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RESTORATIVE JUSTICE – A COMPLEMENTARY APPROACH TO RESOLVING CRIMINAL JUSTICE ISSUES

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INTRODUCTION

Restorative justice consists of a set of principles with regard to how the justice system ought to respond to criminal activity. While there is no widely accepted definition of restorative justice, most academic studies and government reports agree that the majority of programs operating under the banner of restorative justice share a similar philosophy. In particular, advocates of restorative justice begin with the premise that the criminal justice system is not able to fully meet the needs of offenders, victims, and their communities.

The criminal justice system in Canada is based on an adversarial model under which the state takes responsibility for prosecuting and punishing offenders. In this adversarial system, the Crown and defence counsel struggle over whether the accused committed an offence delineated by criminal law. As such, the system concentrates on determining an offender's legal guilt.(1)

In contrast, restorative justice initiatives seek to address the harm that crime inflicts on victims and the larger community. Crime is defined not as an offence against the state, but rather as an injury or wrong inflicted on another individual.(2) The focus of restorative justice lies not in establishing guilt nor on determining appropriate punishment, but rather on "repairing damage and minimizing future harm."(3) Because offenders must first acknowledge the pain and suffering they have caused, restorative justice programs seek to help offenders,

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(1) Law Commission of Canada, *From Restorative Justice to Transformative Justice – Discussion Paper*, Ottawa, 1999, p. 28.

(2) Jo-Anne Wemmers and Marisa Canuto, *Victims' Experiences With, Expectations and Perceptions of Restorative Justice: A Critical Review of the Literature*, Policy Centre for Victim Issues, Research and Statistics Division, Department of Justice Canada, Ottawa, 2002, p. 3.

(3) British Columbia, Ministry of the Attorney General, *A Restorative Justice Framework: British Columbia Justice Reform*, Victoria, 1998, p. 1.

victims and communities to devise a resolution to crime that allows for reparation, forgiveness and healing (see Appendix for examples of restorative justice initiatives currently operating in Canada).(4)

OBJECTIVES

There is no one ideal approach to restorative justice programming.(5) Nevertheless, most restorative justice initiatives share not only a similar philosophy, but also a similar orientation towards practice.(6)

The objectives underlying the operation of many restorative justice programs have emerged, in part, out of a critique of the criminal justice system. These programs have two aims. In the short term, they seek to supplement (or in some cases supplant) the standard processing of criminal disputes.(7) In the long term, however, many supporters of restorative justice see potential in the movement to reshape and, ultimately, redefine traditional conceptions of justice and punishment.(8)

Most restorative justice initiatives are informed by two key considerations: (1) the active participation of all parties involved in the conflict; and (2) flexibility in process and outcomes.

A. Participation

Supporters of the restorative justice movement critique the criminal justice system for its focus on state interests and the adversarial model. They argue that lawyers, judges and other professionals tend to monopolize legal proceedings, leaving few (if any) opportunities for

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(4) Federal-Provincial-Territorial Working Group on Restorative Justice, *Restorative Justice in Canada: A Consultation Paper*, Department of Justice Canada, Ottawa, 2000; available at http://canada.justice.gc.ca/en/ps/voc/rjpap.html.

(5) John Braithwaite, "Principles of Restorative Justice," in *Restorative Justice and Criminal Justice*, ed. Andrew Von Hirsch *et al.*, Hart Publishing, Oxford, U.K., 2003, p. 3.

(6) Tony F. Marshall, *Restorative Justice: An Overview*, Research Development and Statistics Directorate, Home Office, London, U.K., 1999, p. 5.

(7) Julian V. Roberts and Kent Roach, "Restorative Justice in Canada: From Sentencing Circles to Sentencing Principles," in Von Hirsch (2003).

(8) Braithwaite (2003). See also Jennifer J. Llewellyn and Robert Howse, *Restorative Justice – A Conceptual Framework*, Law Commission of Canada, Ottawa, 1999.

other interested players to become involved.(9) As a result, victims, offenders and even the larger community become alienated from (and oftentimes disillusioned with) a system that "de-personalize[s] their experience[s]."(10)

Successful conflict resolution, they argue, requires the input of all parties – victims, wrongdoers, and their communities. Restorative justice initiatives seek to bring these individuals together in order to acknowledge and address the damage that an offender has caused. Each party has a significant role to play.

1. Offenders

Critics argue that the conventional criminal justice system does not properly hold offenders accountable for their actions. At the most general level, wrongdoers are charged with violating a provision of the criminal law, rather than harming another individual. Furthermore, the court focuses on assessing the offender's actions and state of mind in order to determine his or her legal guilt.(11) The criminal justice system typically acknowledges only the injury an offender has inflicted during evidential proceedings and sentencing. As a result, an offender often does not get the opportunity to understand or appreciate the impact the crime has had upon others.(12)

The vast majority of offenders settle their cases through plea-bargaining. While plea-bargaining may help to reduce courts' backlog and cut costs,(13) offenders are not required to face their victims, or their communities, in order to answer for their crimes.(14) Plea-bargaining may also encourage wrongdoers to passively accept guilty pleas, in the hope of receiving a lighter sentence. Because legal guilt and responsibility are not necessarily synonymous, an offender may plead guilty without ever taking actual responsibility.(15)

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(9) Robert B. Cormier, *Restorative Justice: Directions and Principles – Developments in Canada 2000-02*, Department of the Solicitor General Canada, Ottawa, 2002.

(10) Law Commission of Canada, *Transforming Relationships Through Participatory Justice*, Ottawa, 2003, p. 66.

(11) Church Council on Justice and Corrections, *Satisfying Justice: A Compendium of Initiatives, Programs and Legislative Measures*, Ottawa, 1996, pp. x-xi.

(12) Law Commission of Canada (1999), p. 26.

(13) For an overview of the debates surrounding plea-bargaining, see Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach*, Minister of Supply and Services, Ottawa, 1987, pp. 403-432.

(14) Llewellyn and Howse (1999).

(15) Law Commission of Canada (1999), pp. 18-19, 28-29.

Offenders whose cases proceed to trial often do not fare any better. The adversarial nature of the criminal court system leaves little room for them to participate in the adjudication of their own cases. Rather, the focus of the criminal trial is on winning. Lawyers and other professionals dominate the proceedings, using complex language and technical arguments in order to try to convince the judge/jury that the offender is (or is not) legally responsible and should (or should not) be punished.(16) Due process, while seeking to protect defendants from state abuse and/or violation of their rights, may also allow offenders to deny responsibility for their actions.(17) Finally, the criminal justice system doles out punishment, instead of requiring offenders to become actively involved in reparation. In this way, the criminal courts could be said to further isolate offenders from the legal process (and from the law more generally) by "imposing" a punishment upon them.(18)

In all, critics argue that the criminal justice system fails offenders, victims, and the larger community by allowing an offender to avoid taking responsibility for the harm he or she has caused. Offenders, they maintain, are alienated from a system that not only is confusing and oftentimes misunderstood, but also neglects to frame wrongdoing in terms of how an offender's crime has affected others.(19)

Restorative justice initiatives seek to overcome these shortcomings by asking offenders to, firstly, acknowledge the damage they have inflicted and, secondly, take steps to achieve some sort of resolution. In order to participate in one of these types of programs, offenders must voluntarily accept responsibility for their behaviour.(20) Acknowledging responsibility and helping to "make things right" are at the forefront of restorative justice processes.(21) Offenders can help others (and themselves) to make sense of their actions by relaying their version of the events. They can also work with their victims, peers, family

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(16) Jharna Chatterjee, *A Report on the Evaluation of RCMP Restorative Justice Initiatives: Community Justice Forums as Seen by Participants*, Research and Evaluation Branch, Community, Contract and Aboriginal Policing Services Directorate, Royal Canadian Mounted Police, Ottawa, 1999, p. 18.

(17) Kent Roach, "Four Models of the Criminal Process," *Journal of Criminal Law and Criminology*, Vol. 89, No. 2, 1999a, p. 711. See also Rupert Ross, *Returning to the Teachings: Exploring Aboriginal Justice*, Penguin Books, Toronto, 1996, pp. 185-186.

(18) Llewellyn and Howse (1999).

(19) Law Commission of Canada (2003), p. xiii.

(20) Kent Roach, *Due Process and Victims' Rights: The New Law and Politics of Criminal Justice*, University of Toronto Press, Toronto, 1999b, p. 35.

(21) Howard Zehr, *Changing Lenses: A New Focus for Criminal Justice*, Herald Press, Scottdale, Pennsylvania, 1995, p. 181.

members, and even sometimes their local community to devise suitable remedies to address the harm they have caused.(22) In this way, restorative justice programs are said to enable offenders to better understand the consequences of their actions as well as empower them to help "restore" that which they took away.

