

Restorative Justice in Canada: Lessons Learned

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I. Introduction

Restorative justice begins from the premise that the most effective response to conflict is to repair the harm done by the wrongful act. Material and symbolic reparations begin the process of restoration, but restoration means more than receiving compensation. For those harmed, restoration means repairing the actual damage caused by wrongdoing and restoring their sense of control over their lives. For wrongdoers, restoration involves accepting responsibility for their actions by repairing any harm that they caused and dealing with the issues that contributed to the wrongdoing. For the community, restoration means denouncing wrongdoers' behaviour and assisting victims and offenders in their process of restoration. The restorative justice approach responds to the immediate conflict and encourages the development of respectful relationships among those who are wrongdoers, those who have suffered harm and members of the community.

The Commission began its investigation into restorative justice from the assumption that in many situations traditional approaches to resolving disputes are no longer adequate. Traditionally, judicial procedures have presumed that the goal of litigation is to uncover the facts that relate to particular conflict, identify the relevant law and apply the law to the fact situation. However, many of conflicts do not fit into this mould. Frequently there are multiple parties to a conflict, with multiple and competing points of view. Thus issues are not two-sided but multi-sided. Moreover, the remedies that are sought are not necessarily the reparation of some harm or the restoration of a previous situation, often they seek the transformation of a relationship.

The Law Commission of Canada is an independent federal agency whose mandate is to offer advice to improve, modernize and reform the law of Canada. Three principles guide the work of the Commission:

- It must view the law and the legal system in a broad social and economic context;
- It must be innovative in its research methods; and
- It must take account of the impact of the law on different groups and individuals when making its recommendations.

In light of this mandate and these principles, the Commission believes there is much to be learned about how to handle complex relationships involving several competing interests from the way restorative justice is practiced in Canada and around the world. In exploring how restorative justice can be developed within the criminal justice system, we also seek to test whether its framework and principles can be used to establish new understandings of processes for resolving civil disputes.

The purpose of this paper is to reflect on some of issues that have emerged from Canada's experience with restorative justice. What can these lessons tell us about the nature of conflict and conflict management? What can we learn from our experience with restorative justice that is applicable to non-criminal conflict resolution?

II. The Restorative Justice Approach

Conflict causes pain and loss. It damages people and property, sometimes irreparably. Conflict has the potential to destroy relationships between people. But there can also be positive effects of conflict. Conflict defines boundaries, both in a physical sense and a social sense. It establishes limits as to what is and is not acceptable behaviour. Children learn what is socially acceptable behaviour through conflicts with their peers, their parents, their teachers and others they encounter in their lives. Conflict clarifies and reinforces standards in society.

Conflict thus presents a challenge and an opportunity for a society. The goal of social policy cannot be simply to eliminate conflict -- an impossible task. It is, rather, to capitalize on the transformative potential of conflict, to use conflict as a springboard for moving towards a more just society.

Restorative justice is a general approach to the challenge and opportunity of conflict. It offers a framework for thinking about and responding to conflict and crime, rather than a unified theory or philosophy of justice. While there is no widely accepted definition of restorative justice, one that is familiar to most who work in the field is as follows:

[Restorative justice is] a way of dealing with victims and offenders by focussing on the settlement of conflicts arising from crime and resolving the underlying problems which cause it. It is also, more widely, a way of dealing with crime generally in a rational problem solving way. Central to restorative justice is recognition of the community, rather than criminal justice agencies, as the prime site of crime control.¹

Restorative justice occupies the space between theories of justice and specific practices. Restorative justice is less a philosophical system than a set of ideas about how justice as a lived experience should be pursued. These ideas are experiential in nature. They are grounded in concrete actions. Restorative justice is a response to conflict that brings victims, wrongdoers and the community together to collectively repair harm that has been done in a manner that satisfies their conception of justice.

The starting point of most restorative justice programs is the idea that crimes should not be viewed just (or even primarily) as transgressions against the state; conflict represents the rupture of a relationship between two or more people. For this reason, the criminal justice system ought to focus on and address the harm that was caused by the wrongful act. Victims, offenders

¹ Ministry of Justice, *Restorative Justice: A Discussion Paper*, (Ministry of Justice of New Zealand, 1996) at 1.

and the community should, as much as possible, participate in dealing with that harm. Offenders are encouraged to take responsibility for their actions. Victims are provided with an opportunity for the damage caused by the act to be healed. Community members are actively involved in the process of resolving the conflict. While the specific role of the police, Crown attorneys and the judiciary varies from program to program, the key idea is that they should facilitate the settlement of the conflict to the satisfaction of the parties involved.

III. Restorative Justice Programs

There are a number of different types of restorative justice programs currently operating across North America, Europe, Australia and New Zealand.

Victim-offender reconciliation programs are perhaps the best-known and most widespread type of restorative justice initiative. These programs bring victims and wrongdoers together with a trained facilitator to discuss the conflict, identify strategies to repair the harm done by the conflict and agree on schedules for restitution, follow-up and monitoring. Victim-offender reconciliation programs allow victims to express their anger in a controlled environment and to ask questions of offenders. They also place wrongdoers in a position to learn the consequences of their behaviour, to accept full responsibility for their actions and to make appropriate reparations.

