

# **The Alternative Measures and Extrajudicial Sanctions Policies**

**Ministry of Justice**

**January 2013**

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## Preface

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### Preface

The federal and provincial governments have developed policies and guidelines regarding the use of alternative measures and extrajudicial sanctions and the development of alternative measures/extrajudicial sanctions programs. This booklet outlines the legislation and policies governing the use of alternative measures/extrajudicial sanctions in Saskatchewan.

Section 1, the Introduction, defines alternative measures/extrajudicial sanctions, discusses the factors related to their development, and describes processes that are commonly used in Saskatchewan.

Section 2 outlines the provisions in the *Criminal Code* and the *Youth Criminal Justice Act* that authorize the provinces to develop alternative measures/extrajudicial sanctions programs.

Section 3 provides the Ministerial Orders and policies that authorize alternative measures/extrajudicial sanctions programs. These include:

- The Ministerial Order and attached Saskatchewan Ministry of Justice Adult Alternative Measures Policy (2011), which guide alternative measures programs for adults.
- The Ministerial Order and attached Saskatchewan Ministry of Justice Young Offender – Extrajudicial Sanctions Policy (2011), which guide extrajudicial sanctions programs for youth.
- The Saskatchewan Environment Enforcement Bulletin - Alternative Measures (2012), which guides conservation officers in making referrals to alternative measures/extrajudicial sanctions programs. Please note that this booklet does not include the appendices to the Saskatchewan Environment Enforcement Bulletin.
- The federal Alternative and Extrajudicial Measures Policy, which guides the actions of federal prosecutors. The federal policy is taken from the Federal Prosecution Service Deskbook at <http://www.ppsc.gc.ca/eng/fps-sfp/fpd/ch14.html>. The version which has been used in preparing this policy booklet was last updated in 2004. Please note that this booklet does not contain the appendices from the federal Alternative and Extrajudicial Measures Policy. For additional material, please see the Public Prosecution Service of Canada website.

### Section 1: Introduction

Alternative measures/extrajudicial sanctions programs provide individuals who are accused of committing a *Criminal Code* offence an opportunity to make reparation to victims and their community. These programs attempt to balance the needs of victims, the accused, and communities while ensuring that society is protected. They offer accused persons a chance to take responsibility for their behaviour and address the harm they have committed. They take a problem-solving approach to crime which emphasizes healing while helping repair relationships between the victim, the accused and the community to the extent possible.

Alternative measures/extrajudicial sanctions are a way to address crime in conjunction with the criminal justice system. They are consistent with the move towards a responsive justice system that tries to deal with criminal behaviour in a proactive manner. They aim to:

- Increase the offender's accountability and responsibility for criminal actions;
- Promote the involvement of victims in the process;
- Protect society by deterring accused persons from further criminal behaviour;
- Enhance the community's participation in resolving conflicts;
- Involve the community in addressing the crime; and
- Protect the interests of society.

Adult alternative measures programs are similar to youth extrajudicial sanctions programs. Extrajudicial sanctions programs have been operating in Canada since 1983 and in Saskatchewan since 1985. Both adult and youth programs in Saskatchewan are delivered by community-based agencies.

The development of alternative measures/extrajudicial sanctions was influenced by several factors, including the:

- Restorative justice movement;
- Desire of Aboriginal people for a justice system that is responsive to their unique needs; and
- Realization that communities can sometimes deliver a more effective form of justice than the criminal justice system.

Alternative measures/extrajudicial sanctions programs acknowledge the need for effective, efficient ways of resolving disputes that meet the unique needs of Aboriginal people. Accordingly, they involve communities in developing culturally sensitive services that promote healing and reparation between victims, offenders, and communities.

## Section 1: Introduction

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Many kinds of processes are used to resolve alternative measures/extrajudicial sanctions referrals, and community-based agencies have different names for these processes. Some of the most common types include:

- Victim-offender mediation, in which the victim and the accused person meet with a trained facilitator.
- Community justice forums or youth justice forums, in which the victim(s), the accused person(s), and other community members who are relevant to the case meet with a trained facilitator. The facilitator uses a script during the meeting.
- Community justice conferences, which can occur with adult accused persons. The victim(s) and the accused person(s) meet with a trained facilitator and additional professionals and community members who are relevant to the case.
- Family group conferences, which can occur when the accused is a young person. The victim(s) and the accused person(s) meet with a trained facilitator and additional professionals and community members who are relevant to the case. Unlike community justice forums and youth justice forums, scripts are not used during family group conferences or community justice conferences.
- “*Circles*” are a generic name for processes to resolve a conflict or issue between an offender, a victim, and/or community members. Circles usually involve the accused, the victim, a facilitator, and a wide range of individuals such as family supporters, community members, professionals, and others. The people who participate and the procedures used vary according to the circle’s purpose and the practices of the group or agency arranging it.

### Section 2: Legislation

#### Alternative Measures

In September 1996, a number of amendments were made to the *Criminal Code* of Canada. Bill C-41 authorized the use of community-based sentencing alternatives and emphasized that incarceration should be used as a last resort. The use of alternative measures is authorized in section 717 (1) of the *Criminal Code*, which states,

*717. (1). Alternative measures may be used to deal with a person alleged to have committed an offence only if it is not inconsistent with the protection of society and the following conditions are met:*

- (a) the measures are part of a program of alternative measures authorized by the Attorney General or the Attorney General's delegate or authorized by a person, or a person within a class of persons, designated by the Lieutenant Governor in Council of a province;*
  - (b) the person who is considering whether to use the measures is satisfied that they would be appropriate, having regard to the needs of the person alleged to have committed the offence and the interests of society and of the victim;*
  - (c) the person, having been informed of alternative measures, fully and freely consents to participate therein;*
  - (d) the person has, before consenting to participate in alternative measures, been advised of the right to be represented by counsel;*
  - (e) the person accepts responsibility for the act or omission that forms the basis of the offence that the person is alleged to have committed;*
  - (f) there is, in the opinion of the Attorney General or the Attorney General's agency, sufficient evidence to proceed with the prosecution of the offence; and*
  - (g) the prosecution of the offence is not in any way barred at law.*
- (2) Alternative measures shall not be used to deal with a person alleged to have committed an offence if the person*
- (a) denies participation or involvement in the commission of the offence;*  
*or*
  - (b) expresses the wish to have any charge against the person dealt with by the court.*

## Section 2: Legislation

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### Extrajudicial Sanctions

A similar provision respecting young offenders is found in section 10 of the *Youth Criminal Justice Act*, which states,

*10. (1) An extrajudicial sanction may be used to deal with a young person alleged to have committed an offence only if the young person cannot be adequately dealt with by a warning, caution or referral mentioned in section 6, 7 or 8 because of the seriousness of the offence, the nature and number of previous offences committed by the young person or any other aggravating circumstances.*