2. Victims

In the criminal justice system, victims typically find themselves on the sidelines. They experience considerable difficulty in obtaining answers to their questions and/or participating in the crime's resolution in any meaningful way. The criminal justice system has been criticized as being unable to provide victims with the help they need to resolve their anger and fear.(23)

Some critics have argued that victims' isolation is largely a function of the organization of the criminal justice system. While victims are the ones who have suffered wrongdoing, the criminal justice system defines crimes as violations of the state, rather than of individuals.(24) This redefinition of an individual's victimization has important consequences for the scope of victims' involvement in the processing of their cases. As the Law Commission of Canada notes, "[i]t is assumed that the interests of the state and those of the victim are the same."(25) Victims' participation is generally limited to acting as a witness for the state. This means that victims are frequently denied the opportunity to publicly air their losses or to vent their anger and frustration.(26) The criminal justice system is not prepared to answer their questions nor to provide them with "a public affirmation that what occurred to them was wrong."(27) Victims are given little, if any, input into court and prosecutorial decisions. And, lastly, they are often not properly informed about the status of their cases.(28)

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(22) Law Commission of Canada (1999), p. 30.

(23) House of Commons, Standing Committee on Justice and Human Rights, *Victims' Rights – A Voice, Not A Veto*, Ottawa, 1998, pp. 1-2. See also Church Council on Justice and Corrections (1996).

(24) Jeff Latimer and Steven Kleinknecht, *The Effects of Restorative Justice Programming: A Review of the Empirical*, Research and Statistics Division, Department of Justice Canada, Ottawa, 2000, p. 6.

(25) Law Commission of Canada (2003), p. 20.

(26) Llewellyn and Howse (1999).

(27) *Ibid.*

(28) House of Commons, Standing Committee on Justice and Solicitor General, *Taking Responsibility: A Report of the Standing Committee on Justice and Solicitor General on its Review of Sentencing, Conditional Release and Related Aspects of Corrections*, Ottawa, 1988, pp. 23, 26.

It is not surprising, then, that victims have become increasingly vocal about their needs. Over the past few decades, a number of victims' advocacy organizations have sprung up, demanding that the Crown give victims "information, notification, support, and [the right] to be consulted."(29) They have pushed for increased victim involvement in the criminal justice system through initiatives such as victims' bills of rights, victim/witness support programs, and victim-impact statements.(30)

Restorative justice programs take victims' participation to a new level by encouraging them to become actively involved in holding offenders accountable. Supporters of restorative justice argue that these initiatives can help victims to regain a sense of control over the justice process and, more generally, their victimization.(31) While there are many types of restorative justice programs, most share a commitment to empowering victims. Perhaps most importantly, restorative justice initiatives recognize that "crime is first an offense against people."(32) Consequently, these programs focus on uncovering the ways in which victims can be compensated for their losses and begin to heal.

In a safe space, and supported by their family, friends and peers, victims have the opportunity to confront their victimizer.(33) The conference or circle allows victims to express their anger and to share with others how their victimization has affected their lives.(34) They may also get answers to lingering questions such as "Why did this happen to me?"(35) Finally, they are encouraged to convey their perspective on "what is required to put things right," whether it be restitution or other amends.(36) Victims can then decide whether to accept an offender's apology or offer of reparation.(37)

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(29) House of Commons, Standing Committee on Justice and Human Rights (1998), p. 1. See, more generally, Wemmers and Canuto (2002), pp. 3-5.

(30) Roach (1999b), pp. 279, 283.

(31) Roach (1999a), p. 710.

(32) Zehr (1995), p. 182.

(33) Law Commission of Canada (1999), p. 29.

(34) House of Commons, Standing Committee on Justice and Human Rights (1998), p. 19.

(35) Law Commission of Canada (2003), p. 20.

(36) Federal-Provincial-Territorial Working Group on Restorative Justice (2000).

(37) Roach (1999a), p. 710.

Restorative justice programs are believed to give victims a greater sense of security and control. Victims are given much-needed recognition that their victimization was wrong.(38) Furthermore, "restorative justice programs [are said to] offer … individuals a meaningful voice in the [criminal justice] process." Rather than being marginalized from the administration of justice, victims should expect to be able to make their feelings known, to be listened to and, ultimately, to be understood.(39)

3. Communities

Not only are victims and offenders believed to be alienated from the criminal justice system, but other interested parties, such as family members, peers, and the larger community, are as well. One recent paper, published by the British Columbia Ministry of the Attorney General, argues that the criminal justice system "frequently fails to take into account the interests of [individuals] who may not be immediately involved in the justice process but who have a legitimate interest in [its] outcomes."(40) Typically, community members' participation in the legal process is limited to serving on juries or sitting in the court gallery.(41)

While the level of community involvement in restorative justice initiatives varies from program to program, community members are normally encouraged to play a role in the resolution of criminal wrongdoing.(42) At the most general level, communities play a critical role in restorative justice initiatives by conveying their disapproval of an offender's behaviour.(43) However, communities, and most particularly those individuals who are connected to the offender in some way, are also intimately involved in reintegrating and supporting the offender.(44) Moreover, they can help victims and offenders negotiate reparation.(45) Finally,

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(38) Chatterjee (1999), p. 16.

(39) Latimer and Kleinknecht (2000), p. 6.

(40) British Columbia, Ministry of the Attorney General (1998), p. 1.

(41) Law Commission of Canada (1999), p. 29.

(42) Llewellyn and Howse (1999).

(43) John Braithwaite, a staunch proponent of restorative justice, argues that communities must engage in what he calls "reintegrative shaming." Communities must condemn the offender's actions, without condemning the offender him/herself. This type of shaming works best when it comes from individuals whom the offender knows and respects. John Braithwaite, "Shame and Criminal Justice," *Canadian Journal of Criminology*, Vol. 42, No. 3, 2000, pp. 282, 287, 294.

(44) Law Commission of Canada (2003), pp. 3, 56-57.

(45) *Ibid.*, p. 57.

they can help steer offenders into community-based programs to deal with underlying problems such as substance abuse or aggression.(46)

While victims and offenders clearly have much to gain from the support of friends, families and other community members, the larger community also benefits from participating in restorative justice programs. Its involvement can help foster a broader sense of community identity and give people a sense of ownership over their neighbourhoods and their way of life.(47) The effects of crime emanate far beyond those individuals directly involved – they affect the entire community. Restorative justice processes thus may give community members the opportunity to deal constructively with fear and conflict, while also fostering greater "local decision-making and community-building, independent of the formal justice system."(48)

B. Flexibility in Process and Outcomes

The criminal justice system allows for only a select range of processes and outcomes. The conventional adjudication process seeks formal equality; that is, everyone is to be treated the same.(49) Likewise, section 718.2(*b*) of the *Criminal Code* states that "a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances."(50)

In contrast, supporters of restorative justice programs maintain that the very strength of their initiatives lies in their flexibility. They argue that while the conventional adjudication process may allow for formal equality, it neglects "the reality of diversity and power differences."(51) Moreover, they believe that outcomes need to be tailored to meet the specific needs of those individuals involved.

According to John Braithwaite, restorative justice programs exist in order to restore "whatever dimensions of restoration matter to the victims, offenders, and communities

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(46) Federal-Provincial-Territorial Working Group on Restorative Justice (2000).

(47) Law Commission of Canada (2003), p. 26.

(48) *Ibid.*, p. 24. John Braithwaite believes community involvement in restorative justice initiatives fosters "citizen empowerment." Braithwaite (2003), p. 5.

(49) Law Commission of Canada (2003), p. 25.

(50) *Criminal Code of Canada*, R.S.C. 1985, c. C-46, s. 718.2(*b*).

(51) Law Commission of Canada (2003), p. 25.

affected by the crime. Stakeholder deliberation determines what restoration means in a specific context."[52] It is this very attention to context that is believed to make restorative justice programs so meaningful for those involved.

1. Process

a. General Restorative Justice Program Models

Unlike countries such as New Zealand,[53] Canada has no standard scheme or approach to restorative justice. Restorative justice programs can operate at one of five stages in the criminal justice system: (1) before an offender is charged; (2) after an offender is charged, but before trial; (3) after an offender has been found guilty, but before being sentenced; (4) after being sentenced; and (5) before an offender is paroled or released.[54] Furthermore, the actual organization of restorative justice programs varies significantly across the country, based on the needs of offenders, victims, and their communities.

Nevertheless, there are a number of models under which most Canadian restorative justice programs operate:

- **Victim-offender mediation/reconciliation** brings an offender and the victim together for a (or a series of) face-to-face meeting(s). Along with the help of a trained facilitator, the victim and offender can obtain information, share their thoughts and express their feelings about the crime. They also generally try to reach an agreement with regard to either reconciliation or restitution. The Mennonite Central Committee, based in Kitchener-Waterloo, established the first victim-offender mediation program in 1974.[55]

- **Family group conferencing** extends victim-offender mediation/reconciliation to include family members, peers and other supporters. This type of program has gained in popularity since it was first endorsed by New Zealand in the late 1980s.[56] This program focuses on the

(52) John Braithwaite, "Restorative Justice: Assessing Optimistic and Pessimistic Accounts," in *Crime and Justice: A Review of Research*, Vol. 25, ed. Michael Tonry, University of Chicago Press, Chicago, 1999, p. 6.