Family group conferences are similar to victim-offender reconciliation programs with the exception that they include a larger number of participants. Along with the victim and wrongdoer, family group conferences often include the victim's and wrongdoer's family members, professionals such as teachers and social workers, police officers and lawyers. During a conference, victims and wrongdoers tell their version of the event. Other participants are then

given the opportunity to speak and the participants discuss what reparations are required. Family group conferences rely heavily on the ability of community members to evoke a sense of shame among wrongdoers. The purpose of the exercise is to show the community's disapproval for the act (but not the actor) and to provide an avenue for the offender to be welcomed back into the community.

Sentencing circles operate in many Aboriginal communities in Canada. Sentencing circles allow victims, offenders, community elders, other community members and court officials to discuss together the consequences of a conflict and to explore ways of resolving the aftermath.

Restitution for damages and reintegrating the wrongdoer into the community are high priorities. Community members play an active role in assisting the victim and the wrongdoer with the healing process. Youth justice committees operate similarly to sentencing circles, although they are also used for non-Aboriginal offenders as well as Aboriginal offenders.

A restorative justice program may be initiated at any point in the criminal justice system and need not be used simply for diversionary purposes. Currently, there are five identified entry points into the criminal justice system where offenders may be referred to a restorative justice program:

1. police (pre-charge);
2. crown (post-charge);
3. courts (pre-sentence);
4. corrections (post-sentence); and,
5. parole (pre-revocation).

IV. The Restorative Process

A common theme of restorative justice programs is the effort to repair the harm caused by crime to the victim, the offender and the community. Currently, the criminal law focuses on the actions and mental state of the offender. Its aim is to determine guilt and to assess punishment. The actual harm that the offender caused is considered only as evidence of the seriousness of the offence or when determining the sentence. Restorative justice shifts attention towards redressing the harm that was done by the act and making reparations.

Reparations include returning or replacing property, repairing physical or economic damages such as fixing a broken window, paying for property damage, or providing compensation for out-of-pocket expenses incurred by the victim. Reparation may also take a more symbolic form such as providing community service or asking the offender to participate in counselling or therapy to resolve issues that may have contributed to the wrongdoing. Reparations can be directed towards the immediate victims of the incident, secondary victims such as family and friends of the victim, or the larger community of the victim or wrongdoer.

Reparations are a vehicle through which restoration is achieved, rather than ends in themselves. The goal of restorative justice is not simply to compensate victims for lost property or damages that resulted from the wrongdoing. The damage caused by crime cuts far deeper than one's material possessions. Anger, resentment and a sense of loss of control over one's life are emotions that are often expressed by victims. Restoration is the process of 'righting wrongs' or healing wounds. Additionally, reparations only operate in one direction: the offender repairs the damage caused by the act. Restoration involves both the victim and the wrongdoer. Thus, while reparations are a strong (and perhaps necessary) first step towards restoration, in themselves, they are not enough.

Restorative justice programs such as victim-offender reconciliation, family group conferencing and sentencing circles are built around an encounter between the victim and the offender. The encounter is designed as a safe space for people to meet in the presence of a trained facilitator to discuss ways to resolve the conflict. The facilitator guides the interaction. The parties provide their versions of the incident and are encouraged to ask questions of one another, provide clarification and context and develop a common understanding of the event. They are also encouraged to talk about what steps can be taken to repair the harm done by the crime. This results in an agreement that specifies the type of reparations that have been negotiated.

The encounter places offender accountability in the forefront. Wrongdoers have to personally explain their behaviour to the victim and community members. Accountability is based on the belief that a wrongdoer owes a debt to the victim and the community for committing the offence. Wrongdoers are encouraged to develop an understanding of how their behaviour affected the lives of victims and to acknowledge the wrong through verbal or written apologies and by addressing any behavioural issues that contributed to their actions. They also demonstrate accountability by repairing the harm they have done through compensating victims or engaging in community service work.

Restorative justice requires the active participation of community members. They are encouraged to engage in constructive efforts that show their disapproval of the actions of offenders. Community members are also encouraged to support offenders' efforts to take responsibility for their actions and to support victims as they come to terms with the harm caused by the action. By playing an active role in the conflict resolution process, they are able to re-establish bounds of appropriate behaviour within the community.

V. Some Lessons Learned

Restorative justice programs have been operating in Canada for the past ten to fifteen years. This section will provide an overview of some of the lessons learned over this time.

A. The Need for an Alternative to the Adversarial Process

The first lesson that can be learned from the experience of restorative justice is that there is a need for an alternate form of dispute resolution. Dissatisfaction with the court process is particularly acute among those most affected by the process: victims and offenders. Victims are largely left out of the court process, except in their role as witnesses. It is assumed that the interests of the state and the interests of the victim are the same. Most victims want a public affirmation that what occurred to them was wrong, a need to which the criminal justice system is capable of responding. However, many victims also want answers to questions that the criminal courts are not structured to provide: Why did this happen to me? Will I be compensated for my damaged property? Victims' rights organisations have also expressed concerns about procedural issues. They feel that they have been excluded from the process and have lobbied for greater control over and input into decisions that are made regarding how cases are processed through the system. Finally, victims lack important information about what happens to offenders as they progress through the correctional system.

