

Pushing Back - A Response To the Drive for the Standardization of Restorative Justice Programs in Canada - Jonathan Rudin¹

Restorative justice programs, of various types, have increased dramatically in Canada since the early 1990s.² With this rise in programs has come a desire, on a number of fronts, to see the funding and delivery of such programs standardized. While the push for standardization comes from different sources and for different reasons, this paper maintains that, for the most part, such initiatives are unhelpful to the development of restorative justice programs, and in particular, may work against the delivery and development of Aboriginal justice programs.

The paper will begin by briefly outlining the way in which criminal justice is delivered in Canada and how this format has allowed restorative justice programs to flourish, at least at the margins of the system. The paper will then look at the various actors who have an interest in standardizing the delivery of such programs and the reasons why they support such a move. The paper will next critically examine some of the rationales for standardization and, finally, the paper will suggest the types of standards that might be developed that would be helpful for the development and maintenance of restorative justice programs.

In Canada, criminal justice falls within the exclusive purview of the federal government. Unlike

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² Outside of Aboriginal justice programs, which have operated in Canada since time immemorial, the modern era of restorative justice in this country is generally seen to have begun with initiatives led by the Mennonite Central Committee on Kitchener, Ontario, in 1974 (Peachey, D.E., "The Kitchener Experiment" in Wright & Galaway (eds). *Mediation and*

countries such as Australia and the United States, this means that the criminal law is, at least in theory, the same across the country in all provinces and territories. The Criminal Code of Canada, a federal statute, sets out the nature of criminal offences and the penalties for those offences. Provinces and territories are forbidden from enacting their own criminal law, although they have jurisdiction to create provincial offences. These offences can carry with them limited fine and incarceral sentences, but cannot have, as their main focus, criminal justice concerns.

While criminal law is made in Ottawa, the administration of justice is a provincial and territorial responsibility. Thus the prosecution of offences is done, for the most part, by Crown Attorneys who are appointed by the province or territory and who are under the direction of their respective Attorney General or Minister of Justice.³

Policing is also a provincial and territorial responsibility, although some provinces and territories contract with the RCMP - the national police force - to deliver policing services in all, or parts, of the province. Where local or provincial police forces are in place they are under the jurisdiction of the local municipality with overall jurisdiction being exercised by the province or territory. Local RCMP respond to the concerns of the jurisdiction they police, but are accountable to their chain of command which ultimately reports to the federal government.

Within this set-up, there is great discretion allotted to police, Crown Attorneys and judges with respect to the way in which justice is actually delivered in the specific communities. For

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³ All Criminal Code matters are prosecuted by provincial Crown Attorneys. Some criminal-like offences, such as drug charges under the Controlled Drugs and Substances Act or offences under

example, police have discretion about whether they will lay a charge (or recommend that a charge be laid) even after they may have determined that a crime has been committed. Crown Attorneys have discretion regarding whether to prosecute the offence at all and judges have discretion regarding how they wish to carry out the sentencing function that is a large part of their work.

In most of Canada, despite the discretion offered to justice personnel, the administration of justice goes by in a fairly straightforward and routinized fashion. Police are called to investigate allegations of criminal offences and where they find sufficient evidence a charge is laid; Crowns negotiate plea agreements, hold trials, or where the evidence is not deemed sufficient, withdraw charges and judges hold trials and sentence offenders in court with a minimum of information or input from anyone other than defence counsel or the Crown Attorney.

Where communities are interested in looking for restorative ways of dealing with criminal justice matters, and where they find sympathetic police officers, Crown Attorneys, and/or judges, the existence of discretion means that such initiatives are able to develop and thrive at the local basis. The advantage of relying on the discretionary aspects of the criminal justice system to develop restorative justice programs is that these programs can develop and address specific needs of local communities as recognized by those who are closest to that community. On the other hand, the disadvantage with this method of program delivery is that it pushes restorative justice programs to the margins of the criminal justice system. These program seem able to grow and thrive only when somewhat out of sight of the overall development of the system.

the Income Tax Act, are prosecuted by federal Crowns.

