

# Restorative Justice Developments in Canada\*

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Canadá es uno de los pocos países en los que las estrategias de justicia restaurativa están disponibles en cada una de las etapas del sistema de justicia penal. Desde su aparición durante las últimas décadas, muchos hechos notables ocurrieron en el desarrollo de este campo. Explorando tanto los éxitos como las falencias del movimiento de la justicia restaurativa en Canadá, este artículo espera aportar una clara explicación sobre lo que significa la justicia restaurativa, cómo ha sido implementada, y cuál será su posible futuro, utilizando la experiencia canadiense como modelo o como una ilustración de las estrategias posibles. Este artículo también tiene como meta aportar preguntas que nos ayuden a repensar la forma en la que vemos a la justicia.

## Introducing Restorative Justice

Over the past few decades, the restorative justice movement has emerged from obscurity into the forefront of alternative judicial strategies. No longer is it limited in scope to the small Ontario town in Canada in which it is claimed to have had its rather humble contemporary beginnings in the mid-1970s.<sup>1</sup> Today we can see a virtual explosion of restorative justice being applied in its various manifestations worldwide. As might be expected from the location of its debut, this movement has had particular success in becoming a solid component of the Canadian justice system. For advocates of the restorative justice philosophy, the willingness to experiment, adopt and integrate restorative justice strategies into the criminal judicial system is encouraging; support for these efforts can be found from the grassroots to the federal government level. In fact, Canada is one of the few countries which has restorative justice strategies available at every stage of the criminal justice system. In the past few decades since its emergence, many noteworthy developments have occurred in this field. By exploring both the successes and the failures of the restorative justice movement in Canada, this article hopes to provide a good understanding of what restorative justice is, how it has been implemented,

and where it may go from here, thus providing the Canadian experience as a model or illustration of possible strategies elsewhere. If nothing else, this article hopes to raise questions that may help us rethink the way we view justice.

Before delving into the development of this movement, we need to tackle the task of defining and outlining the theory of restorative justice. As it turns out, this task is rather trickier to do than one might originally have hoped. Due to the very nature of restorative justice and the ideology which it represents, there is no universally accepted definition of the term. There are, however, some basic components which make up the foundation of restorative justice approaches. The Department of Justice of Canada broadly defines restorative justice as:

“a way of viewing justice that puts the emphasis on healing relationships that have been broken by conflict and crime. Viewed through this lens, crime is understood as a violation of people and relationships and a disruption of the peace of the community. It is not only an offence against the state. Restorative justice encourages the participation of victims, offenders and the community affected by the crime in finding solutions that will achieve reconciliation and restore harmony”.<sup>2</sup>

\* Many thanks for the publications supplied by Lynette Parker, research specialist for Restorative Justice Online, as well as her helpful commentary on this paper.

<sup>1</sup> Peachey, Dean E., "The Kitchener Experiment", ed. Gerry Johnstone, *A Restorative Justice Reader: Texts, sources, context*. Willan Publishing: Cullompton, 2003, p.178.

<sup>2</sup> Department of Justice Canada, *Restorative Justice in Canada*, at <http://canada.justice.gc.ca/en/news/conf/rst/rj.html>

Restorative justice programmes and strategies are not, and probably never will be, static entities, but are continually evolving to suit the needs of the cultures and situations in which they are being applied.

Despite this fluidity, there are further key elements which stand as pillars within this movement that help further illustrate this theory and its various necessary components. Of central importance to the restorative justice model is the need to have willing and voluntary participation from all those involved, for example. In the case of the offender, however, willingness to partake in these programmes is not sufficient to gain the right to participate. The offender must additionally take full responsibility for his or her actions and be prepared to apologize to the victim for having disrupted their lives and inflicted harm. Typically, these programmes work to bring together the victim and offender in a planned and mediated encounters, be it through conferencing, circles, or mediation – various restorative justice approaches which will be examined further on. The encounter provides an arena in which the criminal act and its consequences can be discussed.

Within these procedures, as opposed to the current mainstream criminal procedures, victims and their experiences play a determining role. For advocates of the restorative model, the displacement of the victim which happens within the criminal justice system is one of its greatest weaknesses, dooming it to failure in any attempt to achieve true justice. How can true justice be attained when the victim has long since lost any important or meaningful place in the criminal judicial process and is reduced merely to a witness in a case which ends up being between the defendant and the state? Restorative justice seeks not simply to punish the offender, as in the mainstream system, but also to regain the harmony lost within the affected community. To achieve this, the victim needs to play a central role in the process and be fully considered at all times.

This encounter, in whichever form it might take, is also used to provide a forum in which to establish how best to make amends, for the act of making amends is crucial to the restorative justice process. As described by Van Ness and Strong in *Restoring Justice*, making amends on the part of the offender consists of four elements: apology (providing a sincere expression of regret), changed behaviour (which primarily involves a commitment to stop committing crime, but also a willingness to

change one's approach to life), restitution (which consists of paying back what the victim has lost in whichever form is agreed upon and is realistically possible), and generosity (going beyond simple amends to the victim, by doing things such as working to contribute to the community at large).<sup>3</sup> The final stage of this restorative process is reintegration, which is of great importance both for the victim and for the offender. This process is achieved through the use of strategies such as support groups, therapy, and mentorship programmes. Proper reintegration is essential in the process to deter future criminal behaviour, to help the victim to heal fully and avoid isolation, and finally to resurrect or instigate a greater sense of harmony within the community in question.