The adversarial criminal process does not always do justice for offenders. It encourages many to be passive and to plead guilty in order to receive the most lenient sentence possible. Their crime is objectified and abstracted from the social context in which it took place. Offenders' actions are cast in terms of violations of the Criminal Code rather than as violations of others. The offender's lawyer uses the law to distance the offender as far as possible from the conflict.

Offenders are rarely provided the opportunity to develop an appreciation of the impact their actions have on the lives of victims, and seldom are they asked to repair any damage they have caused. Because it offers few incentives for offenders to accept responsibility for their actions, the trial process does little to instil in them respect for the law or respect for others.

Many of the concerns expressed by victims and offenders about the criminal justice process have parallels in the civil justice system. Civil dispute resolution in the courts is costly and time consuming. Injured parties have little control over the process and often find it incomprehensible. Issues are framed in legal language rather than in terms of how they are experienced by the parties involved. Judicial remedies are not always consistent with how the parties to the conflict would have resolved the issue if they had been given the opportunity.

So the first lesson to be learned is a simple one: the formal court process is not always the best way for resolving conflict. There are different ways to resolve conflict that provide a much more satisfying sense of justice for victims and offenders, plaintiffs and defendants. Beyond this, however, there are other lessons that can be learned from restorative justice in practice.

B. Coercion

Many criminal offences are expressions of power – assault, for example, is often a way of one person displaying power over another. Many commentators – including, but not limited to, victims' rights advocates – have noted that bringing victims and offenders together in a restorative justice setting may re-victimize the victim if proper safeguards are not taken into account.

Victims may feel coerced into participating in restorative justice programs. This is particularly the case if they feel powerless to defend their interests. For example, a victim may feel

reticent to decline to participate in a program when faced with an accused, community members, the police, other professionals and a facilitator who are all willing to participate.

Coercion also comes into play when negotiating restoration agreements, especially when the failure to negotiate an agreement may result in the offender receiving formal charges or being returned to the formal courts for sentencing.

Offenders can also be coerced into participating in the process. Some wrongdoers may be coerced into a restorative justice program even though they are not guilty of an offence. As long as the threat of incarceration hangs over offenders their agreement to participate in a restorative justice program is not totally free.

Elaborate protocols have been developed to deal with the issue of coercion. First, almost all restorative justice programs are voluntary. Participants – both victims and offenders – must give informed consent before participating in the process. Moreover, at anytime during the process a victim or an offender may withdraw from the process and the case is referred back to the adversarial system. Additionally, provisions are typically made to allow victims and offenders to bring support people, which may include a lawyer, to any meetings in which they are involved. These individuals provide emotional support to the parties during a session, as well as ensure that final agreements are fair and reasonable.

C. Emotion

A third lesson that we learn from restorative justice is that irrationality is good. The criminal justice system tries to control emotion, to deal with a crime dispassionately and rationally. In

criminal courts, the expression of strong emotion is closely managed – consider the degree of opposition to recent developments that allow victims impact statements to be read in court.

The role of the community in the decision-making process presents an interesting example of the “irrationality” of restorative justice. The justice system values decision-making by independent individuals. Juries operate under the assumption that individuals with nothing to lose and nothing to gain from the outcome of the case will make a reasoned decision. Indeed, citizens can be disqualified from participating on a jury if they have any personal connection to the case or if they possess knowledge which may prejudice the decision-making process. Detachment fosters impartiality, and impartiality encourages rational decision-making.

Restorative justice programs suggest a departure from this traditional way of incorporating the community. Unlike juries, community representatives in restorative justice programs are not impartial. Whereas juries represent communities in the abstract, community representation on sentencing circles or community forums is concrete. The families of the victim and offender, the people who live in the area, the people who know the conflicting parties, and the people who have a vested interest in the outcome of the case participate directly in the proceedings. Unlike juries, the value of community participants in a restorative justice process resides in the possibility of leveraging their relationship with the offender to bring about a meaningful resolution to the incident.

Restorative justice recognizes the value of emotion. Facilitators and mediators in restorative justice settings will frequently report that victims do not only want compensation for their losses, they want to tell the offender – in their own words – how the offender’s actions affected them. They want offenders to see that their actions caused real pain. Moreover, they want to see for themselves that the offenders are genuinely remorseful for their actions.

So the lesson to be learned from restorative justice is that emotions are good. In restorative justice settings, emotion is managed, but individuals are given a much greater degree of latitude to express their true feelings. Emotional outbursts are part of the process of resolving conflicts. For some parties who have been wronged they are as important, if not more important, than receiving compensation or restitution for the harm they have received. What we do not know, however, is how emotions are managed in restorative justice settings. How do facilitators, lawyers and others present at a conference respond to emotional outbursts?

D. The Role of Community

One of the goals of restorative justice is to engage the community in the justice process. In the Commission's discussion paper and its video "*Communities and the Challenge of Conflict: New Perspectives on Restorative Justice*", we maintained that restorative justice offers the possibility of harnessing the power of individuals to create the social capital that is required to build strong communities. Social capital refers to the elements of social organisation such as networks, norms and social trust that foster co-ordination and co-operation for mutual benefit.² Social capital helps create interconnectedness and networks of civic engagement between community members. Interconnectedness among community members encourages trust, discourages political and economic opportunism, and facilitates collaboration towards a common goal. Community and political life, then, rises and falls with the level of social capital that can be mobilized by community members.