In addition, the marginal nature of these programs and, particularly, the fact that they tend to rely on one or two justice system personnel to act as champions for them, means that the long-term viability of programs can be quite fragile. The departure from the community of a key police officer, Crown or judge can effectively sideline a restorative justice program that is working very well. If the people in the system won't play, if they refuse to exercise their discretion in a way that allows the program to have access to clients, then the program will wither away.

Inevitably, as more and more programs began to develop, requests were made for funding for these initiatives. Funding requests were made primarily to federal and provincial or territorial governments. The more requests that came in, the more it seemed that governments needed to develop a common response to such requests. One of the overarching rationales for governments as they developed responses to funding requests was the desire to ensure equality - equality in program delivery, in funding and in expectations.

Equality with respect to program delivery focussed primarily on the types of cases that would be appropriate for restorative justice programs. In this case, the equality concern was that justice should be the same for everyone. While community capacity might mean that not every community might have a restorative justice program, the types of cases that such programs should deal with should generally be the same - after all, justice in Canada does not differ from place to place, as there is one Criminal Code for the country. It would not be fair or equitable if a person charged with an offence in one jurisdiction could escape all criminal liability by having his or her case diverted to a restorative justice program while such did not exist elsewhere. This problem would be exacerbated if programs were open to dealing with more serious offences. As

well, there was the concern that standards would ensure that no program get too far ahead of the curve and take on matters that perhaps are outside their capacity or might raise difficult questions in the legislature.

Standardization was also seen as beneficial for those government officials who were charged with funding such programs. Fairness and bureaucratic efficiency would be enhanced the more programs were alike. It would then become easier it to determine funding needs and to assess a program's ability to meet specific goals and targets in comparison with other programs in order to measure success.

A more recent rationale for standardization arose to address definitional issues, in partiuclar, what is a restorative justice program? In order to cope with an ever-increasing number of criminal charges coming before the courts, many jurisdictions have adopted a number of alternative justice responses to move cases, generally minor crimes, out of the system altogether. These types of programs, as important as they are to the administration of justice, are not truly restorative justice programs as they have much different goals.⁴ Defining the hallmarks of restorative justice programs would therefore assist in determining the nature of a program, the expectations for it, and perhaps, funding levels as well. The federal government has developed a response in this regard by drafting a set of guidelines for restorative justice programs based on the model guidelines developed by the United Nations but tailored to address Canadian

⁴ For example, programs developed across in country in the early 1990s to deal with matters such as first offender shoplifting cases have expanded their mandates over time. Any restorative aspects of such programs are largely incidental.

concerns.⁵

What can be wrong with these rationales for more standardization of restorative justice programs? Who is not in favour of treating people equally? Let's examine each of these rationales in turn.

The first rationale - that everyone should be treated the same when coming before the courts - suffers from two problems. The first is that it compares an idealized version of the justice system with the practical realities of restorative justice programs. A better comparison would be with the actual reality of justice as it is practised on the ground as compared to the actual practice of restorative justice.

On this basis, the argument collapses at the outset. Despite the fact that criminal law is the same across the country, there is no uniformity in sentencing today. Within provinces there is great discrepancy in the way certain offences are handled. In some cases those discrepancies emerge when comparing even neighbouring judicial districts. More broadly, for example, crime tends to be treated with longer jail sentences in smaller communities than in big cities. Offences that might result in suspended sentences, discharges or terms of probation in a city such as Vancouver, regularly result in jail sentences in smaller towns. This problem is even more pronounced when the sentencing practices are examined on a province by province basis. It is clear when looking at such figures that some provinces are, for example, more likely to use jail as a sanction than other provinces. All of this puts the lie to the claim that, in a practical sense,

⁵ The Draft Values and Principles of Restorative Justice in Criminal Matters and be found at:

there is any real equality of treatment of offenders across geographic borders - whether municipal or provincial - in Canada.

