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Including Restorative Justice**

ESTABLISHING A FRAMEWORK FOR THE USE OF RESTORATIVE JUSTICE IN CRIMINAL MATTERS IN CANADA

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The Canadian Parliament takes note of grass roots restorative justice initiatives in Canada.

The Canadian House of Commons Standing Committee on Justice and Solicitor General, which I had the honour of chairing, began its review of sentencing, conditional release and related aspects of the correctional system in the spring of 1987, about the time a protracted and difficult national debate on capital punishment was coming to an end. Many of the issues raised in the House of Commons and across the country during that debate went beyond the question of capital punishment. They demonstrated that public confidence in many aspects of our criminal justice system was low. Many Canadians felt that they were not being fully protected and that crime was out of control. The Committee believed that this public perception, whether well-founded or not, had to be addressed and the issues raised by it be faced. The Committee undertook this study partly as a result of this sense of public unease.

The Committee received hundreds of briefs and expressions of opinion from many members of the public and representatives of all participants in the criminal justice system. It heard from lawyers, inmates, victims, helping professionals, parole officers, unions, correctional staff, judges, academics and many other interested Canadians. It held public hearings and in camera meetings across the country as well as in Ottawa. It visited institutions and met with people working directly in the conditional release system. Many witnesses before the Committee not only addressed the issues raised in its Terms of Reference, but also ranged well beyond them at times with their insights and experiences.

In the course of our deliberations, we began to hear about what to all of us on the Justice Committee, was a new concept, Restorative Justice. We found that victim-offender reconciliation or mediation had been used effectively in many Canadian communities since the birth of the concept in Southern Ontario in 1974. The Committee heard from representatives of programs operating in Ontario, Manitoba, Saskatchewan and British Columbia. Generally, such programs dealt with minor offences (e.g., property offences, assault and causing a disturbance, etc.), but we learned that victim-offender reconciliation could be used in more serious cases after an offender had served much of his sentence in prison.

The Committee found the evidence it heard across the country about restorative justice compelling and was particularly attracted to the notion that offenders should be obligated to “do something” for their victims and for society. The Committee was also impressed by the evidence of a number of the victims who appeared before it of their capacity to come to terms with some of the most serious offences which could be perpetrated against them (even murder of a loved one) through reconciliative meetings with offenders or other avenues opened up through victim services which operate on the principles of restorative justice.

The Committee recommended that the federal government, preferably in conjunction with provincial/territorial governments, support the expansion and evaluation throughout Canada of victim-offender reconciliation programs at all stages of the criminal justice process which:

- provide substantial support to victims through effective victim services; and
- encourage a high degree of community participation.

So we saw the desirability 17 years ago of linking restorative justice with improved victim services and the need for good evaluation.

We recommended a statement of sentencing principles that would "hold offenders accountable for their criminal conduct through the imposition of just sanctions which:

- encourage offenders to acknowledge the harm they have done to victims and the community, and to take responsibility for the consequences of their behaviour;
- 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;
- facilitate victim-offender reconciliation where victims so request, or are willing to participate in such programs."

These were among the 97 recommendations my Committee made to the Government in our 1988 Report, *Taking Responsibility*. We based those recommendations on the following principles:

- There must be greater community involvement and understanding at the successive stages of sentencing, corrections and conditional release (parole).
- Sentencing, correctional and releasing authorities must be accountable to the community for addressing the relevant needs and interests of victims, offenders and the community.
- Sentencing, corrections and conditional release should have reparation and reconciliation built into them – a harm has been done and should be repaired (the victim’s loss must be redressed), and most offenders will be (ultimately) reintegrated in to the community.
- Sentencing, correctional and releasing authorities must provide opportunities for offenders to accept and demonstrate responsibility for their criminal behaviour and its consequences.
- Opportunities must be provided for victims to participate more meaningfully in the criminal justice system through the provision of:
 - full access to information about all stages;

- opportunities to participate at appropriate stages of decision-making in the criminal justice system; and
- opportunities to participate in appropriate correctional processes.
- Carceral sentences should be used with restraint; there must be a greater use of community alternatives to incarceration where appropriate, particularly in cases not involving violence or recidivism.
- Parole in some form should be retained with adequate safeguards to ensure that those who benefit from it have earned that privilege and that they do not constitute an undue risk to the community.
- All participants in the criminal justice system must put greater emphasis on public education.

