) of the *YCJA* which impose further supervision upon release of an accused young person. Under section 31(3) of the *YCJA* the proposed responsible person must undertake in writing to, “take care of and to be responsible for the attendance of the young person in court when required and to comply with any other conditions that the youth justice court judge or the justice may specify” while the accused young

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<sup>20</sup> *T.S.*, *supra* note 16 at para. 27.

<sup>21</sup> *Ibid.* at para. 27.

<sup>22</sup> *Ibid.* at para. 29.

<sup>23</sup> *Ibid.* at para. 30.

person must undertake in writing to, “comply with the arrangement and to comply with any other conditions that the youth justice court judge or the justice may specify.”<sup>24</sup>

Attached as schedule “A” is the form of undertaking commonly utilized by the court that sets out the basic terms of responsibility for both the responsible person and the young person, and to which the additional conditions are usually appended. Attached as schedule “B” is the form of Application/Order to be Relieved of Undertaking which is to be utilized in the event that the responsible person is no longer willing or able to fulfil the requirements of the bail conditions. These documents, along with any other proposed conditions, should be reviewed with the responsible person and the young person prior to the inquiry being undertaken.

### **Where “The Plan” Has Been Accepted**

In *D.(J.)*, *supra* the Honourable Judge Kukurin found J.S., the aunt of the accused young person, to be a responsible person. J.S. was called as a candidate with whom the accused could live with if he was released on bail. The court stated that in the case of J.S., the preliminary determination is whether J.S. is a “responsible person”. In J.S.’s testimony, the court noted that the aunt clearly verbalized that she was willing to take care of J.D. and to exercise control over him.<sup>25</sup> Moreover, on J.S.’s cross-examination, the Honourable Judge Kukurin noted that J.S. confirmed that, “she was prepared to abide by and enforce very stringent conditions if imposed by the court.”<sup>26</sup> The Honourable Judge Kukurin summarized his evidentiary findings of J.S. as follows:

J.S. appears to be responsible. She is the mother of three children ages 13, 12 and 8. In addition, she has undertaken customary care of a 13 year old niece. Moreover, she does this as a single mother. She has post-secondary education and is a graduate of at least one, if not two, community colleges. She holds the position as Economic Development Officer...All of this, in absence of any evidence to the contrary, suggests someone of ability, of organization, of dedication, of solidity and stability, someone who has pursued

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<sup>24</sup> *Supra* note 6, s.31(3).

<sup>25</sup> *D.J.*, *supra* note 13 at para. 49.

<sup>26</sup> *Ibid* at para. 49.

and achieved goals, and someone to whom important things have been entrusted. In short, she seems to be a responsible person.<sup>27</sup>

### **Where “The Plan” Has Not Been Accepted**

Conversely, *R. v. J.S.*, 2005 ABQB 511 is a case where the proposed responsible person was found not suitable to act in the supervisory role. In this case, the accused young offender faced a variety of extremely serious charges involving extortion, forcible confinement and various weapon and threatening type offences. The Court stated that,

[9] ...[U]nder these circumstances the protection of the public and more particularly the protection of this complainant and the assurance to the public that in fact this type of activity will not be granted leisurely treatment by the Courts are such as to command detention under that particular ground.

[10] So really, it comes down to this as to whether or not this mother is a suitable candidate to , in effect, provide for a substitute form of placement, as the word is used under the *Youth Criminal Justice Act*.<sup>28</sup>

The Honourable Justice Watson, in his analysis of the mother’s testimony, concluded that she could not possibly meet the achievements that are required for the purposes of these provisions of the *YCJA* and for this type of case and held as follows:

[20] It is not a question of whether the mother is employed or not. It is whether or not she really is capable of being totally in control of this young person’s life and responsible for him.

[21] She has the best of intentions. She has no doubt a mother’s heart and a mother’s desire to do what she can. She loves her son. Her son is alleged to have done terrible things...

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<sup>27</sup> *D.J.*, *supra* note 13 at para. 52.

<sup>28</sup> *J.S.*, *supra* note 4 at paras 9-10.

[22] However it is quite clear that those things developed under her superintendence, even though – like most mothers – she had to maintain distance. Teenagers want to be left alone. Mothers are forced into that particular predicament in having to leave them alone.

[23] But, nevertheless, a promise by a mother that she will make sure that he goes to school and make sure that he stays at home is perfectly legitimate, quite honourable, very trustworthy and completely ineffective it seems to me, to deal with a situation such as this.<sup>29</sup>

### **Adjourning For Tactical Reasons**

There may be circumstances where it might prove appropriate to adjourn a bail hearing for tactical reasons. The first and most obvious is in order to gather the necessary information. As noted by others, the plan is the key. Gathering the relevant information, and confirming availability of resources can prove crucial.

The second, and somewhat less obvious reason, is that quite often the court will recognize that a short sharp period of time in custody can have an important impact on a young person's understanding of the peril they face and the importance of compliant behaviour.

Having noted both of the above, an unsuccessful attempt to obtain a section 31 release does not preclude a further request for an inquiry and consideration of a release plan. "I see no policy reason why an unsuccessful application should be seen as forever pre-empting another application based on a different plan and there is no language to be found in the *YCJA* which would suggest that it is a one shot exercise."<sup>30</sup>

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<sup>29</sup> *J.S.*, *supra* note 4 at paras 20-23.

<sup>30</sup> *T.S.*, *supra* note 16 at para. 33.

## **MISCELLANEOUS**

### **Who Do You Talk To?**

It always must be remembered that defence counsel take instructions from the client, which in these circumstances is the young person. There is often a degree of conflict between the young person and the adults in their life to whom you are going to have to turn to for information, resources and as a possible responsible person. Ensuring the young person knows of and approves the information you will be providing to others, is good practice. It is also often necessary to remind those third parties that the young person is your client.

### **Section 31 Release and the Tertiary Ground of Detention**

It has been stated that a finding that the detention of a young person under section 515 of the *Criminal Code* on the tertiary ground that the detention is necessary to maintain confidence in the administration of justice does not supercede an inquiry and release under section 31.<sup>31</sup> While it has been noted that this might appear inconsistent on the face of it, the additional considerations and limitations involved in a section 31 inquiry and release have been held to properly negate those concerns.

### **Foster Parents**

For children in care, the problem can be finding someone who will stand as the responsible person. The standard contract between the provincial government and a foster parent does not envision such undertakings being entered into, nor will the Ministry accept such a role. To date there have been no cases dealing with the effect of this situation, either in forcing the Ministry to ensure a responsible person can be found or *Charter* implications where a young person in-care is denied release that would otherwise be available, but it is something that could reasonably be expected to arise as an issue in the future.

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<sup>31</sup> *T.S.*, *supra* note 16. See also *R. v. S.(S.)*, 2006 ONCJ 7 (CanLII).

## **CONCLUSION**

The *YCJA* provides a number of opportunities for a young person to be released on bail pending trial. The plan is key, and, while in the case of section 31, the obligation to inquire is on the court, it will most often be up to counsel for the accused to gather the information and coordinate the third parties. Even faced with what might be considered overwhelmingly bad facts relating to the offence alleged or prior poor adherence by the young person, the intent of Parliament has been interpreted to favour the supervision of young people by involved members of the community over confinement in youth detention facilities. Recognizing the concerns the court will have and arranging the plan in a way that alleviates those concerns will go a long way to fulfil that intent.