The second problem with this argument is that it advocates a model of equality that is at odds with the prevailing view of equality held by the courts. The idea that equality is achieved by making sure everyone receives a similar sentence for a similar crime is an argument for formal equality - equality of treatment. Increasingly in Canada, particularly with the introduction of the Charter of Rights and Freedoms in 1982, Canada has moved to a vision of substantive equality - the focus is on equality of outcome. Sometimes we must treat people differently in order to achieve the same result. If the result we wish to achieve through the sentencing process is to deter offenders from committing offences and keeping communities safe, then we must recognize that there are many ways to accomplish this goal within the sentencing process. The Supreme Court of Canada has explicitly recommended that courts adopt a more restorative, and thus a more individualized, approach to sentencing.⁶

The bureaucratic impetus for standardization, although understandable, has two regrettable and

<http://www.restorativejustice.ca/NationalConsultation/ValuesandPrinciplesdraft.htm>

⁶ The Supreme Court of Canada in *R v. Gladue* (1999) 133 C.C.C. (3d) 385 at paragraphs 71 and 72 stated: "In general terms, restorative justice may be described as an approach to remedying crime in which it is understood that all things are interrelated and that crime disrupts the harmony which existed prior to its occurrence, or at least which it is felt should exist. The appropriateness of a particular sanction is largely determined by the needs of the victims, and the community, as well as the offender. The focus is on the human beings closely affected by the crime...The existing overemphasis on incarceration in Canada may be partly due to the perception that a restorative approach is a more lenient approach to crime and that imprisonment constitutes the ultimate punishment. Yet in our view a sentence focussed on restorative justice is not necessarily a "lighter" punishment. Some proponents of restorative justice argue that when it is combined with probationary conditions it may in some circumstances impose a greater burden on the offender than a custodial sentence."

related difficulties. The first is that by centralizing what can be funded, the amounts of funds available, and often the types of offences amenable to restorative justice programs, local creativity and responsiveness is choked off and the scope for restorative justice programs is pushed to the lowest common denominator.

Restorative justice programs develop in response to local needs and as the result of collaboration among a variety of actors at the local level. These creative and innovative responses then form the basis for more communities wishing to undertake such projects. Ironically, this growth then spurs the need for “standards,” thus choking off the very factors that made the programs such a success in the beginning.

In some ways, this situation is an extension of the classic historic debate between core and periphery which has played itself out in many ways in Canadian history. The difficulty with centralizing power and regulating local processes is that the responses lose their ability to actually respond to local needs. When restorative justice programs begin to resemble cookie cutter solutions, they lose their ability to respond to local needs and thus their effectiveness is compromised.

Another unfortunate potential outcome of this approach is that some local programs may begin to operate clandestinely. Justice officials and restorative justice program staff and volunteers continue to do what they have always done, but they simply neglect to tell officials of their activities. Officials then may collaborate with this approach by accepting reports and not asking any probing questions. This “don’t ask - don’t tell” way to deliver restorative justice has its

appeal as a short-term solution, but ultimately can only lead to more problems. At some point, the practices in the community will become known, often as the result of a particularly difficult or controversial case. Government officials will maintain that they had no idea what was going on, the restorative justice program may be shut down or severely scaled back, justice personnel who assisted the program may be reprimanded and the only lessons learned will be either follow all of the rules or do a better job of keeping things secret.

The proposed adoption, by the Canadian government, of a statement of principles of restorative justice based on similar discussions by the United Nations, is also problematic. The biggest problem with the Canadian and UN initiatives is that rather than describing restorative justice in terms of what such processes are expected to accomplish, the guidelines explicitly come out in favour of one particular model of restorative justice - victim-offender reconciliation.⁷ For victim-offender programs, the guidelines have some utility, but equating restorative justice with victim-offender reconciliation does a great disservice to the range and scope of restorative justice programs. As the Program Director for an agency that developed the first urban Aboriginal restorative justice program in Canada in 1992 and has seen the program grow and expand over the years, it is disturbing to see that this initiative does not fall into the definition of a restorative justice program because it does not fully follow the victim-offender model.

On one hand, this issue might be seen as largely semantic - who cares what the program is called as long as it is delivering results. The difficulty is if the limited definition of restorative justice is

⁷ While the preamble to the principles sets matters out in a general sense, the first enumerated principle states: "Participation of a victim and offender in a restorative justice process should be based on their free, voluntary and informed consent...Consent to participate may be withdrawn at any stage." The rest of the principles proceed along this victim-offender reconciliation line.

linked with bureaucratic desires to standardize programs, there is a great danger that all programs that do not fit within the victim-offender paradigm will find it difficult to obtain funding. Even if current programs are exempt from such a response, this development might well make it difficult for new programs to develop.