### Giving Context- Why is Restorative Justice gaining a foothold

Aside from explaining the basic components of restorative justice, it is important to address why there is such a push to reform the current system and adopt alternative methods. Why, in essence, are we seeing growing frustration with the current Western criminal system? John Braithwaite, a leader in modern restorative justice movement, stated despairingly that “few sets of institutional

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arrangements created in the West since the industrial revolution have been as large a failure as the criminal justice system,” and that the system “fails to correct or deter, just as often making things worse as better”.<sup>4</sup> Until the incorporation of alternative methods to heal and reform offenders, the threat of incarceration seemed to be the only real line of defence to prevent criminal behaviour generally and recidivism in particular. As has become plainly clear, however, incarceration has not succeeded in deterring criminal activities, and in many cases it can be argued that it simply exacerbated the problem. Further condemnation of the effectiveness of the current system comes from Canadian Judge Barry Stuart who states that:

“Foolishly, the justice system excessively depends upon punishment to instil in offenders the motivation to change. Our embarrassingly high and readily overlooked recidivist rates unmistakably reveal the folly of our expensive, excessive dependence upon punishment to change behaviour. Hearing and

<sup>3</sup> Van Ness, Daniel W. and Karen Heetderks Strong, *Restoring Justice*, Second Edition, Cincinnati: Anderson Publishing Co. 2002, p.79-84.

<sup>4</sup> John Braithwaite, “Restorative Justice and a better future”, ed. Gerry Johnstone, *A Restorative Justice Reader*, Cullompton: Willan Publishing, 2003, p.84.

facing up to the full human suffering left behind in the wake of their crimes can generate the profoundly new perspectives offenders need to change their behaviour".<sup>5</sup>

Many people believe that despite the fact that prisons are obviously not foolproof strategy for dealing with crime, there is simply no other plausible way in this day and age to deal with offenders. It is in this feeling of despair and lack of alternatives, then, that the public's desire to develop the current retributive system even further can be explained. Citizens are increasingly pushing for tougher measures to deal with crime and encouraging their governments to hand out harsher punishments. We can actually see this trend happening throughout the world. In Canada and the United States, statistical analysis has found that the prison population continues to outgrow both crime rates and the natural growth rates. In certain areas this growth approaches alarmingly close to 30 percent.<sup>6</sup> Though this trend may seem to many perverse and incomprehensible, there can be no doubt that it is happening –and on an international scale. In fact there is growing concern for a phenomenon known as "prison overcrowding" which is found worldwide and is unrelated to different countries' economic capacity or level of development. As revealed by the Latin American Institute for the Prevention of Crime and Treatment of Offenders (ILANUD), for example, 25 "out of 26 countries in Latin America and the Caribbean have overcrowded prisons, and 20 face critical overcrowding levels of more than 120%."<sup>7</sup>

Observers of this phenomenon of overcrowding have proposed several different explanations for this trend. Clearly "more people are being sent to prison, and prison sentences are getting longer"<sup>8</sup> and people are going to prison for crimes that previously did not result in incarceration. This trend can be attributed in large part to the increase of public fear surrounding crime in general. As people lose faith in the ability of the system to protect them and reform criminals, harsher sentences are being handed out.<sup>9</sup> Keeping offenders locked up for as long as possible appears to be the easiest way to appease public fear, despite the growing problem of prison facilities shortages. Regardless of

any sense of security criminal incarceration may temporarily give, the truth is that almost all convicts are one day released.

If a reason were needed for considering altering the current system to focus more on rehabilitation than simple punishment, this reality should be reason enough. The healing abilities of prisons is extremely limited, and in overcrowded prisons, practically non-existent. In fact, prisons, especially for juveniles, are famous for acting as finishing schools for criminals due in large part to the growing cases of inmate violence and brutality.<sup>10</sup> Prisons often cause further physical and psychological damage during the time spent in them damage which lingers afterwards. The further stigmatization which follows ex-convicts throughout their lives upon their release can isolate them, impede reintegration, and can finally push them into further criminal behaviour.

It is within this context of disillusionment, particularly with the prison system and its ability to heal neither offender nor victim, that restorative justice has emerged and managed to gain a foothold. People are beginning to realize that "incarceration need not be the standard against which all punishments are measured. In a restorative system, restitution rather than incarceration provides that gauge."<sup>11</sup> Prisons are costly operations which are a huge drain on any government's budget. If they are also ineffective, the large sums are very ill spent. Thus, although no radical paradigm shift in the mentality of the people and legal professionals has occurred, there has been a growing support for alternatives within the judicial system.

Having now addressed both the context in which restorative justice has emerged and the philosophy which backs it up, we are left with the question of how it is to be implemented in the current system. In other words, what does restorative justice actually look like, and how does it work? As was very briefly mentioned above, there are three main approaches used in Canada through which restorative justice is applied to the criminal system. The Circle approach is officially the oldest method of restorative justice used in Canada followed by a second, more modern creation which is the Victim Offender Mediation approach, and lastly there is the Community Conferencing method.