The Corrections Population Growth Exercise.

The late 1980s and early 1990s had witnessed a sharp growth in the size of offender populations in Canada. Between 1989 and 1994, the federal inmate population (those serving sentences of two years or more) had increased 21.5% with an annual rate of growth of 8% in 1993-1994. Canada's long-term average growth rate had been 2.5% per year. At those rates, predictions called for an increase in the federal population of almost 50% by 2004. Provincial correctional institutions (housing offenders sentenced to up to two years less a day) experienced average caseload increases of over 10% from April 1990 to March 1995.

In Western Canada, an extremely high proportion of provincial inmates and youth in custody were Aboriginal Canadians (over 70% in Saskatchewan for example). While forming only 2.8% of the country's population, Aboriginal offenders made up almost 16% of federal penitentiary inmates. While the Canadian population as a whole was aging, Aboriginals were experiencing a high birth rate and forecasts called for this "baby-boom" to cause the Aboriginal incarceration rate, already a shocking 785 per 100,000 Aboriginal Canadians, to increase still further.

In large part because of the disproportionate Aboriginal prison rates, Canada was imprisoning greater numbers of people per capita than most other developed countries. Comparative statistics placed Canada's number of inmates per 100,000 total population at 133, significantly above western democracies except the United States.

In 1995, Correctional Service of Canada was double-bunking 25% of its inmates. 4,200 offenders were doubled bunked that year compared to 1985 when no one was. Predictions called for a need for 5,000 additional beds by 2004, which would translate, even on a shared accommodation basis, to 5-10 new institutions.

Ministers responsible for justice faced a choice: shift towards a "crime control and punishment" policy, or clearly articulate a strategy combining crime prevention, tough treatment of serious crime, and greater use of community sanctions for low-risk offenders. They opted for the latter approach.

The 1995 Speech from the Throne opening the Second Session of the 35th Parliament of Canada, pledged that the government's criminal justice policy would deal sternly with high-risk, violent offenders while at the same time "develop alternatives to incarceration for low-risk offenders."

In Canada, responsibility for the administration of justice is divided between the federal and provincial/territorial levels of government. The general distinction is that the federal Parliament makes the criminal law and the provinces and territories administer it. The need to work co-operatively is obvious.

In May of 1996, Federal/Provincial/Territorial Ministers Responsible for Justice issued a report entitled "Corrections Population Growth".

Among the recommendations in the Report, the following are worth noting:

- Greater use of diversion programs:
Used for juvenile offenders since the mid-1980s, diversion of low risk adult offenders was permitted by changes to the *Criminal Code of Canada* effective September 1996. It is at this stage that much of restorative justice takes place in my country.
- Restorative justice, other community-based sanctions and sentence management alternatives should be pursued for those low-risk, non-violent offenders who can be effectively managed in the community under appropriate sanctions and controls.
- Jurisdictions were encouraged to explore restorative justice approaches that focus on harm to victims and the community and offender accountability, particularly for youthful and Aboriginal offenders.

Providing a Legislative Foundation for Restorative Justice

The legislative centerpiece of the response to concerns about the overuse of imprisonment was Bill C-41, *An Act to Amend the Criminal Code (Sentencing)* passed by Canada's Parliament in June 1995. The Supreme Court of Canada in *Regina v. Gladue* referred to this legislation as "a watershed, marking the first codification and significant reform of sentencing principles in the history of Canadian criminal law." It interpreted these reforms "as a reaction to the overuse of prison as a sanction [that] must accordingly be given appropriate force as remedial provisions." The Court strongly endorsed greater use of restorative justice.