### Conditions

*(2) An extrajudicial sanction may be used only if*

- (a) it is part of a program of sanctions that may be authorized by the Attorney General or authorized by a person, or a member of a class of persons, designated by the lieutenant governor in council of the province;*
- (b) the person who is considering whether to use the extrajudicial sanction is satisfied that it would be appropriate, having regard to the needs of the young person and the interests of society;*
- (c) the young person, having been informed of the extrajudicial sanction, fully and freely consents to be subject to it;*
- (d) the young person has, before consenting to be subject to the extrajudicial sanction, been advised of his or her right to be represented by counsel and been given a reasonable opportunity to consult with counsel;*
- (e) the young person accepts responsibility for the act or omission that forms the basis of the offence that he or she is alleged to have committed;*
- (f) there is, in the opinion of the Attorney General, sufficient evidence to proceed with the prosecution of the offence; and*
- (g) the prosecution of the offence is not in any way barred at law.*

## Section 2: Legislation

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### **Restriction on use**

*(3) An extrajudicial sanction may not be used in respect of a young person who*

- (a) denies participation or involvement in the commission of the offence; or*
- (b) expresses the wish to have the charge dealt with by a youth justice court.*

Although the *Criminal Code* and the *Youth Criminal Justice Act* give legislative authority for alternative measures/extrajudicial sanctions, it is the responsibility of the provinces to develop and regulate these programs. The development of community-based alternative measures/extrajudicial sanctions programs are authorized by Ministerial Orders and provincial policies.

### Section 3: Provincial and Federal Policies

This section includes the Ministerial Orders and policies that authorize the use of alternative measures/extrajudicial sanctions in Saskatchewan. These include the Saskatchewan Ministry of Justice Adult Alternative Measures Policy (2011), the Saskatchewan Ministry of Justice Young Offender – Extrajudicial Sanctions Policy (2011), the Saskatchewan Ministry of Environment Enforcement Bulletin – Alternative Measures/Extrajudicial Sanctions Policy (2012) and the federal Alternative and Extrajudicial Measures Policy.

The Saskatchewan Ministry of Justice Adult Alternative Measures Policy (2011) applies to alternative measures programs for adults, while the Saskatchewan Ministry of Justice – Extrajudicial Sanctions Policy (2011) applies to extrajudicial sanctions programs for youths.

The Saskatchewan Ministry of Environment Enforcement Bulletin – Alternative Measures/Extrajudicial Sanctions Policy (2012) guides conservation officers who are considering referring an accused person to an alternative measures/extrajudicial sanctions program.

The federal Alternative and Extrajudicial Measures Policy guides the actions of federal prosecutors.

**Section 3-1: Saskatchewan Ministry of Justice  
Adult Alternative Measures Policy (2011)**

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**Section 3-1: Saskatchewan Ministry of Justice Adult Alternative  
Measures Policy (2011)**

Minister of Justice  
and Attorney General



SASKATCHEWAN

Legislative Building  
Regina, Saskatchewan S4S 0B3

**MINISTER'S ORDER**

Section 717 of the *Criminal Code* (Canada) provides, in part, as follows:

717 (1) Alternative measures may be used to deal with a person alleged to have committed an offence only if it is not inconsistent with the protection of society and the following conditions are met:

- (a) the measures are part of a program of alternative measures authorized by the Attorney General or the Attorney General's delegate or authorized by a person, or a person within a class of persons, designated by the Lieutenant Governor in Council of a province;
- (b) the person who is considering whether to use the measures is satisfied that they would be appropriate, having regard to the needs of the person alleged to have committed the offence and the interests of society and of the victim;
- (c) the person, having been informed of the alternative measures, fully and freely consents to participate therein;
- (d) the person has, before consenting to participate in the alternative measures, been advised of the right to be represented by counsel;
- (e) the person accepts responsibility for the act or omission that forms the basis of the offence that the person is alleged to have committed;
- (f) there is, in the opinion of the Attorney General or the Attorney General's agent, sufficient evidence to proceed with the prosecution of the offence; and
- (g) the prosecution of the offence is not in any way barred at law.

I, Don Morgan, Q.C., Minister of Justice and Attorney General for the Province of Saskatchewan, pursuant to section 717 of the *Criminal Code* (Canada), do hereby authorize adult alternative measures programs which are consistent with the program criteria attached hereto as Schedule "A".

I do hereby further authorize the Deputy Minister of Justice and Deputy Attorney General for the Province of Saskatchewan as my delegate for the purpose of amending the program criteria set out in the attached Schedule "A" including with respect to its application to classes of cases or specific cases; for setting operating standards for adult alternative measures programs consistent with the program description authorized above; and for approving individual adult alternative measures programs.

Dated at the City of Regina, Saskatchewan, the 16th day of August, 2011.

A handwritten signature in black ink, appearing to read 'DM', written over a horizontal line.

Minister of Justice  
and Attorney General

**Section 3-1: Saskatchewan Ministry of Justice  
Adult Alternative Measures Policy (2011)**

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**1. Purpose**

Alternative measures programs provide adults who are accused of committing a *Criminal Code* offence an opportunity to make reparation to victims and their community. In addition to being structured and publicly accountable, these programs are sensitive to cultural diversity where appropriate.

Alternative measures programs also draw on the values, principles and processes of restorative justice. For the purpose of this policy, restorative justice is: “An approach to justice that focuses on addressing the harm caused by crime while holding the offender responsible for his or her actions, by providing an opportunity for the parties directly affected by crime – victim(s), offender and community – to identify and address their needs in the aftermath of a crime.” It supports healing, reintegration, the prevention of future harm, and reparation, if possible.

**2. Authority**

- 2.1** In accordance with section 717 of the *Criminal Code*, the Attorney General for Saskatchewan authorizes the implementation of alternative measures programs in Saskatchewan through a Ministerial Order.

**3. The Referral to Alternative Measures**

- 3.1** A referral to an alternative measures program can be made by the police prior to a formal charge being laid or by a Crown prosecutor after a charge is laid. If the police officer wishes to refer a matter to alternative measures, prior approval for the referral must be given by a Crown prosecutor.
- 3.2** In either case, the eligibility criteria must be met and the offence must not be expressly excluded by the criteria set out in this policy.

**4. Eligibility Criteria**

**Statutory Conditions**

For referral to an alternative measures program:

- (1) Either during or following contact with the police, the offender must accept responsibility for the act or omission that forms the basis of the offence that the person is alleged to have committed;

**Section 3-1: Saskatchewan Ministry of Justice  
Adult Alternative Measures Policy (2011)**

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- (2) The prosecution of the offence is not in any way barred by law; and
- (3) There must, in the opinion of the Crown, be sufficient evidence to proceed with the prosecution of the offence.

**Policy Conditions**

In general the offender:

- (1) Must not have been diverted more than twice in the last two years;
- (2) Must not have failed diversion in the previous six months; and
- (3) Must not have a substantial criminal record for similar offences or similar recent convictions.

While referrals must be approved by the Crown prosecutor, suggestions about potential referrals can come from a variety of sources, including police, the staff of alternative measures and community justice agencies, Courtworkers, probation officers, defence attorneys, and other individuals.