All of these issues are particularly significant for Aboriginal justice programs. While the draft guidelines at the UN and the Canadian level explicitly credit the development of restorative justice programs to Aboriginal justice concepts, the guidelines do not recognize that Aboriginal justice initiatives are not historic relics from which lessons can be drawn, but rather vital contemporary projects which have their own distinct needs that must be acknowledged and addressed.⁸

Restorative justice programs in Aboriginal communities have a broader mandate and set of goals and expectations than similar programs in non-Aboriginal communities. For Aboriginal communities, the development of restorative justice programs is part of a reclaiming of the process of social control and order maintenance - a process that was explicitly taken away from Aboriginal communities during the period of colonization. In this way, the development of restorative justice programs by Aboriginal communities is very much a part of decolonization - of reasserting the importance, vitality and significance of Aboriginal community control over

⁸ The preamble states: “ that, based on traditional communal culture and values, Aboriginal people historically utilized a concept of justice akin to what we now refer to as Restorative Justice, and the fact that the evolution of their experience will continue to shape Restorative Justice in both Aboriginal and other communities.”

Aboriginal people.⁹

This vital element that is central to the development of restorative justice programs in Aboriginal communities cannot take place if that process is controlled by officials from the same governments who were responsible for taking away Aboriginal authority in the first place. When Aboriginal communities are told “You can develop restorative justice programs but they must look like this and deal only with these cases, etc.,” community capacity is not truly increased and the colonization process continues.

If the current push for standardization is not working generally and particularly, not for Aboriginal communities - what options exist? Do we not need some guidelines, standards and definitions to allow and encourage the growth and development of restorative justice practices?

There is no question that it is important to define restorative justice programs, if only to serve to distinguish them from other alternative justice processes and thus allow for realistic expectations to be established for the various types of programs that are in place. A short, comprehensive definition of what a restorative justice program is would be helpful. But such a definition should look at the issue - not by championing one form of restorative justice practice over another - but rather by outlining what the purpose and goals of a restorative justice program would be. Such a definition could include examples, but it must be an open-ended definition, not a closed one.

Using such a definition as a guide, communities could be encouraged to develop initiatives that meet the goals of restorative justice in the manner that most makes sense for the community.

⁹ There is a very good discussion of this issue in Craig Proulx’s book *Reclaiming Aboriginal*

Funding should explicitly provide for a period of community development for such projects.¹⁰

Too often, funding is only available after a program is established. This requirement pushes communities to look for ready-to-serve restorative justice responses that can be imported quickly and which take little time or energy in the form of community consultations or identification of community needs. The problem, of course, is that if the programs are not designed to meet the needs of the particular community, then they will not be as effective as they could be.

Encouraging communities to take the time to identify their concerns in the justice area and develop responses that will address those concerns will also allow for more innovation and creativity in this area.

Finally, Aboriginal justice programs should be recognized as distinct endeavours from other restorative justice programs. The importance of developing community responses in Aboriginal communities - urban, rural and reserve - must be central to the process. These initiatives are as important for their contribution to combatting the impact of colonialism, as for their ability to better respond to criminal activity in the community. In fact, without the former objective, it will be difficult for the projects to achieve the latter. This reality of Aboriginal justice projects must be recognized, validated and funded.

None of this is to dismiss the need for accountability. It is vital that restorative justice programs be accountable - accountable to the justice system, the community and to funders. But accountability takes place not just by ensuring that particular boxes are checked off in reporting regimes. It requires regular discussions, evaluations and brainstorming. It means recognizing

where challenges to programs exist and to a concerted effort to find the resources - whatever they might be - to meet those challenges.

There is a great deal of interest and support for restorative justice programs in Canada. Let us hope that this interest can be channelled into assisting programs to become as effective as they can, rather than placing them in straitjackets for the sake of standardization and uniformity.

¹⁰ Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide*, 1995, p. 169-172