Participating in a restorative justice program helps build relationships between members of a community. Restorative justice programs bring these individuals into a safe place where

² R. Putnam, *The Decline of Civil Society: How Come? So What?* The John L. Manion Lecture, Canadian Centre for Management Development, Ottawa, 22 February 1996, at 4.

differences can be discussed and conflicts can be resolved. Sentencing circles, community justice forums, victim-offender mediation sessions and other forms of restorative justice offer the possibility of bringing together individuals from a variety of backgrounds who would not normally enter into meaningful relationships with one another. In the context of a sentencing circle or a community forum, these individuals are asked to interact with one another, to speak openly and listen to the contribution of others. This increases the density of the web of relationships among community members.

Judge Barry Stuart, who regularly takes part in sentencing circles, wrote that providing community members with the opportunity to participate in the resolution of conflict exposes them to the system's limitations.

The value of a Community Circle extends beyond its impact upon victims and offenders. The most important value of the Circle lies in its impact upon the community. In allowing community members to assume ownership for resolving their own issues,³ a Circle restores a sense of collective responsibility – of being a community.

Community members begin to appreciate the complexities of the criminal justice process. They develop an understanding of the limitations of punishment as a response to conflict. Likewise, justice professionals gain a better understanding of the needs and aspirations of community members. Finally, by participating in a restorative justice program, members of a community develop an appreciation of the interconnectedness of life in their community.

Restorative justice moves beyond assessing legal guilt to determining responsibility for a conflict. Determining responsibility means addressing the immediate context of the event – did the individual commit the act – but also placing the act within a broader context – what was the

³ B. Stuart, 'Key differences: Courts and community circles', (1998) 11 *Justice Professional* at 94.

relationship between the victim, offender and the community? What are some of the underlying factors that may have been associated with conflict? As John Braithwaite said,

To rebuild a democracy ... we need to do more than motivate people to participate in circles that address problems of living that directly affect their personal relationships. The extra step to democratic citizenship is taken when the citizen moves from participating in a restorative justice conference to being active in some way in the social movement for restorative justice.⁴

Appeals to build communities often represent a desire to return to a period when meanings were fixed, identities were secure, and public life was safe and predictable. The values evoked by community – reciprocity, mutuality, and sharing – are seen to counter the powerful push towards individualism generated by capitalism, urbanisation, and secularization. Often this is a nostalgic reflex against our ‘post-industrial’ society characterized by social fragmentation, insecurity, lack of certainty and predictability, and increasing anxiety over personal safety. The impulse to return to a better time often glosses over some of the more restrictive aspects that communities can exhibit.

Only rarely do we recognise that some communities can be exclusionary, inflexible, parochial, vengeful or discriminatory. Indeed, attaching the descriptor community – the hunting community, the retired community, the legal community – tends to conceal internal divisions and conflicts within a group. Some communities have strict codes of conduct that curtail individual freedom. In others, power and decision-making ability are concentrated among an elite. Communities can be highly stratified by race, gender, class or age. Communities can also impose membership conditions that are highly exclusionary and unjust. Communities can be inclusive but they can also be exclusive.

⁴ J. Braithwaite, *Democracy, Community and Problem Solving*, Paper presented at the Building Strong Partnerships for Restorative Practices Conference, August 5-7, 1999, Burlington, Vermont.

Many women's group, including aboriginal women's groups, have cautioned about the danger of blithely accepting 'the community' as a social good. There are real concerns that restorative justice will reproduce many of the inequalities of the current adversarial process. For example, the Newfoundland Provincial Association of Family Violence made the following comments:

Restorative Justice envisions the community taking significant responsibility for conducting programs. The creation of new positions of authority creates concern about the participation of diverse community members and how their views are included. The dynamics of communities involve relationships of power - the existence of dominant groups based on age, religion, colour, ability/disability, gender, race, socio-economic status, ethnicity, and sexual orientation; those that lead and those that are led. We cannot assume communities are healthy or safe, or are concerned with creating an equitable status for all their residents. Safeguards must be developed to prevent possible misuse of power created by the alternative programs.⁵

The Commission sponsored the Aboriginal Women's Action Network (AWAN) to conduct a number of focus groups with women in rural aboriginal communities in British Columbia.⁶ The purpose of the focus groups was to identify concerns about justice issues and assess the impact that restorative justice programs may have on these women. AWAN reported that violence in rural aboriginal communities in British Columbia is so pervasive that it has become normalized. Moreover, when women speak-out against violence their voices are silenced. The normalization of violence was accompanied by a lack of social supports and anti-violence programs for the community. AWAN reported that even when social services did exist, aboriginal women often faced discrimination – the police and other social service agencies did not always respond to their

⁵ Provincial Association Against Family Violence, *Making it Safe: Women, Restorative Justice and Alternative Dispute Resolution*, (St. John's, NFLD: Provincial Association Against Family Violence, July 2000) at 12.

⁶ W. Stewart, A. Huntley and F. Blaney, *The Implications of Restorative Justice For Aboriginal Women and Children Survivors of Violence: A Comparative Overview of Five Communities In British Columbia*, (Vancouver: Aboriginal Women's Action Network, 2001).

calls for help. Finally, the inter-connectedness of lives of community members, particularly those who deliver programs and services, made it especially difficult to maintain confidentiality.