Victim participation is encouraged, but not a prerequisite for program eligibility except in victim-offender mediation, community justice forums, community justice conferences or family group conferences. Victim participation is voluntary.

**5. Exclusionary Criteria**

- 5.1** The offender refuses to participate.
- 5.2** The offence or the offender is excluded by one or more of the eligibility criteria.
- 5.3** The Crown, in its discretion, does not think that the offender or offence is suitable for the alternative measures program.
- 5.4** The agency administering the program does not think the offender or the offence is suitable for the alternative measures program.
- 5.5** The following offences are not eligible for alternative measures:
  - (1) Offences involving the use of or threatened use of a weapon where the Crown proceeds by Indictment.
  - (2) Any offence involving the use of or threatened use of bladed weapons, firearms, or any restricted or prohibited weapons.

**Section 3-1: Saskatchewan Ministry of Justice  
Adult Alternative Measures Policy (2011)**

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- (3) Offences involving violence against any person where the Crown proceeds by Indictment.
- (4) Offences involving sexual violence against children or the sexual exploitation of children (including sexual assault, sexual interference, luring, child pornography and procurement).
- (5) Offences involving spousal/partner violence.

For the purpose of this policy, spousal/partner violence is defined as:

“acts or threats of physical or sexual assault or criminal harassment committed against one person by another person with whom they presently or previously have had an intimate relationship, regardless of whether they are legally married or living together at the time of the assault or threat.”

- (6) Offences involving a sexual assault where the Crown proceeds by Indictment.
- (7) Perjury.
- (8) *Criminal Code* driving offences in which drugs or alcohol are a contributing factor or in which the offender was driving while disqualified.
- (9) Federal offences other than *Criminal Code* offences. (The availability of alternative measures regarding these offences is determined by the federal Department of Justice.)

**6. Crown Discretion**

Crown prosecutors have discretion about whether to refer cases to alternative measures programs. Crown prosecutors are encouraged to refer appropriate cases except where the offence is expressly excluded from eligibility. In the exercise of this discretion, some of the factors to be considered by the Crown include:

- The seriousness or triviality of the alleged offence;
- Significant mitigating or aggravating circumstances;
- The age, intelligence, and physical or mental health or infirmity of the persons involved;
- The accused person’s circumstances and needs;
- The victim’s attitude and interests;

### **Section 3-1: Saskatchewan Ministry of Justice Adult Alternative Measures Policy (2011)**

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- The availability and appropriateness of alternatives to conventional prosecution;
- The prosecution's likely effect on public order and morale or on public confidence in the administration of justice;
- The prevalence of the alleged offence in the community, whether the alleged offence is of considerable public concern, and the need for general and specific deterrence;
- Whether the consequences of a prosecution or conviction would be disproportionately harsh or oppressive;
- Whether it would otherwise be in the public interest to refer the matter to alternative measures.

#### **7. Processes for Resolving Cases**

Upon receiving the referral, mediators draw upon their training, experience, knowledge about the referral, and the views of the individuals involved to determine the appropriate type of process. When appropriate, the process may be adapted to suit the circumstances of the case and the individuals.

Some of the processes that are commonly used to resolve alternative measures referrals include:

- Victim-offender mediation (see section 9);
- Community justice forum (see section 9);
- Community justice conference (see section 9);
- Family group conference (see section 9);
- Accountability conference (this is a process in which the accused person meets with a facilitator to discuss the causes and consequences of their behavior and how to address the harm caused);
- Referral to a specialized program such as life skills, crime prevention, restitution or Stoplift;
- Referral for counseling or treatment programs (such as drug/alcohol, health, mental health, or programs offered by social service agencies);
- Participation in Aboriginal cultural activities; or
- Other processes that are reasonable in light of the needs and interests of the persons involved and the availability of programs or resources within the agency administering the program and the community.

**Section 3-1: Saskatchewan Ministry of Justice  
Adult Alternative Measures Policy (2011)**

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**8. Case Outcomes**

Alternative measures programs can enable the persons involved to develop creative solutions that meet their needs and address the harm caused by the offence within the framework of the law. While there are many possible outcomes of alternative measures referrals, some common ones include:

- An apology;
- Restitution or compensation in cash or kind;
- Donation to a charity;
- Personal service work for the victim;
- Community service work;
- Participation in a specialized program such as counseling sessions;
- Participation in public education activities, such as writing essays or making presentations in schools;
- Other agreements that are reasonable in light of the needs and interests of the persons involved, the seriousness of the offence, and the circumstances of the case; or
- Some combination of the above.

**9. Victim-offender Mediation, Community Justice Forums, Community Justice Conferences and Family Group Conferences**

In addition to meeting the alternative measures program guidelines, agencies that offer victim-offender mediation, community justice forums, community justice conferences or family group conferences must demonstrate the following:

**9.1 Purpose and Definitions**

Mediators have discretion about whether victim-offender mediation, community justice forums, family group conferences or community justice conferences would be suitable.

The purpose of these processes is to provide an opportunity for those involved in the incident to discuss what happened, how it affected them, what they need as a result of the incident, and what can be done to address the harm caused.

*Victim-offender mediation* is a type of process in which the victim and the accused person meet with a trained facilitator.

## **Section 3-1: Saskatchewan Ministry of Justice Adult Alternative Measures Policy (2011)**

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A *community justice forum* is a type of process in which the victim(s), the accused person(s), and other community members who are relevant to the case meet with a trained facilitator. The facilitator uses a script during the meeting.

A *community justice conference* is a type of process that can occur with adult accused persons. The victim(s) and the accused person(s) meet with a trained facilitator and additional professionals and community members who are relevant to the case.

A *family group conference* is a type of process that can occur when the accused is a young person. The victim(s) and the accused person(s) meet with a trained facilitator and additional professionals and community members who are relevant to the case.

In regards to community justice forums, community justice conferences and family group conferences, other relevant community members could include friends and family members of the victim or the accused, Elders, pastors, community justice committee members, and others who can provide support to the victim and the accused or who were affected by or involved in the incident.

### **9.2 Training**

Mediators must have a combination of theoretical and practical training specific to criminal justice mediation as required by Dispute Resolution Office, Ministry of Justice.

### **9.3 Victim Participation**

Victim participation is a prerequisite for eligibility in victim-offender mediation, community justice forums, community justice conferences or family group conferences.

Victim participation is strictly voluntary. Refusal by the victim to participate or to allow for a surrogate excludes victim-offender mediation, community justice forums, community justice conferences or family group conferences as an option for the accused.

Special consideration is given in favor of cases where there is an ongoing relationship between the victim and the accused, recognizing there is an enhanced likelihood for a positive outcome and reduction of future incidents.

**Section 3-2: Saskatchewan Ministry of Justice Young Offender –  
Extrajudicial Sanctions Policy (2011)**

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**Section 3-2: Saskatchewan Ministry of Justice Young  
Offender – Extrajudicial Sanctions Policy (2011)**

Minister of Justice  
and Attorney General



Legislative Building  
Regina, Saskatchewan S4S 0B3

**MINISTER'S ORDER**

Section 10 of the *Youth Criminal Justice Act* (Canada) provides in part, as follows:

10 (1) An extrajudicial sanction may be used to deal with a young person alleged to have committed an offence only if the young person cannot be adequately dealt with by a warning, caution or referral mentioned in section 6, 7, or 8 because of the seriousness of the offence, the nature and number of previous offences committed by the young person or any other aggravating circumstances.