(53) *Restorative Justice: A Discussion Paper*, Ministry of Justice, Wellington, N.Z., 1995.

(54) Jeff Latimer, Craig Dowden, and Danielle Muise, *The Effectiveness of Restorative Justice Practices: A Meta-Analysis*, Research and Statistics Division, Department of Justice Canada, Ottawa, 2001, p. 2.

(55) Dean E. Peachey, "The Kitchener Experiment," in *Mediation and Criminal Justice*, ed. Martin Wright and Burt Galaway, Sage Publications, London, U.K., 1989.

(56) Under New Zealand's *Children, Young Persons and Their Families Act* (1989), the police refer young offenders who have committed less serious crimes to family group conferences. Prerequisites for diversion to a family group conference include admitting guilt and voluntarily agreeing to participate. Young offenders who are accused of more serious crimes (for example, armed robbery and a number of sex offences) must appear before the Youth Court. However, even those young people generally attend a conference to discuss possible outcomes before sentencing. See David Miers, *An International Review of Restorative Justice*, Policing and Reducing Crime Unit, Research, Development and Statistics Directorate, Home Office, London, U.K., 2001, pp. 68-72. See also House of Commons, Standing Committee on Justice and Legal Affairs, *Renewing Youth Justice*, Ottawa, 1997, pp. 49-51.

role that the larger community can play in supporting, shaming, and helping the offender to repair the damage he or she has caused. Family group conferences also often explore how the offender can avoid getting into trouble in the future.

- **Community boards or justice panels** intervene either before an offender enters the criminal justice system or before sentencing. Composed of volunteers from the local community, these community boards or panels bring offenders and victims together in order to negotiate a suitable outcome. Generally, the offender and the panel write up a contract, stipulating the terms that an offender must follow during a probationary period. In the event of a breach of the contract, the offender is referred back to the formal justice system for adjudication and/or sentencing. Community justice panels are currently more popular in the United States than in Canada.(57)

- **Circles of support and accountability** were recently developed in order to facilitate the reintegration of high-risk sex offenders into their communities. A group of volunteers meet daily with the offender after he or she has been released to provide support and encouragement.(58)

As the Law Commission of Canada points out, "[t]he very nature of restorative justice processes and their emphasis on informality rejects the one-size-fits-all approach of the traditional adjudicative model."(59) The strength of these programs, supporters argue, lies in their adaptability to the different contexts of offenders, victims, and their communities.

b. Aboriginal Restorative Justice Program Models

Restorative justice programs have also become more widespread in Aboriginal communities in recent years. The attempt to involve victims, offenders, and their communities in the resolution of criminal cases stems from growing evidence that the criminal justice system is doing little, if anything, to respond to the crime and social disorder afflicting many Aboriginal communities.(60) There is also widespread concern about Aboriginal overrepresentation in federal, provincial and territorial correctional institutions.(61)

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(57) Law Commission of Canada (2003), p. 42.

(58) Correctional Service of Canada Chaplaincy, *Circles of Support and Accountability: Evaluation Report*, Ottawa, 2001; available at http://www.csc-scc.gc.ca/text/prgrm/chap/circles_support_e.shtml.

(59) Law Commission of Canada (2003), p. 69.

(60) Kent Roach, "Changing Punishment at the Turn of the Century: Restorative Justice on the Rise," *Canadian Journal of Criminology*, Vol. 42, No. 3, 2000, p. 273.

(61) *Commission of Inquiry into Certain Events at the Prison for Women in Kingston (Canada)*, The Honourable Louise Arbour, Commissioner, Toronto, 1996, p. 219.

A number of critics have argued that the problems Aboriginal people face in the conventional criminal justice system stem from the incompatibility between Western and Aboriginal approaches to justice.(62) According to the Royal Commission on Aboriginal Peoples,

> The Canadian criminal justice system has failed the Aboriginal peoples of Canada – First Nations, Inuit and Métis people, on-reserve and off-reserve, urban and rural – in all territorial and government jurisdictions. The principal reason for this crushing failure is the fundamentally different world views of Aboriginal and non-Aboriginal people with respect to such elemental issues as the substantive content of justice and the process of achieving justice.(63)

There is no one over-arching definition of Aboriginal justice.(64) Nevertheless, critics point out that there are significant differences between Aboriginal justice processes and those that predominate in the Canadian criminal justice system. For instance, it is well known that Aboriginal culture promotes active responsibility-taking. As a result, Aboriginal offenders are believed to be more likely to plead guilty in their cases, even when they may not be legally guilty.(65) In addition, Aboriginal justice sees offenders not as individuals, but as "products of the web of relationships that both surround and, in a very real sense, 'define' them." An offender's "web of relationships" is thus critical to any attempt to restore relationships and to heal.(66) Finally, Aboriginal justice supports reconciliation and healing, rather than an adversarial contest that one wins or loses.(67) As such, "[t]he restorative approach has been embraced by those seeking to counter the destructive effect of the current justice system on Aboriginals because its emphasis on healing, rather than punishment, is very much in harmony with

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(62) Rupert Ross, "Exploring the Aboriginal Paradigm," *Saskatchewan Law Review*, Vol. 59, No. 2, 1995.

(63) Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide – A Report on Aboriginal People and Criminal Justice in Canada*, Ottawa, 1996, p. 309.

(64) Roberts and Roach (2003), p. 240.

(65) Jonathan Rudin and Kent Roach, "Broken Promises: A Response to Stenning and Roberts' 'Empty Promises,'" *Saskatchewan Law Review*, Vol. 65, 2002, pp. 16-17.

(66) Ross (1995), p. 432.

(67) *R.* v. *Moses*, [1992] Y.J. No. 50. According to Rupert Ross, "Traditional teachings, not surprisingly, suggest that antagonistic feelings within relationships are in fact the *cause* of antagonistic acts. Traditional law thus requires that justice processes must be structured to *reduce*, rather than escalate that antagonism." Ross (1995), p. 433.

traditional notions of native justice."[68] Restorative justice programs have also gained support from many Aboriginal communities who "have called for self-determination and control over the justice systems that affect them."[69]

There are a number of restorative justice initiatives operating in Aboriginal communities across the country. Intervention occurs at all stages of the criminal justice process, from before an offender is charged to after an offender is sentenced. While each of the program models is different, they nevertheless share a common goal: to gather input from all those involved in the crime and its aftermath.[70]

- **Sentencing circles** bring offenders, victims, their families, community members and elders together to discuss the ramifications of a crime. The meeting is conducted in a circle, which is believed to reduce hierarchy and promote sharing of thought. Victims and community members are encouraged to discuss how the crime has affected them. The group then presents a sentencing recommendation to the judge and other criminal justice officials (who are also in attendance). The judge determines whether the sentence is appropriate and whether it satisfies the court's sentencing guidelines. Sentencing circles first came into prominence in Canada in 1992 with the case of *R.* v. *Moses*.[71]

- **Elder panels** are similar to sentencing circles insofar as they are designed to provide a judge with information and advice prior to sentencing. However, instead of sitting in a circle, the panel sits with the judge in a conventional courtroom. The elders are generally responsible for providing follow-up and ensuring compliance with sentencing.

- Unlike sentencing circles and elder panels, **healing circles** are meant to divert an offender away from the formal criminal justice system. Interested participants come together in a circle to discuss the crime and to lay out a plan of action. If a consensus can be reached, the offender generally does not have to go to court. Healing circles are different from family group conferences because of their focus on healing.

- **Elder- or community-assisted (parole) hearings** are designed as an alternative to the conventional parole board hearing. These hearings are held in Aboriginal communities instead of in a penitentiary. An Aboriginal elder participates in the hearing, offering parole board members "information about Aboriginal cultures, experiences and traditions, and, when possible, the specific cultures and traditions of the Aboriginal population which the

(68) Daniel Kwochka, "Aboriginal Injustice: Making Room for a Restorative Paradigm," *Saskatchewan Law Review*, Vol. 60, No. 1, 1996, p. 159. See, more generally, Ross (1996).

(69) Federal-Provincial-Territorial Working Group on Restorative Justice (2000).

(70) Royal Commission on Aboriginal Peoples (1996), p. 110.

(71) *R.* v. *Moses* (1992).

offender belongs, or may return to."[72] The parole board uses the elder as a resource when deciding whether to grant an Aboriginal offender early release. The elder is also available to the inmate in case he or she needs guidance.