The principles of sentencing, now codified in Sections 718 to 718.2 of our *Criminal Code* list, alongside objectives of denunciation, deterrence and incapacitation where necessary, sentencing goals that reflect restorative approaches of repairing the harm suffered by individual victims and by the community as a whole, and promoting a sense of responsibility and an acknowledgment of the harm caused on the part of the offender to victims and the community. Restraint in the use of imprisonment is emphasized and courts are asked to consider "all available sanctions other than imprisonment that are reasonable in the circumstances" and not to deprive an offender of liberty "...if less restrictive sanctions may be appropriate in the circumstances".

One of the most novel aspects of Bill C-41 was the creation of a new sentencing option - the conditional sentence of imprisonment. The conditional sentence is a sentence of imprisonment (less than two years in length) that the offender is permitted to serve in the community under

mandatory and optional conditions. It is designed to be a non-carceral alternative for otherwise prison-bound offenders.

On January 31 2000, the Supreme Court of Canada in *R. v. Proulx* rendered a landmark decision on the use of conditional sentences that stated that the purpose of conditional sentences is to reduce incarceration and increase the use of restorative justice principles in sentencing.

Canadian Centre for Justice Statistics (CCJS, June 2001) data from the Adult Correctional Services Survey indicates that conditional sentences have had a significant impact in terms of reducing the prison population (a 13% reduction in sentenced admissions by March 31, 2001, translating to 54,000 individuals).

The CCJS survey found that the use of conditional sentences form a sizable portion of the community correctional caseload. In 2002/03, there were approximately 19,200 admissions to programs of conditional sentence, an increase of 3% from 2001/02 and 33% from 1998/99.

Some of the core program models used in restorative justice programs in Canada include:

- **Victim-Offender Reconciliation/Mediation** which brings victims and accused persons together with a mediator to discuss the crime and to develop an agreement that resolves the incident. This process allows the victim to express his or her emotions to the accused and to have the accused explain his actions and express remorse. Hopefully the process helps the victim to feel closure and the offender to take responsibility for his or her actions. In many Canadian jurisdictions, this method is most commonly used at the diversion stage pursuant to the Alternative Measures protocols in s. 717 of the *Criminal Code of Canada*.
- **Family Group Conferencing** is based upon Aboriginal traditions of involving extended families and the wider community in resolving conflicts. In Canada, facilitators assist accused persons and their families to meet with victims, police, and others to discuss and resolve the incident. The Royal Canadian Mounted Police have been actively involved in training its officers and community members in using this method. Most initiatives have focused on young offenders, but some communities are using this model with adults in a process the RCMP call a “community justice forum”. Again these usually occur at the Diversion or pre-sentencing stage.
- **Circles:** Sentencing and healing circles are based upon Canadian Aboriginal practices of having communities, families, Elders, and disputants meet to discuss and resolve an issue. The participants sit in a circle and pass a “talking stick” or “talking feather” to each speaker.

In sentencing circles, the victim, offender, family, and community members meet with a judge, lawyers, police, and others to determine what type of sentence an offender should receive. The victim and the community have the opportunity to express their feelings to

the offender, and may also take part in developing and implementing a plan relating to the offender's sentence.

A restitution or compensation order can be among the restorative justice outcomes of any of these models.

The Youth Criminal Justice Act (YCJA) which came into force in April 2003, contains many opportunities for the use of restorative approaches in dealing with juvenile offenders.

One of the key objectives of the *Youth Criminal Justice Act* is to increase the use of effective and timely non-court responses to less serious offences by youth. These extrajudicial measures provide meaningful consequences, such as requiring the young person to repair the harm done to the victim. They also allow early intervention with young people and provide the opportunity for the broader community to play an important role in developing community-based responses to youth crime. Increasing the use of non-court responses not only improves the response to less serious youth crime, it also enables the courts to focus on more serious cases.