10 (2) An extrajudicial sanction may be used only if:

- (a) it is part of sanctions that may be authorized by the Attorney General or authorized by a person, or a member of a class of persons, designated by the Lieutenant Governor in Council of the province;
- (b) the person who is considering whether to use the extrajudicial sanction is satisfied that it would be appropriate, having regard to the needs of the young person and the interests of society;
- (c) the young person, having been informed of the extrajudicial sanction, fully and freely consents to be subject to it;
- (d) the young person has, before consenting to be subject to the extrajudicial sanction, been advised of his or her right to be represented by counsel and been given a reasonable opportunity to consult with counsel;
- (e) the young person accepts responsibility for the act or omission that forms the basis of the offence that he or she is alleged to have committed;
- (f) there is, in the opinion of the Attorney General, sufficient evidence to proceed with the prosecution of the offence; and
- (g) the prosecution of the offence is not in any way barred at law.

I, Don Morgan, Q.C., Minister of Justice and Attorney General for the Province of Saskatchewan, pursuant to section 10 of the *Youth Criminal Justice Act* (Canada), do hereby authorize youth extrajudicial sanctions programs which are consistent with the program criteria attached hereto as Schedule "A".

I do hereby further authorize the Deputy Minister of Justice and Deputy Attorney General for the Province of Saskatchewan as my delegate for the purpose of amending the program criteria as set out in the attached Schedule "A" including with respect to its application to classes of cases or specific cases; for setting general program standards for youth extrajudicial sanctions programs consistent with the program description authorized above; and for approving individual youth extrajudicial sanction programs.

Dated at the City of Regina, Saskatchewan, the 16<sup>th</sup> day of August , 2011.

A handwritten signature in black ink, appearing to be "DM", written over a horizontal line.

Minister of Justice  
and Attorney General

## Section 3-2: Saskatchewan Ministry of Justice Young Offender – Extrajudicial Sanctions Policy (2011)

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### 1. Purpose

Extrajudicial sanctions provide an alternative to the traditional court process for young persons facing charges for offences set out in the *Criminal Code*.

These programs offer youth who are accused of committing a *Criminal Code* offence an opportunity to make reparation to victims and their community. In addition to being structured and publicly accountable, these programs are sensitive to cultural diversity where appropriate.

Extrajudicial sanctions programs are supported by the principles of the *Youth Criminal Justice Act* respecting extrajudicial measures, which state:

- Extrajudicial measures are often the most appropriate and effective way to address youth crime; and
- Extrajudicial measures allow for effective and timely interventions focused on correcting offending behavior.

Extrajudicial sanctions programs also draw on the values, principles and processes of restorative justice. For the purpose of this policy, restorative justice is: “An approach to justice that focuses on addressing the harm caused by crime while holding the offender responsible for his or her actions, by providing an opportunity for the parties directly affected by crime – victim(s), offender and community – to identify and address their needs in the aftermath of a crime.” It supports healing, reintegration, the prevention of future harm, and reparation, if possible.

### 2. Authority

- 2.1 In accordance with section 10 of the *Youth Criminal Justice Act* the Attorney General for Saskatchewan authorizes the implementation of extrajudicial sanctions programs in Saskatchewan through a Ministerial Order.
- 2.2 Extrajudicial sanctions programs shall be consistent with the Saskatchewan Youth Services Model-Reducing Reliance on the Youth Justice System.

## **Section 3-2: Saskatchewan Ministry of Justice Young Offender – Extrajudicial Sanctions Policy (2011)**

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### **3. The Referral to Extrajudicial Sanctions**

- 3.1** A referral to an extrajudicial sanctions program can be made by the police prior to a formal charge being laid or by a Crown prosecutor after a charge is laid. If the police officer wishes to refer a matter to extrajudicial sanctions, prior approval for the referral must be given by a Crown prosecutor.
- 3.2** In either case, the eligibility criteria must be met and the offence must not be expressly excluded by the criteria set out in this policy.

### **4. Eligibility Criteria**

#### **Statutory Conditions**

For referral to an extrajudicial sanctions program:

- (1) Either during or following contact with the police, the young person must accept responsibility for the act or omission that forms the basis of the offence that the young person is alleged to have committed;
- (2) The young person chooses to participate, having been advised of the right to counsel and having been given a reasonable opportunity to consult with counsel;
- (3) The prosecution of the offence is not in any way barred by law; and
- (4) There must, in the opinion of the Crown, be sufficient evidence to proceed with the prosecution of the offence.

#### **Policy Conditions**

In general the young person:

- (1) Must not have a significant history of failing to complete previous extrajudicial sanctions, or other significant outstanding charges that call into question the appropriateness of extrajudicial sanctions; and
- (2) Must not have a substantial criminal record for similar offences or similar recent convictions.

While referrals must be approved by the Crown prosecutor, suggestions about potential referrals can come from a variety of sources, including police, the staff of alternative measures/extrajudicial sanctions or community justice agencies, Courtworkers, probation officers, defence attorneys, and other individuals.

## **Section 3-2: Saskatchewan Ministry of Justice Young Offender – Extrajudicial Sanctions Policy (2011)**

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Victim participation is encouraged, but not a prerequisite for program eligibility except in victim-offender mediation, community justice forums, community justice conferences or family group conferences. Victim participation is voluntary.

### **5. Exclusionary Criteria**

- 5.1** The young person is excluded by one or more of the eligibility criteria.
- 5.2** The Crown, in its discretion, does not think that the young person or offence is suitable for the extrajudicial sanctions program.
- 5.3** The agency administering the program does not think the young person or the offence is suitable for the extrajudicial sanctions program.
- 5.4** The following offences are not eligible for extrajudicial sanctions:
  - (1) Offences involving the use of or threatened use of a weapon where the Crown proceeds by Indictment.
  - (2) Any offence involving the use of or threatened use of bladed weapons, firearms, or any restricted or prohibited weapons.
  - (3) Offences involving violence against any person where the Crown proceeds by Indictment.
  - (4) Offences involving sexual violence against children or the sexual exploitation of children (including sexual assault, sexual interference, luring, child pornography and procurement).
  - (5) Offences involving spousal/partner violence

For the purpose of this policy, spousal/partner violence is defined as:

“acts or threats of physical or sexual assault or criminal harassment committed against one person by another person with whom they presently or previously have had an intimate relationship, regardless of whether they are legally married or living together at the time of the assault or threat.”

- (6) Offences involving a sexual assault where the Crown proceeds by Indictment.

## Section 3-2: Saskatchewan Ministry of Justice Young Offender – Extrajudicial Sanctions Policy (2011)

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(7) Perjury.