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<sup>5</sup> R. v. Jacob, 2002 YKTC 15, 2002, at <http://www.sfu.ca/cfrj/fulltext/vjacob.pdf>

<sup>6</sup> Research Branch, Correctional Service of Canada, Have falling crime rates and increased use of probation reduced incarceration? Some trends and comparisons, last updated in 2002.09.06, [http://www.csc-scc.gc.ca/text/pbict/forum/e102/e102a\\_e.shtml](http://www.csc-scc.gc.ca/text/pbict/forum/e102/e102a_e.shtml)

<sup>7</sup> Van Ness, Daniel W., "Trends in Prisons around the world and in Latin America", paper present at the Seminario-Taller: Análisis y Perspectivas del Sistem Penitenciario en Panamá, in Panamá City, 2001.05.24, at <http://www.restorativejustice.org/rj3/Full-text/dan/PanamaAMtalk.pdf>.

<sup>8</sup> Ibid, p.2.

<sup>9</sup> Ibid, p.3.

<sup>10</sup> McClelland, Susan, "Institution Correction: A new Youth Crime Act aims to fix a broken system", *Maclean's* (Toronto Edition), v.116(23) Je "03 p.45.

<sup>11</sup> Van Ness, Daniel W. and Karen Heetderks Strong, *Restoring Justice*, Second Edition, Cincinnati: Anderson Publishing Co. 2002, p.97.

## Building Alternatives - Three methods

The roots of the philosophy of restorative justice can in many ways be found in the customs of North American Aboriginal people; what is called the Circle approach is derived from their customs. Circles are most commonly, but not exclusively, used in Aboriginal communities as they have a greater cultural relevance to Aboriginal communities than the mainstream system. Seated in a circle, selected members of the community come together to discuss a given criminal act and try to come up with the various solutions to the existing problems. There are several kinds of circles, such as the sentencing Circle, which deals with the more punitive aspects of a criminal act. The Circle method is usually used in place of the court process, acting therefore as the hearing. The goal of this strategy is to try to keep the offender out of the prison system, allowing the community instead to work out the punishment and healing process. This method is usually reserved for more serious crimes as it is "intrusive, lengthy and requires significant commitment from all participants."<sup>12</sup> Another form of the Circle approach is the healing Circle which is used to help deal with psychological or spiritual wounds that exist within the community; the understanding is that it will provide a way for the individuals and the community to move beyond these wounds. These healing Circles are largely being used at present to help in confronting the horrors of abuse that Aboriginal communities faced in Christian residential schools over the past century in Canada.

Circles have become a cornerstone in recent attempts to deal with the problem of Native overrepresentation within the prison system. Despite the fact that Aboriginal people only account for 2% of the Canadian population, they make up 17% of the admissions to custody. In some areas, such as in the province of Saskatchewan, where the percentage of Native people is higher, standing at 8%, they account for 76% of the jail population.<sup>13</sup> This overrepresentation is extremely discouraging and demonstrates how ineffective the retributive justice is at dealing with the criminal behaviour amongst Native people in particular. This same trend of ethnic overrepresentation in the prison system is occurring in the United States of America amongst non-Caucasian groups, particularly African-

Americans; there similarly, restorative justice seems like a viable option to improving this situation. The present system is clearly not working for these communities and for this reason there is an even greater interest in using alternative forms of punishment and rehabilitation.

The second approach, which is said to have started more than 25 years ago in Canada, is now one of the most important restorative justice strategies. It brings together the victim and offender to talk face to face, in a structured environment with a trained mediator. Together they are able to discuss the crime and its effects on the individuals involved, providing an opportunity for the victim to explain the consequences this criminal act has had on their life. Rarely, if ever, is an offender brought to face their victim on such a personal level in the mainstream system. The victim is able to

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express their anger and pain to their offender in a controlled environment as well as ask questions to gain a better understanding of the origins of the crime from which they have suffered. The offender in turn has to respond to these personal questions and take responsibility for the acts which they have committed.

There can be several different types of Victim Offender Encounters in existence that are based on this principle of bringing the two sides face to face. For example, as there is not always the opportunity to proceed with a direct encounter between both parties—the offender may be unknown or either the victim or offender may be unable or unwilling to participate—then surrogate Victim Offender Mediation programmes can be used. These programmes bring people together who have experienced similar crimes, which still allows the victim, for example, to question an offender who has committed a similar act to try to better understand why it has happened.

The final strategy is Community Conferencing which is an approach which has more recently been incorporated into the Canadian system. The existing programmes in Canada are an adaptation of Maori traditional family group conferencing in New Zealand. This approach is one which engages the family or community of the accused—however these are constituted—to help achieve a resolution and effect reparation for the victim and at the same time work to diminish the probability of recidivism.<sup>14</sup> The group conferences are in fact quite similar to the Victim Offender Mediation as they follow

<sup>12</sup> Lilles, Heino, "Yukon Sentencing Circles and Elder Panels," *Criminology Aotearoa/New Zealand*, originally a Newsletter from the Institute of Criminology, Victoria University of Wellington, September 2001, No.16, at <http://www.restorativejustice.org/rj3/Full-text/YukonSentencingCircles.pdf>.