The *Youth Criminal Justice Act* contains many provisions to increase the appropriate use of extrajudicial measures for less serious offences, based on the following principles:

- Extrajudicial measures should be used in all cases where they would be adequate to hold the young person accountable.
- Extrajudicial measures are presumed to be adequate to hold first-time, non-violent offenders accountable.
- The *Youth Criminal Justice Act* requires police officers to consider the use of extrajudicial measures before deciding to charge a young person. Police and prosecutors are specifically authorized to use various types of extrajudicial measures including warnings, cautions, referrals to community programs or agencies and extrajudicial sanctions, the most formal type of extrajudicial measure which may be used only if the young person admits responsibility for the offence. If the young person fails to comply with the terms and conditions of the sanction, the case may proceed through the court process.

Conferences.

In many parts of Canada, there is an increasing use of conferences to assist in the making of decisions regarding young persons who are involved in the youth justice system.

These can take the form of family group conferencing, youth justice committees, community accountability panels, sentencing circles, and inter-agency case conferences. Conferences provide an opportunity for a wider range of perspectives on a case, more creative solutions, better coordination of services, and increased involvement of the victim and other community members in the youth justice system.

The *Youth Criminal Justice Act* includes specific sentencing principles that emphasize that the sentence must:

- not be more severe than what an adult would receive for the same offence;
- be proportionate to the seriousness of the offence and the degree of responsibility of the young person;
- within the limits of proportionality,
 - be the least restrictive alternative;
 - be the sentencing option that is most likely to rehabilitate and reintegrate the young person; and
 - promote in the young person a sense of responsibility and an acknowledgement of the harm done by the offence.

Custody is to be reserved primarily for violent offenders and serious repeat offenders.

The *Youth Criminal Justice Act* has led to a dramatic reduction in the number of young persons imprisoned in Canada. Although official statistics are not yet available, youth custody admissions are down between 30 and 50% resulting in the closure of a number of juvenile correctional facilities across Canada.

United Nations Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters.

The emerging consensus in my country about the value of restorative justice has been tempered by prudent caution surrounding the need to safeguard the rights and interests of both victims and offenders in the implementation of restorative justice programmes.

We came to the view at Justice Canada that one way to support the orderly and principled development of restorative justice would be to develop both international and domestic statements of fundamental principles on the use of restorative justice.

So Canada was pleased to take the lead, with the ultimate support of 39 other Member States, in introducing at the 9th Session of the United Nations Commission on Crime Prevention and Criminal Justice in April 2000, a resolution entitled “*Basic principles on the use of restorative justice programmes in criminal matters*” (2000/14) which initiated a process aimed at developing UN basic principles in this field.

Canada hosted a UN Experts’ Meeting in Ottawa in late October 2001 to develop agreement on a *Joint Declaration of Basic Principles*. Chaired by the writer, this meeting of criminal justice professionals and officials from 17 countries resulted in consensus on a draft declaration. The draft was then discussed at the 11th Session of the UN Commission on Crime Prevention and Criminal Justice in April 2002 and a Resolution introduced by Canada, annexing the Declaration, was approved. The Resolution E/CN. 15/2002/L.2/Rev. 1, which is available on the UN Web site: www.UN.org, encourages Member States to draw on these principles in the development and operation of restorative justice programs.

“Canadianizing” Principles and Values of Restorative Justice.

We at Justice Canada felt our country should be among the first Members of the United Nations family to build on the foundation provided by the Resolution. Working with other interested federal departments and agencies such as the Royal Canadian Mounted Police, Correctional Service of Canada and our provincial and territorial partners, our Department published draft principles and program guidelines in September 2002.

In early 2003, we submitted these drafts to a comprehensive and innovative on-line consultation conducted by Conflict Resolution Network Canada. This facilitated electronic dialogue involved over 250 interested Canadians in an intensive and rich three-week on-line discussion about the drafts. Fresh ideas and best practices were volunteered by participants and added to the documents.