(8) *Criminal Code* driving offences in which drugs or alcohol are a contributing factor or in which the offender was driving while disqualified.

(9) Federal offences other than *Criminal Code* offences. (The availability of extrajudicial sanctions regarding these offences is determined by the federal Department of Justice.)

### 6. Crown Discretion

Crown prosecutors have discretion about whether to refer cases to extrajudicial sanctions programs. Crown prosecutors are encouraged to refer appropriate cases except where the offence is expressly excluded from eligibility. In the exercise of this discretion, some of the factors to be considered by the Crown include:

- The seriousness or triviality of the alleged offence;
- Significant mitigating or aggravating circumstances;
- The age, intelligence, and physical or mental health or infirmity of the persons involved;
- The accused person's circumstances and needs;
- The victim's attitude and interests;
- The availability and appropriateness of alternatives to conventional prosecution;
- The prosecution's likely effect on public order and morale or on public confidence in the administration of justice;
- The prevalence of the alleged offence in the community and whether the alleged offence is of considerable public concern;
- Whether the consequences of a prosecution or conviction would be disproportionately harsh or oppressive;
- Whether it would otherwise be in the public interest to refer the matter to extrajudicial sanctions.

### 7. Processes for Resolving Cases

Upon receiving the referral, mediators draw upon their training, experience, knowledge about the referral, and the views of the individuals involved to determine the appropriate type of process. When appropriate, the process may be adapted to suit the circumstances of the case and the individuals.

## **Section 3-2: Saskatchewan Ministry of Justice Young Offender – Extrajudicial Sanctions Policy (2011)**

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Some of the processes that are commonly used to resolve extrajudicial sanctions referrals include:

- Victim-offender mediation (see section 9);
- Community justice forum (see section 9);
- Community justice conference (see section 9);
- Family group conference (see section 9);
- Accountability conference (this is a process in which the accused person meets with a facilitator to discuss the causes and consequences of their behavior and how to address the harm caused);
- Referral to a specialized program such as life skills, crime prevention, restitution or Stoplift;
- Referral for counseling or treatment programs (such as drug/alcohol, health, mental health, or programs offered by social service agencies);
- Participation in Aboriginal cultural activities; or
- Other processes that are reasonable in light of the needs and interests of the persons involved and the availability of programs or resources within the agency administering the program and the community.

### **8. Case Outcomes**

Extrajudicial sanctions programs can enable the persons involved to develop creative solutions that meet their needs and address the harm caused by the offence within the framework of the law. While there are many possible outcomes of extrajudicial sanctions referrals, some common ones include:

- An apology;
- Restitution or compensation in cash or kind;
- Donation to a charity;
- Personal service work for the victim;
- Community service work;
- Participation in a specialized program or counseling sessions;
- Participation in public education activities, such as writing essays or making presentations in schools;
- Other agreements that are reasonable in light of the needs and interests of the persons involved, the seriousness of the offence, and the circumstances of the case; or
- Some combination of the above.

## Section 3-2: Saskatchewan Ministry of Justice Young Offender – Extrajudicial Sanctions Policy (2011)

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### 9. Victim-offender Mediation, Community Justice Forums, Community Justice Conferences and Family Group Conferences

In addition to meeting the extrajudicial sanctions program guidelines, agencies that offer victim-offender mediation, community justice forums, community justice conferences and family group conferences must demonstrate the following:

#### 9.1 Purpose and Definitions

Mediators have discretion about whether victim-offender mediation, community justice forums, family group conferences or community justice conferences would be suitable.

The purpose of these processes is to provide an opportunity for those involved in the incident to discuss what happened, how it affected them, what they need as a result of the incident, and what can be done to address the harm caused.

*Victim-offender mediation* is a type of process in which the victim and the accused person meet with a trained facilitator.

A *community justice forum* is a type of process in which the victim(s), the accused person(s), and other community members who are relevant to the case meet with a trained facilitator. The facilitator uses a script during the meeting.

A *community justice conference* is a type of process that can occur with adult accused persons. The victim(s) and the accused person(s) meet with a trained facilitator and additional professionals and community members who are relevant to the case.

A *family group conference* is a type of process that can occur when the accused is a young person. The victim(s) and the accused person(s) meet with a trained facilitator and additional professionals and community members who are relevant to the case.

In regards to community justice forums, community justice conferences and family group conferences, other relevant community members could include friends and family members of the victim or the accused, Elders, pastors, community justice committee members, and others who can provide support to the victim and the accused or who were affected by or involved in the incident.

## **Section 3-2: Saskatchewan Ministry of Justice Young Offender – Extrajudicial Sanctions Policy (2011)**

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### **9.2 Training**

Mediators must have a combination of theoretical and practical training specific to criminal justice mediation as required by Dispute Resolution Office, Ministry of Justice.

### **9.3 Victim Participation**

Victim participation is a prerequisite for eligibility in victim-offender mediation, community justice forums, community justice conferences or family group conferences.

Victim participation is strictly voluntary. Refusal by the victim to participate or to allow for a surrogate excludes victim-offender mediation, community justice forums, community justice conferences or family group conferences as an option for the accused.

Special consideration is given in favor of cases where there is an ongoing relationship between the victim and the accused, recognizing there is an enhanced likelihood for a positive outcome and reduction of future incidents.

**Section 3-3: Saskatchewan Ministry of Environment  
Enforcement Bulletin – Alternative Measures/Extrajudicial  
Sanctions Policy (2012)**

**I. Authority**

- *Youth Criminal Justice Act* (Canada), section 2 and section 10
- *Criminal Code* of Canada, Section 717
- Saskatchewan Minister of Justice and Attorney General Order
- Federal Minister of Justice Order dated August 1997

**II. Purpose**

To provide an alternative to traditional prosecution and/or court processes for offenders facing charges laid by conservation officers, or to “extrajudicial measures” if the offender is a “young person.”

**III. General Application**

It is the duty of the Attorney General’s agent (Crown Prosecutor) to determine the appropriateness of alternative measures/extrajudicial sanctions. Giving consideration to an offender’s age, character, history and rehabilitative prospects, a conservation officer may recommend that it would be appropriate to use measures alternative to traditional prosecution. These measures provide offenders an opportunity to effect reparation to victims and/or the community within structured, publicly accountable forums.

The alternative measures/extrajudicial sanctions program is not intended to be available for every offender and every offence. Rather, it is an acknowledgement that in some cases, because of the nature and circumstances of the offence and the offender, the public interest would be better served by a resolution outside of the traditional criminal process. The objective of alternative measures/extrajudicial sanctions programs is to have the offender accept responsibility for the offence without going through the formal court process. It is essential, therefore, that the offender takes responsibility for his actions.

**IV. Procedure**

1. Investigate the offence following established investigative procedures. If possible, obtain a warned statement from the accused. Do not advise the accused that you are considering alternative measures/extrajudicial sanctions, as this may jeopardize the admissibility of a warned statement.