AWAN recognized the contradictory position in which many aboriginal communities find themselves. On the one hand, AWAN recognized that many aboriginal communities are paralysed by violence and other social problems which seriously undermines the quality of life for many women and children. On the other hand, AWAN recognized that the traditional justice system, a justice system that takes men out of the community, has not been effective.

AWAN endorsed the ideals of restorative justice but argued that appeals to community ought to be taken seriously. For restorative justice programs to have any legitimacy in the community, *all* members of the community must have input into how the programs are designed and implemented:

...we have looked at women's experience of colonization, which is also informed by gender and in so doing we have named the ways in which women, children and those in positions of less power are marginalized. This marginalization results in not being able to participate in discussions and decision-making on what is good for our communities. For stakeholders of restorative justice reforms to base their understanding of what is good for our communities on what a few more powerful people have to say is to romanticize Aboriginal culture and ignore women and children's lived reality of violence.⁷

Communities are complex social phenomena. Most people have an intuitive understanding of what communities are – the neighbourhoods we live in, the network of associations and friendships we develop over time, the people we work with, or the people with whom we worship. Yet on closer inspection communities are multidimensional, their boundaries are flexible and over-lapping, and, depending on one's point of reference, communities can be

⁷ W. Stewart, A. Huntley and F. Blaney, *The Implications of Restorative Justice For Aboriginal Women and Children Survivors of Violence: A Comparative Overview of Five Communities In British Columbia*, (Vancouver: Aboriginal Women's Action Network, 2001) at 29.

democratic or repressive, dynamic or stultifying, enriching or constricting. Moreover, it is likely that communities are democratic, dynamic and enriching and, *at the same time*, repressive, stultifying and constricting.

Given the complexity of communities, policy statements must go beyond simply professing to support vibrant communities. The lesson to be learned from restorative justice is to first recognise both the positive and negative aspects of community, then develop policies and practices that maximize those aspects of community life that advance freedom and dignity and minimise those that hinder this.

E. Evaluation

A fifth lesson to be learned from the restorative justice experience deals with evaluation. Evaluation is a necessary component of any program. Evaluations help assess whether the program is achieving its desired ends and they draw attention to (both positive and negative) unintended consequences of a program. Program evaluations afford an opportunity to refine organizational goals, enhance programs, and facilitate organizational development.

Traditional evaluations have often been conceived of and implemented in a “top down” authoritative style. Under this model, the questions to be answered are generated by detached theorizing; experts then descend upon the research site to gather data and write reports. These reports are often of limited use to the research “subjects” because what is of interest to the evaluators is not always of interest to those being evaluated.

Evaluations of criminal justice programs have typically been conducted in this top-down style. The primary criteria for evaluating a criminal justice intervention are usually recidivism and

efficiency. To measure recidivism, program evaluators compare a sample of offenders who have gone through a program or received a treatment and compare their subsequent criminal activity with a matched sample of offenders who did not receive the treatment. A program is a success if the treatment group exhibits lower re-conviction rates than the control group. To measure efficiency, program evaluators compare the flow of cases through the system before and after the introduction of the new practice. Did the change increase the speed with which cases are processed? Did the change reduce the average time or resources expended on a per case basis?

Some proponents claim that restorative justice programs may reduce recidivism and many criminal justice administrators support restorative justice programs on the belief that they may clear-up backlogged court dockets and decrease the number of offenders who are incarcerated. Recidivism and efficiency are important measures of a program. It is important to recognise, however, that while these may be consequences of restorative justice, they are not necessarily the goals of restorative justice.

In its Discussion Paper, the Commission asked the following question:

How can we ensure that a restorative justice program is not evaluated exclusively by reference to goals and values that have little or nothing to do with the underlying principles of restorative justice?

Evaluations of restorative justice programs have typically focussed on two issues: participant satisfaction and compliance/recidivism. Generally, compared to traditional non-restorative approaches, restorative justice programs are a more effective method of improving victim/offender satisfaction, increasing offender compliance with restitution, and decreasing the recidivism of

offenders when compared to more traditional criminal justice responses like incarceration, probation or court-ordered restitution.⁸

Evaluation reports of restorative justice programs are impressive. But are satisfaction and compliance sufficient criteria for evaluating restorative justice programs? In the last section, we argued that community building is an important element of restorative justice programs. How do program evaluations measure the success of community capacity building? How do they make the link between conflict resolution and community capacity building?

To date, one of the only evaluations that has attempted to make a link between restorative justice and community capacity was undertaken in the community of Hollow Water.⁹ The Community Holistic Circle Healing (CHCH) evaluation consisted of two components: i) a “traditional” cost-benefit analysis, and, ii) an analysis of the “value-added” benefits for the community. The cost-benefit portion of the evaluation showed that the program was cost-effective. For every dollar that the provincial government spent on the program, it saved \$3.75 for pre-incarceration, prison and probation costs. And for every dollar that the federal government spent on the program, it saved between \$2.46 and \$12.15 on incarceration and parole costs.

The second component of the evaluation measured how the community was changed as a result of the program. The decision to evaluate this aspect of the program was based on a deep understanding of the connection between conflict, conflict resolution and community building:

How does one weigh the intricacies of the healing process, and how much over how long a period of time needs to be achieved to be considered value-added?