In October 2003, the final versions of what had become two separate but related documents were issued: *Values and Principles of Restorative Justice in Criminal Matters* and *Restorative Justice Program Guidelines*.

The following is an abridged version of the **Canadian Statement of Values, Principles and Procedural Safeguards**.

Purpose of a Restorative Justice Process:

- To understand the underlying causes of the restorative justice process and its effects on those who have been harmed, and address the needs of the parties for healing and reparation.

Basic Principles and Procedural Safeguards:

- Participation of victim and offender should be based on their free, voluntary and informed consent. Consent may be withdrawn at any stage;
- The essential facts of the offence must be accepted by victim and offender. Offenders should take responsibility for the offence;
- There must be sufficient evidence to proceed with a charge. The prosecution of the offence must not be barred at law;
- The right of each party to seek legal advice at all stages;
- Referrals to a restorative justice process can occur at all stages of the criminal justice system. Referrals should take into account pertinent prosecution policies;
- A restorative justice process must take account of the safety and security of parties and any power imbalances between victim and offender;
 - Particular attention should be given to **implied or explicit threats to the safety of either party, and any continuing relationship between the victim and the offender.**
- Agreements must be made voluntarily and contain only reasonable, proportionate and clear terms;
- The failure to reach or to complete a restorative justice agreement must not be used in any subsequent criminal proceedings to justify a more severe sentence than would otherwise have been imposed on the offender;

- Restorative justice programs should be evaluated regularly in order to ensure that they continue to operate on sound principles and meet stated goals.

Restorative Justice Program Guidelines highlights:

- These Guidelines are intended to be aspirational and not prescriptive in nature;
- They are intended to reflect Best Practices in Restorative Justice;
- They are intended to be applied in a way appropriate to the context of each community;
- A program will be considered to be engaged on restorative justice if it has the intention to fully involve the victim, the offender and the community in the process, and can demonstrate the capacity in the program or the community to support the victim and the offender before, during and after the conference;
- Guidelines encourage the safe and effective use of restorative justice processes;
- The referral must be consistent with the provisions of the criminal law:
 - Right to counsel, authority to make referrals, privacy protections, proportionate accountability, withdrawal of consent and Alternative Measures.

Program Development:

- Each program should develop and articulate its own vision, goals and objectives;
- At the initial planning stage, a program would benefit from the input of a diverse cross-section of the community and justice stakeholders. Of particular importance is the need to encourage balance among victim, community and offender perspectives in the development and operation of the program. The access of any party to the program should not be limited in a discriminatory fashion;
- Each program should be developed and maintained through close working relationships and consultation with provincial and territorial officials responsible for restorative justice and local criminal justice officials and social service agencies. Collaborative relationships should be maintained with community and justice stakeholders.

Program Facilitation:

- Restorative justice processes must be facilitated by fair and respected third parties known as “facilitators”;
- Facilitators may be recruited from all sectors of society and should possess an understanding of the local cultures and communities in which they are working;
- The training of facilitators should provide the following skills and knowledge:
 - Values and principles of restorative justice, restorative justice processes, skill set of conflict resolution, how to effectively work with victims and with offenders, how to recognize and deal with issues of power imbalance.

Program Operation:

- Programs should develop ethical standards and protocols to guide their operation;
- All cases should include careful preparation and follow-up with both victims and offenders. Efforts should be made to identify and attend to the needs of victims and offenders, and where necessary, to connect individuals to support services which can meet their needs;
- Efficient data collection practices should be developed at the outset.

- It is suggested that each program consider implementing an outreach and public education strategy;
- Ongoing professional and volunteer recruitment, training, support and development will be a priority of a successful program.

Conclusion

Responding to Challenges.

As jurisdictions develop programs based upon restorative processes, several issues and challenges emerge. Even the words that are used can raise questions, such as what exactly is meant by “restorative” or “community”. For restorative justice programs to be effective, all of the parties involved must have a clear understanding about goals, definitions, and principles.