2. Outcomes

It is well known that the Canadian public is largely dissatisfied with the operations of the criminal justice system. Opinion polls conducted over the past two decades have consistently shown that Canadians do not believe that the criminal justice system deals effectively with offenders.[73] More specifically, while most Canadians support the work of the policing organizations in their communities, they are significantly less likely to express satisfaction with the work of the criminal courts, prison and parole systems.[74]

Most critiques of the criminal justice system appear to centre on two key issues of sentencing: leniency and disparity.[75] There appears to be a general sense that the criminal justice system is "too soft" on crime, because it is not seen to be imposing harsh enough sentences (and more specifically, long enough periods of imprisonment).[76]

While there is considerable evidence that Canadians underestimate the severity of sentences and, more generally, overestimate the overall level of crime,[77] it is nonetheless likely that public opinion has had some effect on the Canadian courts' processing of criminal disputes. As Cory and Iacobucci J.J. of the Supreme Court of Canada point out in *R.* v. *Gladue*,

> Canada is a world leader in many fields, particularly in the areas of progressive social policy and human rights. Unfortunately, our country is also distinguished as being a world leader in putting people in prison.[78]

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(72) National Parole Board, Government of Canada, "Facts: Hearings for Aboriginal Offenders," January 2002; available at http://www.npb-cnlc.gc.ca/infocntr/factsh/hearings_e.htm.

(73) Julian V. Roberts, "Sentencing, Public Opinion and the News Media," *Revue générale de droit*, Vol. 26, No. 1, 1995. See also Angus Reid Group, *Alternatives to Incarceration: Final Report Submitted to Solicitor General*, Angus Reid, Ottawa, 1996; and Jennifer Tufts, "Public Attitudes Towards the Criminal Justice System," *Juristat*, Vol. 20, No. 12, Canadian Centre for Justice Statistics, Statistics Canada, 2000.

(74) Tufts (2000).

(75) Julian V. Roberts, *Public Opinion and Sentencing: The Surveys of the Canadian Sentencing Commission*, Research and Development Directorate, Policy, Programs and Research Branch, Department of Justice, Ottawa, 1988.

(76) Law Commission of Canada (1999), p. 17.

(77) Julian V. Roberts and Anthony N. Doob, "Sentencing and Public Opinion: Taking False Shadows for True Substances," *Osgoode Hall Law Journal*, Vol. 27, 1989.

(78) *R.* v. *Gladue* [1999] 1 S.C.R. at 52.

In 2000, Canada's rate of incarceration (including both adult and young offenders) was 118 inmates per 100,000 population. Although significantly less than that of the United States, at 699 inmates per 100,000 population (and this figure includes only adult offenders), Canada has one of the top five incarceration rates in the western world.(79) According to the Supreme Court of Canada, "[t]his record of incarceration rates obviously cannot instil a sense of pride."(80)

In recent years, however, Canada's incarceration rate has been declining, from 137 adults and youth in custody per 100,000 population in 1996 to 118 in 2000.(81) While some critics argue that Canada's incarceration rate is still too high,(82) recent initiatives such as those under the restorative justice banner may be diverting offenders from the prison system.

Critics of the criminal justice system have long maintained that imprisonment has helped neither to lower the crime rate nor to prevent recidivism among offenders. According to a report by the Standing Committee on Justice and Solicitor General called *Taking Responsibility*,

> It is now generally recognized that imprisonment has not been effective in rehabilitating or reforming offenders, has not been shown to be a strong deterrent, and has achieved only temporary public protection and uneven retribution, as the lengths of prison sentences handed down vary for the same type of crime. … The use of imprisonment as the main response to a wide variety of offences against the law is not a tenable approach in practical terms.(83)

Supporters of restorative justice argue that their programs can provide victims, offenders, and their communities with creative and flexible sanctions that not only are meaningful, but also attempt to address their long-term needs.(84)

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(79) Denyse Carrière, "Adult Correctional Services in Canada, 2001/02," *Juristat*, Vol. 23, No. 11, Canadian Centre for Justice Statistics, Statistics Canada, 2003, p. 6.

(80) *R.* v. *Gladue* (1999) at 52.

(81) Carrière (2003), p. 6. As noted earlier, incarceration rates for Aboriginal offenders are disproportionately higher than for the rest of the Canadian population. See Rudin and Roach (2002). For a contrasting point of view, see Philip Stenning and Julian Roberts, "Empty Promises: Parliament, the Supreme Court, and the Sentencing of Aboriginal Offenders," *Saskatchewan Law Review*, Vol. 64, 2001.

(82) See, for example, Church Council on Justice and Corrections (1996).

(83) House of Commons, Standing Committee on Justice and Solicitor General (1988), p. 75.

(84) Marshall (1999), pp. 5-6, 11.

Unlike traditional sentencing, restorative justice prescribes no rules that dictate how an offender's criminal activity must be resolved. Nevertheless, most restorative justice programs seek to denounce an offender's actions and hold the offender responsible for the harm he or she has caused. Within these guidelines, sanctions vary depending on the wishes of the parties involved.(85)

Generally, restorative justice advocates believe that "crime creates obligations."(86) It is thus up to the conference or circle to collectively determine how to address the current damage and to discuss ways in which future harm can be avoided.(87) Reparation and/or compensation are typical. However, they, in and of themselves, are typically not enough.(88) In *R.* v. *Proulx* (2000), the Supreme Court of Canada argued that restorative justice

> is accomplished, in part, through the rehabilitation of the offender, reparations to the victim and to the community and the promotion of a sense of responsibility in the offender and acknowledgement of the harm done to victims and to the community.(89)

The ways in which these objectives are reached can vary. Offenders can be asked to engage in community service, attend programs for anger management and/or drug abuse, or even, in some cases, be incarcerated.(90) However, most restorative justice programs support community-based sanctions.(91)

Some concerns have been raised about whether restorative justice initiatives are too "soft" on offenders. Supporters have rebutted this critique by arguing that facing those individuals whom you have hurt can be difficult for many offenders.(92) A small number of restorative justice programs operating in Canada today specifically deal with offenders accused of serious violent crimes.(93) Nevertheless, as the Standing Committee on Justice and Solicitor

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(85) Law Commission of Canada (2003), pp. 61-62.

(86) Zehr (1995), p. 196.

(87) Federal-Provincial-Territorial Working Group on Restorative Justice (2000).

(88) Llewellyn and Howse (1999).

(89) *R.* v. *Proulx* [2000] 1 S.C.R. at 18.

(90) Law Commission of Canada (2003), p. 62.

(91) James Bonta, Suzanne Wallace-Capretta and Jennifer Rooney, *Restorative Justice: An Evaluation of the Restorative Resolutions Project*, Solicitor General Canada, Ottawa, 1998, p. 3.

(92) Roach (1999b), pp. 218-219.

(93) See, for example, Native Counselling Services of Alberta, *A Cost-Benefit Analysis of Hollow Water's Community Holistic Circle Healing Process*, Aboriginal Corrections Policy Unit, Solicitor General Canada, Ottawa, 2001.

General reports, restorative justice focuses on very different objectives than retribution and punishment. Rather, these initiatives seek to "offer [offenders] both the greatest hope of sensitizing [them] to the impact of their criminal conduct […] and the best opportunities for them to take responsibility for their behaviour."(94) The relationship, however, between "restorative justice" and "justice" continues to spark debate among academics, policy-makers and the courts.(95)

RESTORATIVE JUSTICE, PARLIAMENT, AND THE CRIMINAL JUSTICE SYSTEM

The roots of restorative justice go back many years to traditional forms of Aboriginal justice. However, restorative justice programming (and restorative justice principles more generally) have only recently been integrated into criminal law and the criminal justice system.

During the last few decades of the 20th century, concerns arose over a general reliance on imprisonment as the primary response to criminal activity. In particular, important questions were raised about the capacity of imprisonment to rehabilitate offenders or to prepare them for re-entry into Canadian society.(96) In spite of this acknowledgement, however, there was typically little mention of alternative sanctions and no discussion of involving more than the conventional parties in the adjudication of criminal cases. In the 1969 report of the Canadian Committee on Corrections, for example, the possibility of victim reparation was briefly discussed, but with the following caveat:

> Existing provisions in the Criminal Code offer limited opportunities to order restitution or compensation. … These provisions have been on the statute books for some time but have rarely been invoked. … It appears to the Committee that this failure to invoke let alone expand those provisions can be attributed to the difficulty likely to be experienced by a criminal court in assessing damages which arise from personal injury or complicated interference with property rights.(97)

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(94) House of Commons, Standing Committee on Justice and Solicitor General (1988), p. 76.

(95) Law Commission of Canada (1999), p. 38.

(96) Canadian Committee on Corrections, *Toward Unity: Criminal Justice and Corrections*, The Queen's Printer, Ottawa, 1969.

(97) *Ibid.*, p. 201.

The Committee chose not to recommend victim reparation or restitution, instead inviting the government to review the possibility of using such measures in the future.