**Section 3-3: Saskatchewan Ministry of Environment Enforcement Bulletin  
Alternative Measures/Extrajudicial Sanctions Policy (2012)**

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2. When the investigation is complete and there is sufficient evidence to support a charge, examine the eligibility criteria to determine whether the accused qualifies for the alternative measures/extrajudicial sanctions program. The program is generally aimed at offenders without substantial records of resource or environmental offences. Both the circumstances of the offender and the offence should be considered.

**2.1 The Offender**

- Acknowledgement of responsibility for behavior;
- No substantial record or recent charges of resource or environment offences;
- No failed diversion in the last 6 months; or
- Must not have been diverted more than twice in the last two years.

**2.2 The Offence**

Existence of any of the following circumstances will preclude diversion:

- All hunting offences where alcohol was a contributing factor;
- Where the conduct demonstrated sophisticated planning (for example, the offence was part of an ongoing illegal enterprise):
- Offences involving the killing, possessing, capturing, injuring or trafficking in wild species at risk; or
- Where the victim (if applicable) does not consent to alternative measures.

In addition to the factors outlined above, the case must satisfy the eligibility criteria established under the Adult Alternative Measures Policy or, for federal offences other than *Criminal Code*, the Federal Alternative and Extrajudicial Measures Policy.

3. Interview the accused and advise him that the Crown is considering alternative measures/extrajudicial sanctions. Explain the program, outlining possible diversion options available to them and that further approvals will be required to proceed.
4. The accused must fully and freely consent to participate in the alternative measures/extrajudicial sanctions program. Before consenting, he must be advised of the right to be represented by counsel.
5. If the accused consents to participate, complete the Allegation and Agreement to Refer to Alternative Measures/Extrajudicial Sanctions form (EB10-B-2006). The investigating officer also completes the Alternative Measures/Extrajudicial Sanctions Request (EB10-D-2006) form and forwards both to the Compliance Area Specialist (CAS). Included on the

### **Section 3-3: Saskatchewan Ministry of Environment Enforcement Bulletin Alternative Measures/Extrajudicial Sanctions Policy (2012)**

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Request form is a recommendation of how to proceed. The CAS completes and forwards the form to the designated area Alternative Measures/Extrajudicial Sanctions Coordinator or Service Provider. The CAS, Alternative Measures/Extrajudicial Sanctions Coordinator and the investigating officer will determine by consensus the appropriate diversion option. Options include a community justice committee, Dispute Resolution Office (Saskatchewan Ministry of Justice), an Alternative Measures/Extrajudicial Sanctions Provider or simply an alternative measures/extrajudicial sanctions agreement completed by the investigating officer and the offender.

6. Upon receiving signed approval from the Prosecutor, the case may proceed to alternative measures/extrajudicial sanctions. The following diversion options may be available and should be considered:
  - Restitution/compensation in cash or in kind;
  - Personal service work for the victim;
  - Community service work (resource or environment related);
  - Donation to a charity (i.e. SaskTip or other suitable natural resource related charity);
  - Referral to a specialized program (i.e. SAFE);
  - Aboriginal cultural activities;
  - Mediation;
  - Other reasonable agreements; and
  - A combination of the above.
  
7. The investigating conservation officer is responsible for concluding the file including submission of all applicable forms. Alternative Measures Agreement (EB10-A-2012), Allegation and Agreement to Refer to Alternative Measures/Extrajudicial Sanctions (EB10-B-2006) and Report to Crown and Others – Alternative Measures (EB10-C-2012) should be completed and copies sent to the Enforcement Center. The Justice tracking form (from Alternative Measures/Extrajudicial Sanctions Coordinator) will also be completed and returned to the original Alternative Measures/Extrajudicial Sanctions Coordinator or Service Provider where necessary. In all instances where charges have been laid in a case, and the Alternative Measures/Extrajudicial Sanctions Request (EB10-D-2012) have been completed successfully, a copy of the Report to Crown and others (EB10-C-2012) should be filed with the court the day the charge(s) are withdrawn.
  
8. If the alternative measures/extrajudicial sanctions process is unsuccessful, depending upon advice from the Crown Prosecutor, the case will normally proceed through the court system.

## Section 3-4: Federal Alternative and Extrajudicial Measures Policy<sup>1</sup>

### 14 ALTERNATIVE AND EXTRAJUDICIAL MEASURES

#### 14.1 Introduction

Not every individual alleged to have committed an offence need be prosecuted. Section 717 of the *Criminal Code* recognizes that where it is not inconsistent with the protection of society, Crown counsel can exercise their discretion to deal with the individual by “alternative measures,” (or “diversion,” as it is sometimes known). In such circumstances, Crown counsel refers the offender to an individual or agency with the intention of reaching an agreement to deal with the offence outside the judicial process. In appropriate cases, alternative measures may provide greater benefit to the offender, the victim, and society than can the formal criminal process. Indeed, the fundamental principle underlying alternative measures is that criminal proceedings should be used with restraint and only when other less intrusive measures have failed or would be inappropriate. This allows the courts to devote their resources to addressing more serious crime.

The object of these alternative measures programs for adults is to have the offender accept responsibility for the offence without going to trial. Participation in an alternative measures program is voluntary; the offender cannot be forced into it. If the offender complies with the diversion agreement, the Crown relinquishes its right to prosecute the offender for the offence.

Diversion can occur before or after a charge is laid<sup>2</sup>. This policy generally applies after a charge has been laid, except in provinces where pre-charge screening takes place, where it will apply both pre-charge and post-charge. The policy applies to both adults and young offenders.

While many of the principles in this alternative measures policy are relevant to both adults and young persons, important differences exist between alternative measures for adults and extrajudicial measures for young persons under the *Youth Criminal Justice Act*. Adult alternative measures do not apply to young

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<sup>1</sup> Please note that this document does not contain the Federal Alternative and Extrajudicial Measures Policy Appendices. For this material, please see Public Prosecution Services of Canada website at <http://www.ppsc.gc.ca/eng/fps-sfp/fpd/ch14.html>

<sup>2</sup> Investigative agencies also “divert” alleged offenders by exercising their discretion not to lay charges. This policy deals only with situations in which Crown counsel play a role in the diversion decision.

## Section 3-4: Federal Alternative and Extrajudicial Measures Policy

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persons. To distinguish between the options available to adults from those available to young persons, the terms “alternative measures” and “diversion” are used throughout this policy to refer to adult offenders; “extrajudicial measures” is used in association with young persons.

### 14.2 Statement of Alternative Measures Policy

#### 14.2.1 General Principles

Diversion is not intended to be available for every offender and every offence. Rather, it is an acknowledgement that in some cases, because of the nature and circumstances of the offence and the offender, the public interest would be better served by a resolution outside of the traditional criminal process. Generally, it will be most suitable for younger adult offenders and those with no criminal record, who have committed minor offences.