<sup>13</sup> *Ibid.*

<sup>14</sup> Cormier, Robert B., *Restorative Justice: Directions and Principles - Developments in Canada*, a paper presented at the Technical Assistance Workshop of the Programme Network of Institutes at the 11th Session of the Commission on Crime Prevention and Criminal Justice, held in Vienna, 2002.04.16-25, at <http://www.unicri.it/Workshop2002/2-%20Robert%20Cormier.doc>.

the same principles of face to face engagement. The difference, of course, is that there are more participants in the Community Conferencing as the victim and offender's communities are involved in the mediated interactions. This method, it should be noted, seems to be an especially useful method for juveniles whose behaviour patterns are less fixed and who may respond better to a well-articulated community intervention.

Dr. John Braithwaite gave interesting examples of his experiences working with juveniles in his paper at the Conference on Juvenile Justice in Chile last year.<sup>15</sup> When working in juvenile cases, he discovered that the victims often ended up being sympathetic to the accused because of the difficulties the offender may have endured in their lives, such as a childhood of poverty. Learning that the offender was actually a homeless child who had been abused by his or her parents, for example, not only gives context to their criminal behaviour, but might help the victim to forgive the offender which may in turn help them to recover themselves.<sup>16</sup> Perhaps more importantly still is the support of the offender's community—whether a soccer coach or an aunt or whomever—in helping to change the offender's environment in order to ensure changed behaviour; the main aim is to avoid the troubled youth in question becoming a criminal adult.

In using restorative justice methods, particularly these last two methods, offenders have to confront and acknowledge the pain and suffering that they have inflicted on another human's life. This tends to be a very powerful experience. In having to face the victim, the accused usually develops a more humane understanding of the situation and feels greater remorse; it is arguably much harder for one to feel angry and persecuted by the justice system when one is brought to face one's victim and the harm caused. In turn, the victim will perhaps be more likely to forgive the criminal, as he or she is able to come into contact with a real person. A resolution agreement can be reached in this environment to better suit the needs of both the victim and the offender and further support can be found within the community to help them to build or return to more balanced lives.

Flexibility is essential when applying any of these restorative justice approaches; different situations will demand different strategies. Of necessity

restorative justice is designed to be very adaptable. Also, there should be ample opportunity for the people who are affected by crime, especially those shocked or traumatized, to consider using alternative approaches and not to feel rushed into trying out these strategies before they are ready. In Canada there are entry points throughout the entire criminal justice process in which restorative justice can be applied, namely: by the police (pre-charge), the Crown (post-charge), the courts (pre-sentencing), during the corrections period (post-sentencing), during parole (pre-revocation).<sup>17</sup>

## Growth and Development within Canada

There have been many developments in restorative justice in Canada since its official modern debut in the justice system with the famous 1974 Elmira Case near Kitchener-Waterloo when the Mennonite Central Committee introduced victim-offender mediation into the court process to deal with some juvenile offenders. What originally started as a couple of intoxicated teenagers engaged in

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random acts of vandalism, turned into a new view on how to deal with criminal behaviour. The probation officer who prepared their pre-sentencing reports also happened to be a member of the Mennonite Central Committee. He thought that an encounter between the offender and the victim might have a therapeutic effect on the offenders' criminal behaviour and proposed this idea to the Judge. Unexpectedly, even to

the probation officer himself, the Judge assigned to the case accepted this new strategy and allowed this experiment to proceed. The offenders ended up talking and apologizing to 21 of their 22 victims (one having had moved away in the interim period). Within three months, after having been put on probation and fined 200 dollars each, they had paid back the remaining costs of the damage they had caused which had not been covered under insurance. Although the ideas were still rather undeveloped at this stage, Victim Offender Mediation had in fact emerged in Canada.<sup>18</sup>

While things began to evolve at a more local, grassroots level, restorative justice was not taken terribly seriously at the national level until 1988,

<sup>15</sup> Braithwaite, John, "La Justicia restaurativa en el contexto de la política criminal para adolescentes infractores de ley penal: principios, modelos, comparados, logros y desafíos," at Justicia restaurativa con Adolescentes Infractores de Ley Penal en el Marco de la Convención de los Derechos del Niño conference held in Santiago, Chile in 2003.10.

<sup>16</sup> As pointed out by Lynette Parker, expecting the victim to forgive the offender is actually becoming quite a controversial topic. As restorative justice seeks to empower the victim, expecting or promoting forgiveness from the victim may take away from efforts made to empower them.