A. Restorative Justice and Parliament

It was only during the late 1980s that restorative justice programs and principles first entered the political and public discourse. A much-anticipated report by the Canadian Sentencing Commission (1987) focused almost exclusively on addressing the issue of disparity in sentencing. While the Commission recommended the use of community sanctions for less serious crimes, it did not include any elements of the restorative justice philosophy in its recommended purposes or principles of sentencing. The Commission's report did, however, briefly mention that judges may consider a sentence that "provid[es] for redress for the harm done to individual victims or to the community" and/or "promotes a sense of responsibility on the part of offenders and provid[es] for opportunities to assist in their rehabilitation as productive and law-abiding members of society."(98)

Scarcely a year later, the House of Commons Standing Committee on Justice and Solicitor General presented its own report to Parliament on sentencing.(99) *Taking Responsibility* is generally acknowledged to be among the first reports to recognize the value of restorative justice in sentencing. In its statement of the purpose of sentencing, for example, the Committee specifically recommends incorporating restorative justice principles into the determination of an offender's sentence:

> The purpose of sentencing is to contribute to the maintenance of a just, peaceful and safe society by holding offenders accountable for their criminal conduct through the imposition of just sanctions which:
>
> (a) require, or encourage when it is not possible to require, offenders to acknowledge the harm they have done to victims and the community, and to take responsibility for the consequences of their behaviour;
>
> (b) take account of the steps offenders have taken, or propose to take, to make reparations to the victim and/or the community for the harm done or to otherwise demonstrate acceptance of responsibility;

(98) Canadian Sentencing Commission (1987), p. 155.

(99) House of Commons, Standing Committee on Justice and Solicitor General (1988).

> (c) facilitate victim-offender reconciliation where victims so request, or are willing to participate in such programs;
>
> (d) if necessary, provide offenders with opportunities which are likely to facilitate their habilitation or rehabilitation as productive and law-abiding members of society; and
>
> (e) if necessary, denounce the behaviour and/or incapacitate the offender.(100)

In spite of the Committee's recommendations, however, the government did not reform sentencing until the introduction of Bill C-41 nearly 10 years later.(101)

In 1996, Parliament passed Canada's first formal principles governing the sentencing of convicted offenders. This also marked the first time that the *Criminal Code* recognized the potential of restorative justice in sentencing. Specifically, the Code's Purposes and Principles of Sentencing include sections 718 (*e*) and (*f*), which specify that judges may consider "provid[ing] reparations for harms done to victims or to the community" and "promot[ing] a sense of responsibility in offenders, and acknowledgement of the harm done to victims and to the community" as objectives in sentencing. Section 718.2 (*e*) also specifically requires the sentencing court to consider alternatives to imprisonment. It states that "all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders."

Restorative justice principles have also been integrated into legislation governing young offenders. Under the *Young Offenders Act* (1985), the sentencing court could impose a number of dispositions or sentences. Included within that list were several dispositions that could be said to fulfil restorative aims: providing victims with compensation, restitution and/or personal services, as well as engaging in community services.(102) A 1997 report by the House of Commons Standing Committee on Justice and Legal Affairs, however, advocated expanding the use of diversion programs and alternative sentences. According to the Committee, the government ought to

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(100) *Ibid.*, p. 55.

(101) In 1996, a report for the Federal/Provincial/Territorial Ministers Responsible for Justice also called upon the government to use diversion programs and community sanctions for low-risk, non-violent offenders. *Corrections Population Growth*, A Report for Federal/Provincial/Territorial Ministers Responsible for Justice, Ottawa, 1996.

(102) *Young Offenders Act*, R.S.C. 1985, c. Y-1, s. 20.

> favour […] an approach based on early intervention, where prevention efforts, community and family-based, informal, non-criminal justice and non-custodial strategies are given primacy. The full gamut of criminal justice instruments, including custodial dispositions, should be reserved for the most serious instances of youth offending.(103)

In 2003, the *Youth Criminal Justice Act* came into effect. It repealed its predecessor, the *Young Offenders Act*, and put in its place new legislation designed to govern the state's response to youth crime.(104) The *Youth Criminal Justice Act* places considerable emphasis on the use of restorative justice measures and community sanctions, albeit primarily for youth charged with committing less serious crimes. The Act's principles and objectives state (in section 4) that:

> (a) extrajudicial measures are often the most appropriate and effective way to address youth crime;
> (b) extrajudicial measures allow for effective and timely interventions focused on correcting offending behaviour;
> (c) extrajudicial measures are presumed to be adequate to hold a young person accountable for his or her offending behaviour if the young person has committed a non-violent offence and has not previously been found guilty of an offence; and
> (d) extrajudicial measures should be used if they are adequate to hold a young person accountable for his or her offending behaviour and, if the use of extrajudicial measures is consistent with the principles set out in this section, nothing in this Act precludes their use in respect of a young person who
> (i) has previously been dealt with by the use of extrajudicial measures, or
> (ii) has previously been found guilty of an offence.

According to the Act, the use of extrajudicial measures is desirable for several reasons. It states (in section 5) that these measures are designed to be an appropriate and effective means to deal with young offenders because they encourage youth to take responsibility for their actions and attempt to repair the harm they have caused, and because they enable victims, communities and the offenders' families to participate in the design and implementation of measures in response to

(103) House of Commons, Standing Committee on Justice and Legal Affairs (1997), p. 41.

(104) *Youth Criminal Justice Act*, S.C. 2002, c. 1.

youth crime. Finally, the Act instructs the court that "all available sanctions other than custody that are reasonable in the circumstances should be considered for all young persons, with particular attention to the circumstances of aboriginal young persons" (section 38.2).

B. Restorative Justice and the Courts

While Parliament recognized the merit of restorative justice principles in sentencing in the mid- to late 1990s, the integration of these principles into the criminal justice system has not been completely smooth. In 1999 and 2000, the Supreme Court of Canada was called upon to refine how restorative justice values and programming ought to be applied. Concerns arose primarily over the use of restorative justice in the sentencing of serious and violent offenders, of both Aboriginal and non-Aboriginal origin. This debate played itself out primarily over the use of conditional sentences, a sanction that, according to Julian Roberts and Kent Roach, "has […] been interpreted as a vehicle for restorative aims."(105)

1. *R.* v. *Gladue* (1999)

The first test of the restorative justice philosophy and the applicability of the new sentencing principles introduced in 1996 into the *Criminal Code* (s. 718) came in 1999 with the case of Jamie Tanis Gladue. The defendant, an Aboriginal woman, pled guilty to manslaughter for the death of her common-law partner, Reuben Beaver. According to the evidence presented at trial, Ms. Gladue and Mr. Beaver fought after she caught him in what she believed to be an affair with her sister. Ms. Gladue later chased Mr. Beaver down the hall of their townhouse complex and stabbed him. Ms. Gladue was sentenced to three years' imprisonment and to a 10-year weapons prohibition. The British Columbia Court of Appeal upheld the sentence.

The main issue before the Supreme Court of Canada was the interpretation and application of the *Criminal Code*'s new sentencing principles under section 718. In particular, it was asked to consider the application of s. 718.2(*e*), which states that "all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders."

(105) Roberts and Roach (2003), p. 245.

The Court found that s. 718.2(*e*) was originally adopted by Parliament because of concerns about the overuse of incarceration as a sanction and the overrepresentation of Aboriginal people in Canada's prisons. Cory and Iacobucci J.J., speaking for the Court, wrote that the section was meant to be remedial, designed to "ameliorate the serious problem of overrepresentation of aboriginal people in prisons, and to encourage sentencing judges to have recourse to a restorative approach to sentencing."(106)

Under the new sentencing principles, therefore, judges are required not only to exercise restraint in the use of imprisonment when sanctioning an offender, but also to consider the specific circumstances of convicted Aboriginal offenders.(107) The Court has long acknowledged that there is no such thing as a "uniform sentence," and that judges must balance the circumstances of the offender and the offence before determining an appropriate sanction.(108) However, in *Gladue*, the Court stated that judges must take into account two additional factors when sentencing an Aboriginal person:

> (A) The unique systemic or background factors which may have played a part in bringing the particular aboriginal offender before the courts; and
>
> (B) The types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection.(109)

Because most Aboriginal communities share a common history of using community-based sanctions to address and deter crime, sentencing judges must consider alternatives to imprisonment – particularly for those offenders found guilty of committing non-violent and less serious crimes.(110) However, the Court submitted that "[g]enerally, the more violent and serious the offence the more likely it is as a practical reality that the terms of imprisonment for aboriginals and non-aboriginals will be close to each other or the same, even taking into account their different concepts of sentencing."(111)

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(106) *R.* v. *Gladue* (1999) at 93.

(107) *Ibid.*, at 38.

(108) See, for example, *R.* v. *M. (C.A.)* [1996] S.C.R. at 92.

(109) *R.* v. *Gladue* (1999) at 66.

(110) *Ibid.*, at 74.

(111) *Ibid.*, at 79.