1. The roles of government and community in restorative justice

Both government and community have roles to play in restorative justice, but achieving a balance between the two may be one of the most challenging tasks in developing restorative justice programs. Restorative justice requires community members to be involved as active participants, as early as possible in the resolution of the conflict. Victims are involved so that their needs for answers, healing, acknowledgement, safety, and emotional reparation are met. Offenders are involved in accepting responsibility for the harms they have caused, making compensation to their victims and communities, and making positive changes in their own lives. The community is involved in providing programs for these processes to occur, opportunities for offenders to make restitution, and safe environments where rights are respected.

For all this activity to occur, criminal justice officials must be willing to accept communities as partners in making decisions. Governments can play an important role in developing legislation, policies, and guidelines; forming partnerships between groups; and providing information, research, and technical support to communities. Governments will also have to consider the amount of funding that is necessary to develop and sustain these programs.

Community involvement depends on having individual members who are willing and able to volunteer in restorative justice programs. Communities also differ in their willingness to accept restorative processes and in their ability to administer programs. Therefore, communities may need time and assistance to develop restorative processes.

2. Effects on victims

Involvement in restorative justice processes can give victims the opportunity to express their feelings about the offence and the harm done to them, and to contribute their views about what is required to put things right. Studies have indicated that victims who take part in these processes are often more satisfied with the justice system and more likely to receive restitution. Involvement can also help victims with emotional healing and lessen their fears about being re-victimized. Nonetheless, some victims remain concerned about restorative processes. In Canada some victims groups have expressed concern that programs tend to focus on the offender and do

not recognize the needs of victims. There is a danger that victims may feel pressured into taking part, even if they feel threatened by the thought of meeting the offender.

As our Program Guidelines indicate, it is important to involve victims' right from the beginning in developing restorative policies or programs. Governments should have developed victims' services programs that provide victims involved in restorative justice processes with support, referrals to other social agencies, information about the criminal justice process, and other services.

3. Appropriate offences for restorative processes

Can restorative processes be applied to any type of criminal offence? Not surprisingly, the public tends to be more receptive when the situation involves non-violent, non-repeat offenders and less-serious crime. However, programs such as Community Justice Initiatives in Langley, British Columbia, have had considerable success in working with sentenced offenders in cases of serious personal and sexual violence. In a study of this program, victims said they felt they had finally been heard, that they were less fearful and that they weren't preoccupied with the offender any more, and that they felt at peace. This is not to suggest that restorative justice is a cure-all for violent crimes, or that it can be applied to all types of offences or to all offenders; but the emphasis on healing could make an important contribution in dealing with the harm and damage that has been done.

Educating the Public and Criminal Justice System players.

One of the major challenges facing governments or non-governmental organizations establishing restorative justice options and programmes, is responding to the prevailing public view that restorative justice is a soft option that "lets offenders off too easily". Our experience has been that this initial view is actually fairly easily rebutted by consideration of how difficult it can be for an offender to face his victim and:

- Explain why the incident happened;
- Express his feelings and emotions;
- Express remorse to his victim and tell the victim that he is sorry for his behaviour;
- Demonstrate to the victim that he has taken the steps to address his offending behaviour and that there is minimal risk for re-offending;
- Answer questions that the victim may have for him/her;
- Repair the damages that resulted out of his actions;
- Desire to be accountable to the victim, taking responsibility for the harm that the victim has suffered as a result of his/her actions/behaviours;
- Desire to make amends to the victim's and their community; and
- Reassure the victim that he/she can feel safe.

It is possible to convey to a skeptical public the power of genuine remorse and accountability on the part of an offender, particularly with the testimony of a victim that this has allowed them to find closure and bring normalcy and a sense of control back into their life.

That is essentially what restorative justice is about - having many more stories to tell of victim satisfaction and success in finding a sense of justice.

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