<sup>17</sup> Research and Statistics Division of the Department of Justice Canada, Jeff Latimer, Senior Research Officer, The Effectiveness of Restorative Justice Practices: A meta-Analysis, 2001, p.2, at <http://canada.justice.gc.ca/en/ps/rs/rep/meta-e.pdf>

<sup>18</sup> Peachey, Dean E., "The Kitchener Experiment", ed. Gerry Johnstone, A Restorative Justice Reader: Texts, sources, context. Cullompton: Willan Publishing, 2003, p.178-182.



with the publication of the a report entitled *Taking Responsibility*, but better known as the Daubney Report, which had been produced by the Parliamentary Standing Committee on Justice and the Solicitor General. This report recommended both the need for a new focus on the victim within the judicial system, and also the incorporation of restorative justice practices at a national level. It was also recommended that the government "support the expansion and evaluation throughout Canada of the victim-offender reconciliation programs at all stages of the criminal justice process."<sup>19</sup> Throughout the 1990s, the interest in restorative justice grew beyond Victim Offender Mediation to include, for example, the adaptation of the Aboriginal Sentencing Circles into the judicial system.

By 1996, the Criminal Code was amended "to add principles of sentencing, which include providing reparations for harm done to victims or the community and promoting a sense of responsibility in offenders as well as acknowledgement of the harm done to victims and to the community."<sup>20</sup> Following these amendments, the Supreme Court of Canada acknowledged the importance of these changes in several landmark decisions: *R[EGINA]. v. Gladue* in 1999, *R. v. Proulx* in 2000, and *R. v. Jacob* in 2002.<sup>21</sup> The crimes committed in these cases were respectively second degree murder, manslaughter due to reckless driving, and breaking and entering followed by aggravated sexual and physical assault. The gravity of these crimes were what made the decision to use restorative justice methods (including minimum sentences and extensive therapy) such landmarks. Serious crime such as "sexual offences against children; aggravated sexual assault; manslaughter; serious fraud or theft; serious morality offences; impaired or dangerous driving causing death or bodily harm"<sup>22</sup> are seen by many as being too serious to be resolved by restorative justice approaches; according to this view such alternative approaches should be reserved for petty crimes. There is no proof, however, that restorative justice works better with non-serious or non-violent crimes; in fact, as Braithwaite claims, the "most methodologically advanced research that has been done shows the reverse."<sup>23</sup>

In response to the concerns raised, the written appeal decision in the *R. v. Proulx* case explained its position in the matter of serious crime, declaring

that "offence-specific presumptions introduce unwarranted rigidity in the determination of whether a conditional sentence is a just and appropriate sanction."<sup>24</sup> In general it seems unwise to try to predetermine which cases can best be resolved by means of restorative justice. The Court continues by explaining that it was acting according to the amended Criminal Code in which:

"Parliament has sent a clear message to all Canadian judges that too many people are being sent to prison. In an attempt to remedy the problem of overincarceration, Parliament has introduced a new form of sentence, the conditional sentence of imprisonment... [W]e [the Manitoba Court of Appeals] have decided to hear this case and four related cases because they afford the Court the opportunity to set out for the first time the principles that govern the new and innovative conditional sentencing regime".<sup>25</sup>

As the court doubtless understood, legal history was being made.

There is, it should be mentioned, one area in which the appropriateness of applying restorative justice approaches is a contested issue, and that is domestic violence. Many women's groups in Canada have worked to maintain a moratorium on the use of restorative justice in cases of domestic abuse. The power imbalance which exists in cases of woman battery, for example, are considered too complex and problematic to bring both sides together in some kind of mediated encounter.

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Even with the help of trained mediators, it is argued that this strategy will prove to be insufficiently powerful to overcome this imbalance. Those involved in the women's movement know that having the State acknowledge the serious nature of domestic violence is a very recent victory. They have argued successfully that including such cases in the restorative justice system would only serve to decrease the weight and importance given to this issue in the current system. In addition, it has been revealed that many women in situations of domestic violence would

<sup>19</sup> Cormier, Robert B., *Restorative Justice: Directions and Principles - Developments in Canada*, a paper presented at the Technical Assistance Workshop of the Programme Network of Institutes at the 11th Session of the Commission on Crime Prevention and Criminal Justice, held in Vienna, 2002.04.16-25, p.4, at <http://www.unicri.it/Workshop2002/2-%20Robert%20Cormier.doc>

<sup>20</sup> Department of Justice Canada, *Restorative Justice in Canada*, at <http://canada.justice.gc.ca/en/news/conf/rj.html>

<sup>21</sup> Full text of these three written legal cases available here for further inquiry: <http://www.sfu.ca/crj/legal.html>

<sup>22</sup> *R. v. Proulx*, [2000] 1 S.C.R. 61, at <http://www.sfu.ca/crj/fulltext/rvproulx.pdf>

<sup>23</sup> E-mail correspondence with John Braithwaite, 2003.10.15.