Ms. Gladue's appeal was dismissed, in part because she had already been granted full parole before the case reached the Supreme Court. However, legal commentators such as Kent Roach and Jonathan Rudin argue that the *Gladue* decision is important for at least two reasons.(112) First, the Court acknowledged the value of pursuing restorative justice aims, particularly in light of the growing prison population in Canada, and also in the interests of imposing meaningful consequences on offenders for their actions. Second, the Court directed judges to consider alternative sentences to imprisonment for both non-Aboriginal and, in particular, Aboriginal offenders.

2. Other Cases

In a series of decisions that followed in 2000, the Supreme Court of Canada further clarified the application of the new sentencing principles and, more specifically, the appropriate use of conditional sentences.(113) In these decisions, the Court responded to a number of queries, including – perhaps most significantly – questions about the availability of restorative justice-type sanctions for non-Aboriginal offenders and offenders convicted of serious, violent crimes.

In *R.* v. *Proulx*, the Court stated that judges must consider sanctions that can fulfil restorative aims, such as conditional sentences, for all offenders who meet the requisite conditions as laid out in s. 742.1 of the *Criminal Code*. However, the Court also recognized that conditional sentences do not merely facilitate restorative goals. They are also a punitive sanction, and should be imposed as such. According to the Court, "conditional sentences should generally include punitive conditions that are restrictive of the offender's liberty. Conditions such as house arrest or strict curfews should be the norm, not the exception."(114) Consequently, conditional sentences should not be seen as the panacea for overincarceration – particularly if breaches result in jail time.(115)

In an accompanying decision, *R.* v. *R.A.R.*, a majority of the Supreme Court of Canada also stated that conditional sentences are not appropriate for all offenders; judges must examine "the gravity of the offences committed and the [offender's] moral

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(112) Kent Roach and Jonathan Rudin, "*Gladue*: The Judicial and Political Reception of a Promising Decision," *Canadian Journal of Criminology*, Vol. 42, No. 3, 2000.

(113) *R.* v. *Wells* [2000] 1 S.C.R. 1; *R.* v. *Proulx* [2000] 1 S.C.R. 61; *R.* v. *L.F.W.* [2000] 1 S.C.R. 132; *R.* v. *R.N.S.* [2000] 1 S.C.R. 149; *R.* v. *R.A.R.* [2000] 1 S.C.R. 163; and *R.* v. *Bunn* [2000] 1 S.C.R. 183.

(114) *R.* v. *Proulx* (2000), at 36.

(115) Roach and Rudin (2000), pp. 369-372.

blameworthiness."[116] Conditional sentences and other restorative justice measures, the Court argued, are likely not suitable in cases where denunciation and deterrence are paramount.[117]

Finally, in *R.* v. *Wells*, the Supreme Court of Canada said that while judges must consider the circumstances of Aboriginal offenders, the section "does not displace the need to take into account all of the other principles and objectives set out in ss. 718 to 718.2."[118] An offender's Aboriginal status should not translate into an "automatic […] reduc[tion]" of his or her sentence.[119] The judge must examine all of the circumstances of the case, including the offender's Aboriginal status. The Court argued, however, that even though a judge must take into account these additional factors, an Aboriginal and a non-Aboriginal offender might end up with a similar sentence.

EMPIRICAL ASSESSMENT OF RESTORATIVE JUSTICE PROGRAMMING

There is much philosophical support for restorative justice programs. Advocates of such programs argue that they benefit all parties involved – victims, offenders, communities, and the state. The gathering and analyzing of empirical evidence to support or dispute these claims is, however, still in its infancy. The vast majority of assessments conducted in Canada have consisted of program evaluations of particular initiatives, such as Hollow Water's Community Holistic Circle Healing Process[120] and the Royal Canadian Mounted Police Community Justice Forums.[121] Comparatively fewer studies have attempted to study restorative justice programming at a more general level. This situation appears, however, to be changing. The Research and Statistics Division of the Department of Justice, in particular, has been active since 2000 in evaluating the effectiveness of restorative justice programming in Canada and abroad.

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(116) *R.* v. *R.A.R.* (2000), at 24.

(117) *Ibid.*, at 30.

(118) *R.* v. *Wells* (2000), at 30.

(119) *Ibid.*

(120) Native Counselling Services of Alberta (2001).

(121) Chatterjee (1999).

One study consisted of a meta-analysis of restorative justice initiatives, or a statistical analysis of existing studies on the topic, drawn from a variety of sources (both published and unpublished) and covering many different types of restorative justice programs.(122) The results suggest that the restorative justice initiatives analyzed were generally successful in meeting their goals. In comparison to the control groups who were processed through the traditional criminal justice system, study participants were more likely to express satisfaction with the resolution of their cases, offenders were more likely to comply with restitution agreements, and offender recidivism decreased. The authors note, however, that restorative justice programs are voluntary, and that the results are therefore likely subject to some self-selection bias.(123)

Another study conducted by two professors at the International Centre for Comparative Criminology, Université de Montréal, and funded by the Policy Centre for Victim Issues and the Research and Statistics Division, Department of Justice, focused on victims' experience with restorative justice programming.(124) In their review of the existing literature in the area, Jo-Anne Wemmers and Marisa Canuto found that victims are generally supportive of restorative justice initiatives, provided that their participation is voluntary. Not every victim chooses to take part in these programs. Reasons for participation fall under two themes: (1) the desire for compensation or restitution, and (2) as a means to heal. Some victims choose not to involve themselves in these programs out of fear, anger, or the belief that it "is not worth the time and effort."(125) By and large, victims are satisfied with their participation in restorative justice programming; satisfaction rates, however, are not as high as those among offenders. Moreover, the authors note an important caveat: "… in comparison to victims whose cases were handled in the criminal justice system, there is no clear evidence to conclude that victims in restorative programs are any more or less satisfied."(126)

(122) Latimer, Dowden, and Muise (2001).

(123) *Ibid.*, p. 17.

(124) Wemmers and Canuto (2002).

(125) *Ibid.*, p. 26.

(126) *Ibid.*, p. 35.

Both of these studies point to a knowledge gap with regard to the operation and outcomes of restorative justice programs. The research literature in Canada remains pale in comparison to that in some other countries.(127) In 2003, the Canadian Centre for Justice Statistics, part of Statistics Canada, published a report on a preliminary consultation designed to assess the feasibility of gathering statistical data on restorative justice programs.(128) Unfortunately, given the lack of consensus on the "definitions and applications" of restorative justice programming in Canada, the report concludes that a "[s]urvey is not considered feasible at this time …"(129) It may yet be some time before this project is undertaken.

CRITIQUES OF RESTORATIVE JUSTICE

As Julian Roberts and Kent Roach point out, "The absence of research data has not stopped people from both criticizing and defending victim-offender reconciliation programs [and other restorative justice initiatives] in Canada."(130) While supporters of restorative justice programs have listed many reasons why these initiatives are important (and should continue to expand), other commentators have expressed reservations about the ability of these programs to meet their stated goals. Most of the concerns focus on one of the following issues: (1) the offenders whom restorative justice programs target; (2) victims' involvement in restorative justice initiatives; (3) the potential of restorative justice in Aboriginal communities; and (4) the role of the state and the community in restorative justice processes.

A. Access to Restorative Justice

A number of important questions have arisen over which offenders should be eligible to participate in restorative justice programs. In particular, debate has focused on whether restorative justice programs are appropriate for serious and violent offenders, or whether they should target only particular populations such as young offenders and Aboriginal people. Unfortunately, each option has drawbacks.

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(127) Latimer, Dowden, and Muise (2001).

(128) Sara Johnson, *Restorative Justice Programs and Services in Criminal Matters: Summary of Consultations*, Canadian Centre for Justice Statistics, Statistics Canada, 2003.

(129) *Ibid.*, pp. 12, 14.

(130) Roberts and Roach (2003), p. 239.

1. Serious and Violent Offenders

Some advocates of restorative justice measures argue that these programs can (and should) be extended to offenders involved in serious and violent crimes. In fact, there are a small number of programs currently in place in Canada that will intervene in cases involving crimes such as sexual assault and robbery.(131) However, critics point out that expanding the scope of restorative justice programs to include serious and violent offenders may impede realizing the other inherent goals of sentencing: rehabilitation, deterrence, incapacitation and denunciation of criminal activity. For instance, the Federal-Provincial-Territorial Working Group on Restorative Justice commented that "… the public expects the justice system to clearly denounce serious and violent crimes, and the use of restorative processes might be seen as compromising that message."(132)

Furthermore, some sentencing scholars have questioned whether restorative justice programs deliver outcomes that conform to the other sentencing principles set out by the *Criminal Code*. Firstly, critics argue that the "individualized punishments" developed by restorative justice initiatives such as sentencing circles violate Canada's most fundamental sentencing principle: that of proportionality.(133) By focusing their efforts primarily on devising penalties that "restor[e] [both] offender and victim," these programs become less concerned with achieving proportionality, defined as balancing punishment with the seriousness of the crime an offender has committed.(134) According to Julian Roberts, "If the principle of sentencing is undermined by restorative justice, the sentencing process will lose much coherence and public support."(135)

Similar concerns are raised about the possibility of disparity in sentencing. Because restorative justice programs focus on devising unique and local solutions to criminal activity, it is probable that offenders committing similar crimes will not necessarily receive similar sanctions. However, as Julian Roberts and Carol LaPrairie point out, "Equity of

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(131) See, for example, Native Counselling Services of Alberta (2001) and Gord Richardson, Burt Galaway and Michelle Joubert, "Restorative Resolution Project: An Alternative to Incarceration," *International Journal of Comparative and Applied Criminal Justice*, Vol. 20, No. 2, 1996.