#### 14.2.2 Preconditions to Diversion

Where Crown counsel is considering exercising the discretion to divert an alleged offender, Crown counsel must be satisfied that the following preconditions have been met:

- The case meets the criteria in the “Decision to Prosecute” policy<sup>3</sup> (ss. 717(1)(f) and (g), *Criminal Code*);
- The offender has been advised of his or her right to counsel and is aware that he or she does not have to accept diversion (ss. 717(1)(c) and (d), *Criminal Code*);
- The offender is willing to acknowledge responsibility for his or her actions (s. 717(1)(e), *Criminal Code*);
- A program described in s. 717(1)(a) of the *Criminal Code* exists for which this particular offender would be eligible;
- Appropriate consultation has been undertaken, where necessary, with victims, investigating authorities<sup>4</sup> or other interested parties, and diversion would be in the interests of society, the offender and the victim (s. 717(1)(b), *Criminal Code*); and
- Crown counsel should note that the statutory pre-conditions to alternative measures for adults in s. 717 of the *Criminal Code* are virtually identical to the pre-conditions for the use of extrajudicial sanctions for young persons under s. 10(2) of the *Youth Criminal Justice Act* (YCJA).

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<sup>3</sup> Part V, Chapter 15.

<sup>4</sup> Where government departments have compliance programs for regulatory offences, diversion will usually be considered within the context of the program. Crown counsel should bear in mind that many offenders referred for prosecution for having committed regulatory offences will have already been considered inappropriate for participation in a compliance program.

### 14.3 Guidelines for Application of Policy

#### 14.3.1 The Circumstances of the Offender

The policy is aimed generally at offenders who have not violated the criminal law previously, and are unlikely to do so in the near future. Crown counsel should consider the following factors in assessing an offender's suitability:

- Whether the offender has previously violated the criminal law (including convictions, discharges or diversions) and if so, the date and nature of the violations;
- The offender's remorse (including for example, whether the offender has agreed to fairly compensate any victim(s));
- Whether the offender poses a risk to the community; and
- Whether the offender is facing other charges.

#### 14.3.2 The Nature of the Offence

As indicated above, the policy is directed at “minor” offences. “Minor” offences include offences that are objectively less serious, or potentially serious offences committed in a less serious way. The following factors are relevant in determining seriousness:

- Whether the offence is summary or indictable;
- Whether a minimum punishment is prescribed;
- Whether the offence usually results in a sentence exceeding three months imprisonment (“imprisonment” includes a conditional sentence of imprisonment served in the community);
- The potential or actual harm to the victims(s) or society in general.

Crown counsel must also ascertain whether the offence is the subject of other policies, which would affect the decision to divert, eg. “Spousal Violence”<sup>5</sup>, “Aboriginal Law Issues”<sup>6</sup>, “Impaired Driving Cases”<sup>7</sup>, “Firearms and Other Offensive Weapons”<sup>8</sup>. These policies should also be considered regarding the use of extrajudicial measures under the YCJA.

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<sup>5</sup> Part VI, Chapter 28.

<sup>6</sup> Part VI, Chapter 25.

<sup>7</sup> Part VI, Chapter 27.

<sup>8</sup> Part VI, Chapter 31.

**14.3.3 The Circumstances of the Offence**

Existence of any of the following circumstances will preclude diversion:

- The offence involved the use of, or threatened use of, violence reasonably likely to result in harm that is more than merely transient or trifling in nature;
- A weapon was used or threatened to be used in the commission of the offence;
- The offence affected the sexual integrity of a person;
- The offence had a serious impact upon the victim (physical, psychological or financial);
- The conduct demonstrated sophisticated planning (for example, the offence was part of an ongoing criminal enterprise);
- A person trafficked in a controlled substance or possessed the substance for the purposes of trafficking, in or near a school, on or near school grounds or in or near any public place usually frequented by persons under the age of 18 years;
- A person trafficked in a controlled substance, or possessed the substance for the purpose of trafficking, to a person under the age of 18 years;
- A person used a person under the age of 18 years to commit a drug offence; and
- The motivation for committing a drug offence was primarily profit<sup>9</sup>.

**14.4 Successful Completion of the Alternative Measures Program**

If the offender successfully completes the diversion program, the criminal charge shall be withdrawn or stayed and not re-instituted. If the criminal charge was already withdrawn or stayed before the offender was diverted, the charge shall not be re-instituted. If charges were not laid before the offender was diverted, Crown counsel shall not institute or proceed with those charges.

**14.5 Failure to Complete the Alternative Measures Program**

If the offender fails to complete the program, criminal proceedings may be instituted or re-instituted. However, before doing so, Crown counsel should determine why the program was not completed and assess the appropriateness of instituting or re-instituting proceedings in light of those facts. The decision to institute or re-institute proceedings will require the authorization of the FPS Director or Regional Director.

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<sup>9</sup> In unusual circumstances, diversion may be considered despite the presence of this factor. However, authorization must be obtained from the Federal Prosecution Service Director or Regional Director.

## **14.6 Extrajudicial Measures Under the YCJA**

### **14.6.1 Introduction**

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

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

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

### **14.6.2 Extrajudicial Measures: Options for Crown Counsel**

If a pre-charge screening program is in place in the jurisdiction, Crown counsel can advise the police that they can exercise one of the options available to them under s. 6 of the Act: take no further action; issue a warning or police caution; refer the young person to a community program or agency, with the consent of the young person; or refer the young person to an extrajudicial sanctions program.

If a pre-charge screening program is not in place, Crown counsel have the following options once the police forward the file to the Crown:

**14.6.2.1 Withdrawal of the Charge**

Crown counsel may determine that, although there is sufficient evidence to proceed with a prosecution of the charge, withdrawal of the charge is appropriate. It may be clear, for example, that after considering the principles and objectives in sections 3, 4 and 5 of the Act, and the factors related to the seriousness of the offence, discussed below, the process of apprehension, detention and charging has been a sufficient response from the youth criminal justice system, and no further action is required. Crown counsel should also refer in this regard to the factors listed in the Decision to Prosecute policy.<sup>10</sup>

**14.6.2.2 Referral to a Community Program or Agency**

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

**14.6.2.3 Crown Caution**

Section 8 of the Act states that the Attorney General may establish a program authorizing prosecutors to administer cautions to young persons instead of starting or continuing judicial proceedings under the YCJA. The Attorney General of Canada formally established a program of Crown cautions for young persons in April 2003. The Attorney General's order states that federal prosecutors are to consider the use of Crown cautions for young persons in relation to minor offences.

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

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<sup>10</sup> Part V, Chapter 15.

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While a Crown caution can be provided verbally to the young person by the prosecutor, a Crown caution letter should also be provided to the young person. A notice to the parent or guardian that the young person has been cautioned, as well as a copy of the caution letter, should also be provided to the parent or guardian of the young person wherever possible. Once Crown counsel has confirmed that the young person has received the caution, and has documented the file accordingly, the charge or charges should be withdrawn or stayed, depending on the circumstances.

### **14.6.2.4 Extrajudicial Sanctions**

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

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

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

### 14.6.3 General Principles for the Use of Extrajudicial Measures

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

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

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

Determining whether an extrajudicial measure would be adequate to hold the young person accountable requires Crown counsel to determine whether an extrajudicial measure can provide meaningful consequences that are proportionate to the seriousness of the offence and to the degree of responsibility of the young person and that promote the young person's rehabilitation. Additional factors to consider in making this determination are discussed below at 14.6.5 and 14.6.6.