<sup>24</sup> *R. v. Proulx*, [2000] 1 S.C.R. 61, at <http://www.sfu.ca/crj/fulltext/rvproulx.pdf>

<sup>25</sup> *Ibid.*

not want to participate in such programmes regardless. This is due primarily to the fear of endangering themselves even further. Although similar questions and problems can arise in all forms of restorative justice, the particular, intimate circumstances of domestic violence seem to demand a difference approach. Based on the restorative principles, however, if there is the belief that people can be reformed and heal, and if they show real willingness to participate, then domestic violence should not necessarily be ruled out completely.<sup>26</sup>

Despite the existing challenges, such as the question of domestic violence, Canada is looking to continue promoting restorative justice further throughout the legal system. The 1999 publication, "From Restorative Justice to Transformative Justice: Discussion Paper" put out by the Law Commission of Canada, calls for the implementation of restorative measures beyond simply the criminal justice system. The use of basic principles of restorative justice should expand to areas where conflict exists in our societies and not only be reserved for criminal cases. Civil cases are equally built on conflict and the breakdown of harmony within a community, be they labor issues, environmental issues, corporate law, neighbour property disputes, or bankruptcy; all these areas can be dealt with in a restorative, or as this paper calls it, transformative manner. Transformative justice involves rethinking our approach not only to the justice system, but also our attitude to any conflict within society and how it should be resolved. "Conflicts are framed in a legal language rather than in terms of how individuals experience them," and they are as much a community-based issue as crime.<sup>27</sup> In short there are ample opportunities to use restorative principles within our society to help deal with conflict at all levels.

As mentioned above, one area that has really sought to integrate restorative principles to its very core is the juvenile criminal system. Finding the most strategic ways of stopping youth from turning into more serious adult criminals and living a lifetime of crime is clearly a social priority. As we have already noted, in no way does their time in prison prepare or train young offenders for a crime-free life once they return into the community. The recognition that youth crime is on the rise in

Canada has led to the replacement of the Youth Criminal Act by the Youth Criminal Justice Act (YCJA) on April 1, 2003. This Act tries to deal with criminal behaviour in ways that avoid incarceration, including of course, using restorative justice techniques. Ironically, despite the growth acceptance of the efficacy of restorative justice in dealing with serious crimes in the adult courts, this new Act punishes young offenders involved in serious crimes more harshly than did the previous Act. For example, the age which a juvenile offender accused of a serious crime can be tried in an adult court has dropped from 16 to 14. Still, many consider the new Act too soft and argue for harsher measures dealing with both petty and serious crimes, lest "the kids think they can get away with" their criminal behaviour.<sup>28</sup>

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Despite these ongoing debates, Canadian legal experts have not hesitated to promote the concept of restorative justice at home and abroad. At the instance of experts who felt that some statement of principles would help shape and focus this initiative, a national consultation webpage<sup>29</sup> was set up to increase the dialogue and include interested Canadians in the creation of the Draft Principles and Program Guidelines for the Use of Restorative Justice in Canada as well as for the UN Basic Principles on the Use of Restorative Justice in Criminal Matters. All acknowledged, however, the importance of ensuring the flexibility which is so important to this approach thus: "These basic principles would not be prescriptive or normative but rather would provide a framework to guide the development and implementation of restorative justice in Member States."<sup>30</sup>

Although it is recommended that the ideas and principles be followed to ensure the successful implementation of restorative approaches, Member States are free to either adopt these Basic Principles or not. Furthermore the Basic Principles provide much latitude, stating for example, that restorative justice should be available at any stage in the criminal justice system; that participation of the offender and victim be voluntary; that both the offender and the victim must agree on the basic facts of the case before proceeding; and that the existing power imbalances evident within a case must be taken into consideration.<sup>31</sup> The role that Canada has

<sup>26</sup> Manoley, Lana and Graham Reddoch, *Restorative Justice and Family Violence: A community-based effort to move from theory to practice*, 2003, at <http://www.sfu.ca/cfrj/fulltext/maloney.pdf>  
<sup>27</sup> Cooley, Denis, Law Commission of Canada, *From Restorative Justice to Transformative Justice: Discussion Paper*, Catalogue No. JL2-6/1999, at <http://www.lcc.gc.ca/en/themes/sr/rj/2000/paper.asp>  
<sup>28</sup> Taylor, Lisa, *The Docket*, CBC, [http://www.cbc.ca/thedocket/show\\_08.html](http://www.cbc.ca/thedocket/show_08.html)  
<sup>29</sup> To read more about the National Consultation information is available at <http://www.restorativejustice.ca/NationalConsultation/Consultation.htm>  
<sup>30</sup> Cormier, Robert B., *Restorative Justice: Directions and Principles - Developments in Canada*, a paper presented at the Technical Assistance Workshop of the Programme Network of Institutes at the 11th Session of the Commission on Crime Prevention and Criminal Justice, held in Vienna, 2002.04.16-25, p.18, at <http://www.unicri.it/Workshop2002/2-%20Robert%20Cormier.doc>  
<sup>31</sup> Conflict Resolution Network, *National Consultation on the Principles of Restorative Justice in Canada*, at <http://www.restorativejustice.ca/NationalConsultation/BasicPrinciples.htm>

played in the creation of these Principles continues to reinforce its international status as a promoter of restorative justice methods.