(132) Federal-Provincial-Territorial Working Group on Restorative Justice (2000).

(133) Julian V. Roberts and Carol LaPrairie, "Sentencing Circles: Some Unanswered Questions," *Criminal Law Quarterly*, Vol. 39, 1996, pp. 74-75. On the use of restorative justice principles in sentencing, see Julian V. Roberts and Philip Stenning, "The Sentencing of Aboriginal Offenders in Canada: A Rejoinder," *Saskatchewan Law Review*, Vol. 65, 2002, pp. 84-85.

(134) Julian V. Roberts, "Restorative Justice: Some Caveats," *Justice Report*, Vol. 17, No. 1, 2002, p. 3.

(135) *Ibid.*

treatment … lies at the heart of public conceptions of fair sentencing." Programs such as sentencing circles might undermine the public's trust in the criminal justice system if people believe that "[d]isparity of treatment is not just more likely, but inevitable …"[136]

2. Young Offenders and Offenders Involved in Less Serious Crimes

Other critics have questioned the efficacy of restorative justice programs targeting only particular populations, such as young offenders and Aboriginal people. In particular, they warn of the possibility of "net-widening," or increasing the number of people under the purview of the criminal justice system. For example, if restorative justice programs were to involve only first-time offenders, or offenders who have committed only minor crimes, such programs would expand the reach of the criminal justice system to individuals who might have previously gotten off with a warning. Net-widening, critics argue, is particularly problematic for two reasons. First, it may increase the costs of running the criminal justice system. Second, if only offenders unlikely to be incarcerated under the conventional criminal justice system can obtain access to restorative justice programs, it is unlikely that these initiatives could, on their own, reduce Canada's high levels of incarceration.[137]

B. Victim Participation in Restorative Justice

Although supporters of restorative justice programming point to the potential benefits for victims, a number of victims' organizations have significant reservations about the ability of these programs to satisfy victims' needs. Concerns have been raised about the apparent voluntariness of such programs. Victims may have numerous reasons for not wanting to become involved in these initiatives – for example, not "need[ing] or want[ing] to be reconciled with [their] offender …"[138] or simply finding these programs "inconvenient and time-consuming."[139] However, victims who are averse to such programs may nonetheless be pressured into participating by community members, restorative justice program workers, or even the thought of sending an offender to jail.[140]

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(136) Roberts and LaPrairie (1996), p. 75.

(137) Tony Dittenhoffer and Richard V. Ericson, "The Victim/Offender Reconciliation Program: A Message to Correctional Reformers," *University of Toronto Law Journal*, Vol. 33, No. 3, 1983, pp. 318-319.

(138) Roberts and Roach (2003), p. 239.

(139) Federal-Provincial-Territorial Working Group on Restorative Justice (2000).

(140) Patricia Hughes and Mary Jane Mossman, *Re-Thinking Access to Criminal Justice in Canada: A Critical Review of Needs, Responses, and Restorative Justice Initiatives*, Research and Statistics Division, Department of Justice Canada, Ottawa, 2002, p. 84.

One of the main critiques of restorative justice processes, therefore, concerns the focus on the needs of the offender, rather than those of the victim.(141) Critics call upon restorative justice program organizers to involve victims in the development of such initiatives from the beginning. They argue that the success of these programs depends, in part, on getting the input of all the key players – including the victims.(142)

C. Restorative Justice and Aboriginal Peoples

According to the Royal Commission on Aboriginal Peoples, "successful [Aboriginal] justice projects must be firmly rooted in the community they are intended to serve."(143) The Commission supported alternative justice programs such as healing circles precisely because they were believed to give communities the flexibility to determine how best to respond to their own needs.

Others have not been so quick to endorse the potential of restorative justice programs in Aboriginal communities. Some critics, for example, have questioned the wisdom of relying on community-based justice programs to respond to crimes such as domestic violence and sexual assault. For instance, in one study of a community in the Baffin Region, Nunavut, several Inuit residents claimed that restorative justice processes were not an appropriate response to domestic violence. Specific concerns centred, firstly, on a lack of acknowledgment among community members about the extent of wife abuse in their communities. Coupled with this "conspiracy of silence" was the failure of a number of community chiefs, councils, and elders to condemn domestic violence.(144) Questions have also been raised as to whether restorative justice programs might exacerbate already existing inequalities:

> In Inuit communities, as in many other Native communities, there are inter-family conflicts and families with more power. Therefore, there are concerns about patronage and that the views of some residents will weigh more heavily in decisions regarding the administration of justice. Power relationships could have a significant impact on all facets of community-based justice initiatives including the perception

(141) House of Commons, Standing Committee on Justice and Human Rights (1998), p. 20.

(142) Federal-Provincial-Territorial Working Group on Restorative Justice (2000).

(143) Royal Commission on Aboriginal Peoples (1996), p. 168.

(144) Evelyn Zellerer, "Restorative Justice in Indigenous Communities: Critical Issues in Confronting Violence Against Women," *International Review of Victimology*, Vol. 6, 1999, p. 349.

> of the seriousness of the offense, how the victim is treated, the response to the offender, and how decisions are made. Abusers may not be confronted, or may even be supported, while victims may be revictimized.(145)

While these concerns are clearly not limited to the operation of restorative justice programs in Aboriginal communities, they are particularly salient in light of ongoing calls to expand the Aboriginal justice processes.(146)

Other critics have questioned whether funding should be directed toward indigenous justice programs or toward addressing the roots of Aboriginal crime. Carol LaPrairie, for example, argues that "[c]ommunity justice is often portrayed as a panacea for a range of community ills and seen as a solution to many problems, as if changing the face of a justice system changes the face of the community."(147) The problem, she maintains, is that these programs are diverting funds away from initiatives designed to bolster the socioeconomic status of Aboriginal communities. As Sanjeev Anand points out, "[w]ould it not be preferable to spend this money attempting to combat housing shortages, substance abuse, and education deficiencies among aboriginal people and thereby address the real causes of aboriginal crime and the main basis of their overrepresentation in Canadian prisons?"(148)

D. The Role of the Community and the State in Restorative Justice

While community involvement is believed to be one of the key benefits of restorative justice programming, critics have questioned whether communities really have the ability (and/or the willingness) to participate at levels needed to make these programs work. Firstly, important questions are being raised about how to define a "community," particularly in light of the concentration of Canadians in major urban centres.(149) Furthermore,

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(145) *Ibid.*, p. 351. See also Law Commission of Canada (2003), pp. 51-52.

(146) See, for example, Royal Commission on Aboriginal Peoples (1996), pp. 305-308, 310.

(147) Carol LaPrairie, "Community Justice or Just Communities? Aboriginal Communities in Search of Justice," *Canadian Journal of Criminology*, Vol. 37, No. 4, 1995, p. 529.

(148) Sanjeev Anand, "The Sentencing of Aboriginal Offenders, Continued Confusion and Persisting Problems: A Comment on the Decision in *R.* v. *Gladue*," *Canadian Journal of Criminology*, Vol. 42, No. 3, 2000, p. 418.

(149) Hughes and Mossman (2002), pp. 115-116.

> [t]he availability of a community for the purpose of circle sentencing [or any other type of restorative justice program] involves more than just being able to define the existence of a group, whether geographically or personally. Community capacity, willingness and preparedness to participate in criminal justice decision-making (and to oversee follow up) is a prerequisite for the success of community-based justice, whether in the form of circle sentencing or otherwise.(150)

Do communities have the commitment or the resources to see these programs through? Will only a select group of individuals volunteer, leading to "burnout" and frustration? Will the community be willing to support every offender, no matter who he or she is and what crime has been committed?(151)

As in Aboriginal communities, critics raise serious questions about the potential for restorative justice programs to reproduce inequality. For example, a number of women's groups have cautioned that communities involved in restorative justice initiatives may be tempted to provide more support to offenders than to victims.(152) In order to avoid duplicating problems already identified in traditional criminal justice processes, care must be taken to ensure that participants are members of a "healthy community [and that the initiatives involve] people whose decision-making will be fair and balanced."(153)

Some critics are also wary of state intervention in restorative justice programming. They worry that the original intentions of restorative justice programs could be "corrupted" as they become more mainstream (and thus more bureaucratic). These programs, they argue, are in danger of becoming less creative, less individualized, and less tailored to their communities if they are "taken over" by the state and criminal justice professionals.(154) On the other hand, government officials claim that they must ensure that "restorative justice programs are accountable and open to the public" – particularly those that are publicly funded.(155) The

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(150) Luke McNamara, "The Locus of Decision-Making in Circle Sentencing," *Windsor Yearbook of Access to Justice*, Vol. 18, 2000, pp. 83-84.