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

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

## **Section 3-4: Federal Alternative and Extrajudicial Measures Policy**

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

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

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

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

### **14.6.5 Factors Related to the Seriousness of the Offence, and the History of Previous Offences or any other Aggravating Circumstances**

- Whether the offence is summary or indictable;
- Whether the offence involved the use of, or threatened use of, violence reasonably likely to result in harm that is more than transient or trifling in nature. An offence involving bodily harm is not necessarily too serious to be dealt with by extrajudicial measures. However, the more serious the harm, the less likely that it should be dealt with by extrajudicial measures.
- The potential or actual harm or damage to the victim (physical, psychological or financial) and/or to society;
- Whether the incident affected the sexual integrity of a person;
- Whether a weapon was used or threatened to be used in the commission of the offence. As youth cases have demonstrated (water balloons and spit-balls have been found to be weapons), it is important to consider the actual danger represented by the weapon.
- Whether the offence is a drug offence. (If so, see 14.6.6 for specific factors to consider in relation to Crown cautions and extrajudicial sanctions.)
- If the offence is a drug offence, the nature and deleterious consequences of the drugs involved should be considered (Again, see 14.6.6 for specific drug offence considerations and the possible use of extrajudicial measures.)

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- If the drug trafficking or possession of the drug for the purpose of trafficking occurred in or near a school, on or near school grounds or in or near any other public place usually frequented by persons under the age of eighteen years old, this should be considered an aggravating factor;<sup>11</sup>
- Whether the offence is a property offence. If so, did the young person intentionally cause or attempt to cause substantial property damage or loss? Should the young person have reasonably foreseen that substantial property damage would be caused by the offence?
- Whether the offence is an administration of justice offence, such as breach of probation. If so, would the non-compliance (e.g., failure to attend school; violation of curfew) have been an offence outside the context of a probation order? If not, it should be considered less serious and more likely to be dealt with appropriately through extrajudicial measures or through a review of the original sentence to determine whether the conditions should be changed.
- The role of the young person in the incident. For example, if the young person was the leader who planned and directed the offence, then his/her degree of responsibility is greater. However, this factor is secondary to the seriousness of the offence.
- Whether the young person was a victim in the commission of the offence (e.g., a sexually exploited juvenile prostitute; a young person committing a drug offence who is being directed or exploited by an adult drug dealer). If so, it is more likely that an extrajudicial measure should be used.
- Whether the young person has a history of committing offences. If so, what is the nature and number of previous offences? Although a history of offences may indicate that a more serious consequence is required to hold the young person accountable, this factor is secondary to the seriousness of the current offence.
- Whether the young person has already displayed remorse (e.g., through voluntary reparation to the victim or to the community) or agreed to do so.
- If the young person were to proceed through the court system, what is the likelihood that the sentence would be more severe than what is available through extrajudicial measures? If the sentence is expected to be less severe, Crown counsel should consider whether proceeding to court would be an effective use of Crown and judicial time and resources.

### 14.6.6 Choosing the Appropriate Extrajudicial Measure

In addition to the principles and objectives in sections 3, 4 and 5 of the Act and the factors outlined in section 14.6.5 above, specific considerations apply to Crown cautions and to extrajudicial sanctions. These considerations are discussed below.

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<sup>11</sup> This factor should be applied with particular care in the case of young persons since it is clearly more aggravating for an adult trafficker to attend a school for the purpose of selling drugs to youths than for a young person to sell drugs to his peers at school.

**14.6.6.1 Crown Cautions: Specific Considerations**

The choice between using a Crown caution or an extrajudicial sanction depends on several factors. As stated in s. 10(1) of the YCJA, a sanction may be used to deal with a young person alleged to have committed an offence only if the young person cannot be dealt with by a warning, caution or referral in sections 6, 7 or 8 because of the seriousness of the offence, the nature and number of previous offences committed by the young person or any other aggravating circumstances. Crown counsel should determine the seriousness of the offence by considering the factors discussed above at 14.6.5. The less serious the offence, the more likely it is that a Crown caution should be used. The more serious the offence, the more likely it is that an extrajudicial sanction should be used.

A Crown caution should not be used for offences in which the young person intentionally caused or attempted to cause bodily harm or should have reasonably foreseen that bodily harm would be caused by the offence.

Crown cautions should be adequate to hold a young person accountable for a minor drug offence.

However, a Crown caution is unlikely to be adequate to hold a young person accountable for the following drug offences:

- Possession of large amounts of marijuana or hashish;
- Possession of cocaine, ecstasy or heroin;
- Trafficking in a controlled substance, or possession of the controlled substance for the purpose of trafficking.

In certain circumstances, some of these drug offences could be dealt with by an extrajudicial sanction.

**14.6.6.2 Extrajudicial Sanctions: Specific Considerations**

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

If the Crown determines that a less serious extrajudicial measure is inappropriate, Crown counsel should still consider whether an extrajudicial sanction would be adequate to hold the young person accountable for his or her offending behaviour. Crown counsel must also remain cognizant of the principle that an extrajudicial measure is presumed adequate to hold a young person accountable if the young person has committed a non-violent offence and has not previously been found guilty of an offence. It is important to bear in mind,

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however, that presumptions are rebuttable. In applying the factors in 14.6.5 and the relevant principles under the YCJA, Crown counsel will sometimes conclude that a sanction is not appropriate to hold the young person accountable in the circumstances.

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

Extrajudicial sanctions can be used to deal with some drug offences that are too serious to be dealt with by a Crown caution. However, the following drug offences and circumstances are unlikely to be appropriate for extrajudicial sanctions:

- Possession of large amounts of marijuana or hashish, or drugs such as cocaine, heroin or ecstasy;
- Using another person more than two years younger than the young person alleged to have committed the offence to commit or assist in the commission of a drug offence;
- Trafficking in a controlled substance, or possession of the substance for the purpose of trafficking (an exception may arise where the young person shares a very small quantity of the substance with a peer for little or no consideration).

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

### 14.7 The *Canadian Environmental Protection Act, 1999*

The *Canadian Environmental Protection Act, 1999*, (CEPA) contains special provisions for the use of alternative measures in the environmental prosecution context. The Department of the Environment has developed a program of alternative measures which has been authorized by the Attorney General pursuant to s. 296(1)(a) of the *CEPA, 1999*<sup>12</sup>. Section 296(1)(d) of the *CEPA, 1999* sets out five factors counsel must consider in determining whether alternative measures are appropriate.

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<sup>12</sup> Pursuant to Part V, Chapter 16, "Decisions Made by, and on Behalf of, the Attorney General," the authorization of the program is made by the Assistant Deputy Attorney General, Criminal Law. The program is described in a document entitled Guidelines for Negotiating and Monitoring Environmental Protection Alternative Agreements under the *Canadian Environmental Protections Act*.