## Challenges Facing the Restorative Movement

Although the restorative justice movement has received its fair share of support within the judicial system of Canada and amongst Canadian citizens more generally, this apparent success should not be touted too optimistically. The movement continues to run into challenges and uncertainties which it has yet to overcome, from the grassroots up to the Federal Government. To demonstrate what kind of challenges exist at the community organization level, the discussion below will draw on a case from Victoria, British Columbia, as reported by Dr. Dhami of the University of Victoria and Penny Joy of the Restorative Justice Victoria Program, B.C. The Restorative Justice-Victoria Program (RJVic) is one of about 40 similar programmes which have developed out of the provincial government's 1998 initiative to promote volunteer-run community-based restorative justice programmes. This particular organization uses Family Group Conferencing methods and deals with pre-charge young offenders. The challenges to its efforts are similar to those all such programmes have faced.

The first problem that may arise is how to define "community." If these programmes are based within the community, a clear sense of what constitutes one's community, be it physical or spiritual, is essential to success. In today's world, in which families are widely scattered, communities may span continents. In these circumstances it can be difficult to come up with a strong community base for either the offender or the victim. Not only is community important for the individuals, however, it is also integral to the whole process. For example, there needs to be cooperation between different parts of the community, such as the local police department. Without the active support of the police and legal professionals, nothing can be achieved. To get referrals and cooperation on cases, there has to be a good relationship between one's organization or programmes and the police as well as with other legal professionals.

Funding is equally important and it should ideally come from the community. Interesting local stakeholders in the prospect of restorative programmes is very important. That way, the organization may be able to get financial support from local businesses, clubs, community groups, or even

individuals from within the community. Since these people are stakeholders in the community they will by definition want to see their communities become safer and healthier environments. While RJVic does receive funding from the government, or more specifically the Ministry of Public Safety and Solicitor General, including a \$5,000 Canadian start-up grant, followed by annual grants of up to \$2,500 Canadian there after, these funds are realistically not enough to cover all the costs. Convincing one's community that such programmes are worth investing in, therefore, is another huge challenge that will probably have to be faced, especially in the development phase of such programmes.

Educating the community can also be a very difficult task and it is very helpful if there is support coming from the higher ranks of the government to give such a movement more legitimacy in the people's eyes. Realistically, many citizens have either never heard of restorative justice, or do not know how it works. Of those who do know of restorative justice principles, many are not convinced, and believe that it is a "soft" response to crime. The process of educating the community also plays an important role in recruiting volunteers, as these volunteer-run organizations depend on volunteer commitment. In the case of the RJVic, 90 per cent of the nearly 30 volunteer workers have received training in Community Conferencing. These volunteers come from all walks of life, some being legal professionals, others students, or interested members of the community. Their training is a costly process, as it is covered by the organization, which is one of the main reasons that these organizations hope to have a low turnover rate amongst volunteer members. Hanging on to volunteers is not always easy, however. If there is insufficient funding to make the programmes work efficiently, there is an even greater danger of losing volunteers to discouragement.<sup>32</sup> These, in brief, are a few of the kinds of challenges that can be faced in these kinds of community-based organizations.

Within the same conference where the RJVic case was presented —The 6th International Restorative Justice Conference in 2003 in Vancouver, Canada— Roger Colwill gave a presentation on Restorative Justice Networking Systems; a useful way of responding further to some of these challenges. He explains that while these restorative based community justice programmes are expanding rapidly all throughout Canada, people may find themselves "reinventing the wheel," one by one. "Restorative Justice groups everywhere face similar

<sup>32</sup> Dhahi, Mandeep K. and Penny Joy, "Summary: Challenges to Establishing community-Based Restorative Justice Programmes: the Victoria Experience," paper presented at the 6th International Conference on Restorative Justice, Vancouver, B.C., June, 2003. <http://www.sfu.ca/crj/fulltext/dhami.pdf>



## Meta-Analysis

challenges. Whether starting a fledgling new RJ organization or administering a long established successful program many groups find themselves duplicating efforts.”<sup>33</sup> Yet there is a wealth of information already available on both the theoretical and practical dimensions of restorative justice. The hope is that not only will resources be pooled and made more accessible to all members of the movement, but that member groups will begin to communicate more freely, exchange information and support with training efforts across the nation.

To facilitate this development, Colwill proposes an online support network which easily links communities and organizations together to help disperse information and avoid the repetition of efforts. While there has already been a prototype system developed which is operational and is servicing several groups, a more complete pilot project is going to be launched in the near future. This website will not only act as a resource centre, as there are several of those websites already in existence, such as through The Centre for Restorative Justice at Simon Fraser University, but they would also facilitate communications so that interested people can engage in dialogue. This website contains several tools, including an Interactive Calendar; a Library of restorative justice resources and links; a Directory of active groups; Active Server Pages to post information; an Interactive Discussion Board; and finally a Resource Board which could help to match available information with members' needs.<sup>34</sup> A password will be necessary to access the website as it is secure and protected, allowing the members to interact freely and openly on this site.

Innovative projects like this are underway all over Canada to help build the movement and to make the community-based projects successful endeavours. These various experiences and projects can be helpful to similar efforts being undertaken around the world. As the Canadian experience reveals, some challenges are universal and many experiences are worth sharing. In other words, struggling or emerging restorative movements can gain practical assistance in pursuing their goals.