(151) Carol LaPrairie, "The 'New' Justice: Some Implications for Aboriginal Communities," *Canadian Journal of Criminology*, Vol. 40, No. 1, 1998, pp. 67-68.

(152) Law Commission of Canada (2003), pp. 57-58.

(153) *Ibid.*, p. 127.

(154) *Ibid.*, pp. 60-61, 129-130.

(155) Federal-Provincial-Territorial Working Group on Restorative Justice (2000).

coming years will prove challenging as governments and community groups work together to form a "partnership … that would combine the vitality and local knowledge of community-based initiatives with the accountability and resources offered by governments."(156)

CONCLUSION

Restorative justice has expanded considerably since the first victim-offender mediation program was established in the early 1970s. Although the exact number of restorative justice programs operating in Canada is not currently known, Statistics Canada estimated that there were well over 400 programs and/or service providers in existence in 2003.(157) The restorative justice movement also acquired considerable legitimacy in the 1990s, when some of the key tenets of its philosophy were introduced as guiding principles in the sentencing of adult and youth offenders. Yet in spite of these gains, important questions still linger.

The overall lack of empirical evidence in this area makes some of the questions asked throughout this paper difficult to answer. However, the questions also highlight important concerns about such long-standing issues as the objectives of sentencing, the importance of punishment, and the role of the state in responding to criminal activity. It is not surprising, then, that fierce debate continues over the value of restorative justice initiatives as well as the appropriateness of restorative justice principles in sentencing.(158)

Part of the problem may lie in how "restorative justice" is defined. As Patricia Hughes and Mary Jane Mossman point out, restorative justice refers to a range of processes, practices, and sentences; "… the term is applied [to] everything from a revolution in justice to limited measures such as victim compensation schemes." It is little wonder, then, that while some argue that restorative justice goes too far, others argue that it does not go far enough.(159) In this climate, it is unlikely that the debates surrounding restorative justice will be resolved any time soon.

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(156) Law Commission of Canada (2003), p. 190. See also Hughes and Mossman (2002), pp. 118-119.

(157) Johnson (2003), p. 15.

(158) On sentencing circles, for example, see Barry D. Stuart, "Key Differences: Courts and Community Circles," *The Justice Professional*, Vol. 11, 1998; and Roberts and LaPrairie (1996). Also, more generally, see Ingrid Phaneuf, "Re-examining Restorative Justice," *Canadian Lawyer*, Vol. 26, May 2002.

(159) Hughes and Mossman (2002), p. 114.

APPENDIX

EXAMPLES OF CANADIAN RESTORATIVE JUSTICE PROGRAMS

Community Council Project, Aboriginal Legal Services of Toronto (Toronto, Ontario)

The Community Council Project is a diversion program for Aboriginal offenders charged with a wide range of criminal offences. Offenders who want to participate in the program must acknowledge responsibility for at least one of the offences they have been charged with committing. If the Crown consents to the diversion, the charges against the offender are withdrawn. The offender is then required to meet with the Council, which consists of volunteers from the Aboriginal community. Typical dispositions include counselling, community service, attendance at drug and/or alcohol programs, and restitution.

Aboriginal Legal Services of Toronto, "Community Council Program," n.d.; available at http://www.aboriginallegal.ca/council.php.

Campbell Research Associates, *Evaluation of the Aboriginal Legal Services of Toronto Community Council Program – Executive Summary*, 2000; available at http://aboriginallegal.ca/docs/evales.htm.

Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide – A Report on Aboriginal People and Criminal Justice in Canada*, Minister of Supply and Services, Ottawa, 1996, pp. 148-158.

Sharon Moyer and Lee Axon, *An Implementation Evaluation of the Native Community Council Project of the Aboriginal Legal Services of Toronto*, Ministry of the Attorney General (Ontario), Toronto, 1993.

Fraser Region Community Justice Initiatives Association (Langley, British Columbia)

The Fraser Region Community Justice Initiatives Association runs three distinct restorative justice programs. (1) The victim-offender reconciliation program brings together young offenders and their victims to discuss the crime and its effects. (The organization used also to run a similar program for adult offenders. However, recent provincial funding cutbacks forced the association to eliminate the program.) (2) The victim-offender mediation program brings together offenders convicted of some of the most serious and violent crimes under the *Criminal Code* and their victims. The focus of the program is on healing and closure. (3) "Education for Peacebuilding" focuses on promoting the use of restorative justice principles among students, parents, and staff in local area schools.

Fraser Region Community Justice Initiatives Association, *2003 Annual Report (1 April 2002 – 31 March 2003)*, Langley, B.C., 2003; available at http://www.cjibc.org.

Tim Roberts, *Evaluation of the Victim Offender Mediation Project, Langley BC: Final Report*, Solicitor General Canada, Ottawa, 1995.

Hollow Water's Community Holistic Circle Healing Project (Hollow Water, Manitoba)

The Community Holistic Circle Healing Project (CHCH) was designed to respond to cases of sexual abuse in Hollow Water, a First Nations community, and three adjoining Métis communities, Manigotagan, Aghaming, and Seymourville. The project provides support and assistance to all those individuals affected by sexual abuse – offender, victim, and their families.

The CHCH program consists of 13 discrete steps. After an incident of sexual abuse is reported, program workers confront the offender. Participation in the program is contingent on the offender taking responsibility for his/her actions and pleading guilty. Sentencing is put off for as long as possible to allow CHCH to work with the offender. Offenders typically receive three years' probation, during which they must continue to work with CHCH. Completion of the program generally takes five years.

CHCH does not focus solely on the offender. It also takes steps to protect the victim as well as to provide support to the family of the offender.

Aboriginal Peoples Collection of Canada, *The Four Circles of Hollow Water*, Public Works and Government Services Canada, Ottawa, 1997.

Native Counselling Services of Alberta, *A Cost-Benefit Analysis of Hollow Water's Community Holistic Circle Healing Process*, Aboriginal Corrections Policy Unit, Solicitor General Canada, Ottawa, 2001.

Rupert Ross, *Returning to the Teachings: Exploring Aboriginal Justice*, Penguin Books, Toronto, 1996.

Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide – A Report on Aboriginal People and Criminal Justice in Canada*, Minister of Supply and Services, Ottawa, 1996, pp. 159-167.

Restorative Resolutions (Winnipeg, Manitoba)

The Restorative Resolutions program is run by the John Howard Society of Manitoba. The program offers community-based alternatives to custodial sentences in the hope of reducing incarceration rates. While the program accepts referrals from members of the criminal justice system as well as applications from offenders, the program works only with offenders for whom the Crown has recommended a minimum sentence of six months' imprisonment.

In order to participate in the program, an offender must plead guilty to the charges laid against him or her. The offender must also agree to follow an action plan that can include counselling, group programs, substance abuse treatment, and victim-offender mediation (if the victim wishes to participate).

Gord Richardson, Burt Galaway and Michelle Joubert, "Restorative Resolutions Project: An Alternative to Incarceration," *International Journal of Comparative and Applied Criminal Justice*, Vol. 20, No. 2, 1996, pp. 209-219.

James Bonta, Suzanne Wallace-Capretta and Jennifer Rooney, *Restorative Justice: An Evaluation of the Restorative Resolutions Project*, Solicitor General Canada, Ottawa, 1998.

John Howard Society of Manitoba, "Programs and Services," n.d.; available at http://www.johnhoward.mb.ca/rrestore.htm.

Royal Canadian Mounted Police Community Justice Forums (National)

Community justice forums are based on the family group conference model. They provide an opportunity for offenders, victims, and their families to come together to discuss a crime and its impact. Forum participants, supported by a trained facilitator, then collectively devise a plan to "right the wrong" that has occurred. While the components of the action plans vary, they can include such things as community service, substance abuse treatment and/or counselling.

Before being considered for a community justice forum, an offender must accept responsibility for his or her actions and agree to participate in the program. Either the police or the Crown, subject to agreement by the facilitator, typically refers offenders to the program. The victim must also agree to take part.

Jharna Chatterjee, *A Report on the Evaluation of RCMP Restorative Justice Initiatives: Community Justice Forums as Seen by Participants*, Research and Evaluation Branch, Community, Contract and Aboriginal Policing Services Directorate, Royal Canadian Mounted Police, Ottawa, 1999.

Royal Canadian Mounted Police, "Restorative Justice: A Fresh Approach," 2003; available at http://www.rcmp-grc.gc.ca/ccaps/restjust_e.htm.