⁸ J. Latimer, C. Dowden and D. Muise, *The Effectiveness Of Restorative Justice Practices: A Meta-Analysis RR2001-6e*, Department of Justice Canada, April 2001.

⁹ Native Counselling Services of Alberta, *A Cost-Benefit Analysis of Hollow Water's Community Holistic Circle Healing Process*, (Ottawa: Solicitor General of Canada, 2001).

How does one put a dollar value on a child's smile, the mental, emotional, spiritual and physical components of wellness. Or, how does one put a dollar figure on the power of the Seven Sacred Teachings, the core philosophy around which CHCH operates and brings healing to offenders and to the community. Suitable criteria have not been put into place, nor perhaps can they be, to quantify the threads of value for the parts that comprise the whole...The real value of CHCH work is in the value of the community being in process, more than just dollar value.¹⁰

In order to measure the impact on the community, the evaluation process included interviews with elders and other members of the community. The evaluation found that since the introduction of the program, a number of positive changes had occurred:

- more people completed their education;
- children's health improved;
- the community broadened its resource and took more responsibility for its affairs;
- there was an increased sense of safety and a decrease in overall violence.

The lesson to be learned from restorative justice then is to think creatively when evaluating programs. Restorative justice (and, hopefully, civil mediation) is more than finding the most convenient way of resolving a dispute. These "alternative" methods are about finding satisfying and constructive approaches to the problem of conflict. Cost and case management issues are important indicia of success, but they are not the only ones.

F. Top-down or Bottom-up

The expanding role of the community in the criminal justice system is part of a larger movement that is re-fashioning the relationship between the law, communities and government. Increasingly governments are turning to communities for the solutions to many social issues.

¹⁰ Native Counselling Services of Alberta, *A Cost-Benefit Analysis of Hollow Water's Community Holistic Circle Healing Process*, (Ottawa: Solicitor General of Canada, 2001) at 29.

Communities have become the site not only in which policy and programs are implemented, more and more communities are being called upon to develop and administer policy. Restorative justice is one example of this new relationship, but others include community policing, community health care, and community economic development.

These new partnerships raise a number of issues regarding the relationship between governments and communities. Partnerships are voluntary arrangements between two or more individuals or organisations who agree to work co-operatively towards a common goal. Successful partnerships extend further than consultation.

The shift from meaningless consultation and sometimes vacuous engagement – usually a snapshot of public opinion captured at a particular moment in time – to genuinely deliberative and interactive citizen engagement will require a fundamental change True citizen engagement involves dialogue and listening, the expression and exchange of views, group and individual deliberation, reflection and learning.¹¹

Successful partnerships are those in which there is a recognition that all parties may not come to the table with equal power and steps are taken to ensure that even the least powerful members of the partnership are given equal standing. For example, a restorative justice program in which experts act upon victims and offenders or otherwise exert control over the criminal justice process is not a partnership, regardless of how much information these experts share with their 'clientele'. Partnerships must involve a willingness on the part of the government to surrender power and decision-making to the community. On the other hand, community members must be encouraged to assume control of the decision-making process.

¹¹ S. Torjman, *Strategies for a Caring Society*, Paper presented at the Conference 'Investing in the Whole Community: Strategies for a Caring Society', Toronto, October 15-16, 1998, p.10.

G. Restorative Justice and the Living Law

A final lesson to be learned from the restorative justice experience in Canada is that law reform is not always a matter of changing legislation. There have no doubt been reforms of the law that have influenced the development of restorative justice. The *Gladue*¹² decision of the Supreme Court of Canada made a clear statement that Section 718 (e) of the Criminal Code is supportive of restorative justice programming for aboriginal Canadians:

The drastic overrepresentation of aboriginal peoples within both the Canadian prison population and the criminal justice system reveals a sad and pressing social problem. It is reasonable to assume that Parliament, in singling out aboriginal offenders for distinct sentencing treatment in s. 718.2(e), intended to attempt to redress this social problem to some degree. The provision may properly be seen as Parliament's direction to members of the judiciary to inquire into the causes of the problem and to endeavour to remedy it, to the extent that a remedy is possible through the sentencing process. (para 64).

The *Youth Justice Act* that is currently before Parliament also gives a prominent role for the concepts of restorative justice. The discussion around the victims issues in the Parliament made it clear that the proposed office for Victims of Crime should develop any restorative justice principles that are consistent with the protection of victims' interests.¹³ Most recently, Canada has spearheaded a move to have the United Nations to accept basic principles on the use of restorative justice.

These law reform efforts will no doubt advance the restorative justice agenda in Canada, as well as abroad. But perhaps more importantly, however, Canada's experience with restorative justice has shown that effective law reform means changing the way Canadians live the law.

¹² R v. Gladue [1999] 1 S.C.R. 688.

¹³ Canada. Parliament. House of Commons. Standing Committee on Justice and Human Rights. *Victims' Rights - A Voice, Not A Veto, Report of The Standing Committee on Justice And Human Rights*, (Ottawa: The Committee, 1998).