Despite these challenges, restorative justice often seems to be more popular, at least amongst its users, than the mainstream counterpart; or so says “The Effectiveness of Restorative Justice Practices: A Meta-Analysis” undertaken by the Research and Statistics Division of the Department of Justice Canada published in 2001. The research team undertook 22 unique studies which examined the effectiveness of 35 individual restorative justice programmes.<sup>35</sup> This analysis revealed some interesting and encouraging results on the use of restorative justice, which have been of great interest not only within Canada, but also abroad. This study examined four areas including victim satisfaction, offender satisfaction, restitution compliance, and recidivism. The first area, being victim satisfaction, proved to have the highest success ratings. The satisfaction rates amongst victims were found to be significantly higher in all but one of the 13 restorative justice programmes in comparison to the mainstream system control groups; the one exception with the satisfaction rates in the restorative approaches was in the programmes that used restorative justice in the post-sentencing entry point, as opposed to the entry points earlier on within the criminal procedure.

Offenders were found to have a rather similar satisfaction rates to the mainstream system, on the other hand. It should be noted that the lowest success rates were again found in the post-sentence entry point as with the victims.<sup>36</sup> Between the various models of restorative justice, Victim Offender Mediation models revealed themselves to be the more successful approach in comparison to the Family Group Conferencing. Another discovery revealed within the project was that the offenders participating in restorative justice programmes were much more likely to complete restitution agreements than the non-restorative justice offenders. This may be one the main reasons for victim satisfaction rates being significantly higher as they are actually more likely to receive compensation for the harm caused by the crime (at least in whatever form is possible and can be agreed upon). Only eight studies were undertaken on this last theme, however, which may be too few to allow inferences to be securely drawn.<sup>37</sup>

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<sup>33</sup> Colwill, Roger, "RJ Networking System," paper presented at the 6th International Conference on Restorative Justice, Vancouver, B.C., June, 2003, at <http://www.sfu.ca/cfrj/fulltext/colwill.pdf>

<sup>34</sup> *Ibid.*

<sup>35</sup> Research and Statistics Division of the Department of Justice Canada, Jeff Latimer, Senior Research Officer, The Effectiveness of Restorative justice practices: A meta-Analysis, 2001, p.9, at <http://canada.justice.gc.ca/en/ps/rs/rep/meta-e.pdf>

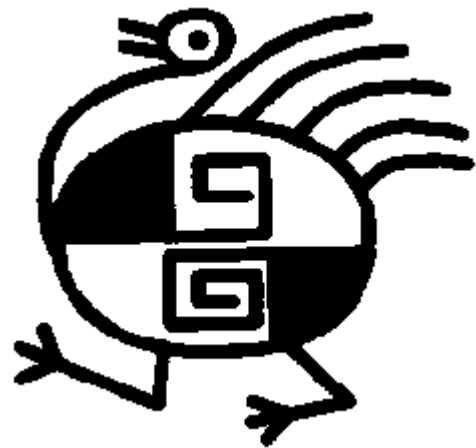
<sup>36</sup> *Ibid.*, p.11

<sup>37</sup> *Ibid.*, p.12

Finally, the researchers tested recidivism rates. Success in this area is crucial, as it is one of the main premises on which restorative justice is promoted. And indeed, “compared to control groups that did not participate in a restorative justice program, offenders in the treatment groups were significantly more successful during the follow-up periods”<sup>38</sup> in the matter of recidivism rates. In fact, “with regards to recidivism, the results of the meta-analysis showed a reduction of 7% due to restorative justice intervention” – thus confirming the similar results that had been revealed in an earlier analysis.<sup>39</sup>

This meta-analysis demonstrates that restorative justice was “more successful at achieving each of its four goals”<sup>40</sup> than the mainstream system or other judicial programmes. Aside from offender satisfaction rates, restorative approaches were significantly more effective in their outcomes. Of course, the voluntary nature of the restorative justice model should be borne in mind for these findings as the results may be skewed due to the self-selection process. Nevertheless, the fact that the system works when it is selected argues that it should be available for selection. Restorative justice has still proved itself to be beneficial in its ability to provide alternative solutions for people who were interested in participating; and if the system is equally, if not more effective, then why not permit its use. In the absence of a better solution, it would be folly not to explore the potential of this one.

Clearly there is a great deal of room left for further research on the matter. As restorative justice continues to evolve, a better picture of how it is working will emerge. It is early days yet, but for the present, restorative justice looks to have a very promising future. It is reassuring to discover that a more humane approach is also more effective in dealing with criminal matters.



<sup>38</sup> Ibid, p.14

<sup>39</sup> Cormier, Robert B., Restorative Justice: Directions and Principles - Developments in Canada, a paper presented at the Technical Assistance Workshop of the Programme Network of Institutes at the 11th Session of the Commission on Crime Prevention and Criminal Justice, held in Vienna, 2002.04.16-25, p.14, at <http://www.unicri.it/Workshop2002/2-%20Robert%20Cormier.doc>.

<sup>40</sup> Research and Statistics Division of the Department of Justice Canada, Jeff Latimer, Senior Research Officer, The Effectiveness of Restorative justice practices: A meta-Analysis, 2001, p.17, at <http://canada.justice.gc.ca/en/ps/rs/rep/meta-e.pdf>