One of the assumptions that underpins the work of the Commission is that law is fundamentally as much the affair of Canadians, as it is the business of legislatures, courts and lawyers. Canadians constantly build and negotiate their own unofficial legal systems to complement Canada's official legal system. In doing so Canadians create a more responsive and pluralistic law. As the former President of the Law Commission of Canada wrote:

Citizens know that, however much legislatures, lawyers and courts claim a monopoly on law, it is the unofficial law of their day-to-day lives that underlies a just and respectful society. In a democracy, citizens are always the most important law reformers. They renew the law by living the law, often managing to redress the injustices of an official law that Parliament is unable or unwilling to change.¹⁴

The rise of restorative justice is a persuasive example of the power of communities to change the law. The restorative justice movement emerged from church basements, board room meetings of not-for-profit justice agencies, in prisons, and in community centres where individuals who were dissatisfied with how the adversarial process responds to crime sought to re-fashion new and innovative concepts of law. In doing so, community-based organisations challenged the claim that the courts and legislatures have a monopoly on law. By seeking to change the way we conceive of justice, by daring to challenge some fundamental precepts of the justice system, community-based organisations were engaged in practical law reform, in reforming the living law of their day-to-day lives.

One of the messages that has emerged as a result of the Commission's consultations with Canadians involved with restorative justice across the country is that *legislative* reform ranked very low among the factors that encouraged or discouraged the development of restorative justice. Restorative justice was a product of a change in the living law in Canadians. Perhaps

¹⁴ R. Macdonald, "Law, Justice And Community: The Way Ahead", Address to the Symposium on Law, Justice And Community, Dalhousie University, Halifax, NS, April 17, 1999.

more important was the development of strong working relationships between individuals in the community and a commitment to change the living law.

Recently, the Commission sponsored research by Julie Macfarlane to examine the mandatory mediation program in Ontario. One of the main conclusions of this research was that the mandatory mediation program was better received in Ottawa compared to Toronto. One of the key differences that explained why the mandatory mediation program in Ottawa was more successful than in Toronto was that in Ottawa the living law was also reformed.

A critical element of changing attitudes towards the use of mediation by litigators is the credibility imparted to the process by the support of professional leaders. Practically every one of the lawyers in the Ottawa sample commented - unprompted - on the leadership role played by Mr Justice James Chadwick and Master Robert Beaudoin in building support for mandatory mediation in Ottawa. In Toronto there are some professional leaders committed to mediation, but these are fewer and less powerful than their compatriots in Ottawa. This is reflected in peer group norms. It is still not especially fashionable for top-flight commercial litigators to be highly supportive of mediation, and certainly not of the mandatory mediation program.¹⁵

Law reform cannot be legislated into existence – enduring change will only come about when the living law is reformed.

The lesson to be learned from Canada's experience with restorative justice, as well as from Macfarlane's study of mandatory mediation is that law reform must seek to change not only the formal law, but the way law is lived by Canadians.

¹⁵ J. Macfarlane, *Culture Change? Commercial Litigators and the Ontario Mandatory Mediation Program*, Paper submitted to the Law Commission of Canada and the Social Science and Humanities Research Council, 2001 at 77.

VI. The Prospect of Transformative Justice

How can we move from restorative justice to transformative justice? What do we mean by transformative justice? Transformative justice is a way of handling conflict that recognises and responds to the variety of harms caused by conflict and capitalizes on the opportunities offered by conflict by bringing individuals together in a process that encourages healing and growth.

It would be wrong, however, to equate the ideas of alternative dispute resolution as a way of dealing with conflicts in the civil law with restorative justice in criminal law. There is a continuum of alternative dispute resolution mechanisms ranging from informal negotiation to traditional adjudication by private courts. Alternative dispute resolution processes can be highly formal or quite informal. They can be voluntary or mandatory. Agreements may be negotiated or they may be imposed. Many proponents of alternative dispute resolution do believe that alternatives to court processes must respect principles analogous to those of restorative justice. But not all. To date the idea of alternative dispute resolution has not focused on ways to ensure that the concerns and interests of parties to a conflict are addressed in a more satisfying manner than they would were the regular civil process to be deployed.

The significance of transformative justice in non-criminal areas of law will lie in its ability to inform and enrich our understanding of the diverse forms of alternative dispute resolution that have been developed over the past two decades. Different forms of alternative dispute resolution can be examined and evaluated against the three principles of restorative justice.

- Do alternative dispute resolution programs frame disputes in terms of violations of relationships rather than in terms of the substantive conflict in question?

- Do the most common forms of alternative dispute resolution – negotiation, mediation and arbitration – vest parties to a dispute with sufficient power to frame issues and determine outcomes according to their particular interests?
- Is there a role for the community in the resolution of civil disputes?

Restorative justice approaches turn on the existence of a wrong. Restorative justice begins with the premise that a wrong has occurred. Restorative justice works well within the criminal justice system because the criminal law provides a ready-made list of wrongs and an easily identifiable wrongdoer. In the vast majority of cases there is no ambiguity regarding what is the wrong, who is the wrongdoer and who is the victim. For restorative justice, because the culpability of the wrongdoer is taken for granted, determining what happened is important only in order to address the wrong.

When one moves beyond the criminal law, a new set of questions relating to the relationship between wrongdoing and the application of restorative justice emerges. Of course, in many civil disputes there is an obvious wrong: a person intentionally or inadvertently damages property; a person intentionally or inadvertently breaks a contract; a person intentionally or inadvertently profits from the work or ideas of another. But in other cases, the wrongfulness of a person's behaviour cannot be taken for granted: when children argue about their respective entitlements under a parent's will the dispute is not normally about wrongdoing; when parents disagree about custody and access to children in a divorce case the dispute is normally not about wrongdoing; when creditors make conflicting claims to the property of a bankrupt company, they usually do not accuse one another of wrongdoing.

Can the principles of restorative justice be made to apply to these situations where there is no wrongdoing? Again, can they be extended to accommodate cases where an individual desires to use the law to prevent a potential harm from occurring rather than remedying a harm that has already occurred? For example, an environmental organization may seek an injunction to halt the construction of a chemical warehouse adjacent to a residential neighbourhood.

There are also civil disputes that do not involve a discrete wrong; some family, labour and landlord-tenant disputes often comprise cumulative wrongs committed by all parties to the conflict. For example, an eviction notice given to a tenant for not paying rent may follow a landlord's failure to fix broken plumbing, which follows a tenant's refusal to dispose properly of garbage, which follows the landlord's failure to rid the apartment properly of pests. What role can principles of restorative justice play in these cases?

Finally, can the principles of restorative justice apply when there is no dispute regarding the harm done, but the dispute centres rather on who is responsible for the harm? A homeowner, for example, sues a general contractor for the improper construction of a house foundation. The contractor acknowledges the harm (leaky foundation) but claims that its source was improperly mixed concrete and that, therefore, responsibility should lie with the concrete company.

The last few examples raise a number of issues about the possibilities (and appropriateness) of transferring the principles of restorative justice to non criminal law settings. On the other hand, they are all cases where the traditional processes of civil disputing have encountered difficulty. If not all the principles and practices of restorative justice are applicable, can they be modified to meet the particularities of non-criminal disputes without undermining the overall framework of restorative justice as a response to conflict in the criminal law field? Here,

perhaps, is where the transformative potential of restorative justice can be used to develop a broader conception of transformative justice capable of handling both criminal and civil disputes.

Even when it does not involve a discrete wrong, conflict remains a relational concept. A conflict about where to locate a landfill site may involve relationships between members of different industries, labour organisations, environmental organisations, Aboriginal peoples, different levels of government, citizens' organisations and other individuals or groups. Bankruptcy involves relationships between a debtor and one or more creditors, and between various types of creditors -- each of whom may have an entirely different kind of relationship with the debtor: a bank, a car dealer, an employee, a spouse, the government, someone who has been injured by the debtor, and so on. Labour relations conflicts always involve complex relationships between labour and management, between shareholders of a company and managers, between employees and their union, between government and the corporation, between a community and its factories, and so on. In each situation, competing interests are at stake and values may clash as parties attempt to shape the definition of and response to the conflict.

Taking a cue from restorative justice, a transformative approach to dispute resolution would begin with a commitment to transforming the relationships between parties to the conflict. The power of restorative justice is the ability to use conflict to encourage growth and development. The same potential exists in conflict in other domains. A transformative approach to conflict resolution would encourage accommodative relationships between groups with competing interests. The conflict situation would be transformed from one in which groups are in competition with one another to one in which groups recognise their mutual interests in arriving at workable solutions.

What does restorative justice have to say about the underlying approaches that should be taken to resolve non-criminal disputes?

Most importantly, it provides a benchmark for evaluating different alternative dispute resolution processes. A transformative justice approach would bring together all those individuals and groups affected by a conflict, including those with the power to make the decision. As much as possible, the participants must be provided the freedom to control the process, to establish the boundaries of the conflict, to establish rules about how the process should unfold, and what, if any, role does the mediator play. Interests should be discussed and negotiated and positions should be clarified. Like an encounter between a victim and an offender in the criminal process, meetings between parties in a civil conflict help develop an appreciation of one's own and others' position as they work towards a resolution.

Unlike a restorative justice encounter in the criminal context, there may not always be a requirement to restore relationships by repairing the harm that was caused as a result of the wrongdoing. For example, a conflict over a workplace health and safety standards may be about encouraging a company to abide by air quality standards rather than about repairing any harm that was caused by faulty air circulation. In these cases, apologies, reparations and restitution may not always be appropriate remedies. Rather the goal is to arrive at an agreement that is acceptable to all parties.

In some situations, however, the conflict may appear to be a technical issue but underlying this may be an unresolved wrong. For example, a workers' compensation appeal may ostensibly be concerned with establishing the status of a claimant. Underlying this concern, however, is a worker's perception that the company refuses to acknowledge how unsafe working conditions

contributed to the injury. An apology, reparations and restitution may be the most appropriate remedy in this situation.

Transformative justice must be driven by the needs of participants. Decisions on how to resolve the conflict ought to be based on a consensus. By consensus, we mean an agreement on how to move forward that is acceptable to all parties. A consensus cannot be imposed. Nor is a consensus just a middle ground position. The goal will be to find common ground on which a mutually acceptable resolution can be established. This is the power of transformative justice: the possibility of using the substance of a conflict as a means of exploring options and establishing responses that are not only acceptable to all parties but develop and strengthen relationships among those involved.