

# Lessons From the Front Lines in Canada's Restorative Justice Experiment: The Experience of Sentencing Judges

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*Restorative justice offers an alternative to traditional criminal justice processes by adopting a contextual approach to resolving the aftermath of a crime. Restorative justice engages a variety of programs and processes to address not only the needs of the offender, but also those of the victim and the community. The author explores the impact of Canada's 1996 sentencing reforms, which explicitly incorporated restorative justice principles into the criminal sentencing process. Through data that comes from interviews with provincial and superior court judges in Toronto, she evaluates the success of these reforms and identifies key gaps that need to be addressed before they are fully adopted by Canadian courts.*

*The author begins by examining the rise of restorative justice in recent years as a response to the failings of traditional criminal justice in the Western world. Turning to the Canadian sentencing reforms and their interpretation in the Supreme Court of Canada decisions in R. v. Gladue and R. v. Proulx, she demonstrates that judges have been placed in the centre of the restorative justice movement. Her interviews reveal obstacles to the effectiveness of restorative justice outside certain specialized settings, such as aboriginal sentencing and the processes in the Youth Criminal Justice Act. She takes an in-depth look at the obstacles, which range from heavy case loads to a lack of political support.*

*Based on her observations, the author proposes a "new governance" approach to facilitating the incorporation of restorative justice principles into the traditional criminal justice system.*

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*Where restorative justice is working, some elements of new governance appear to be present — such as a flexible process that allows for input from non-legal actors. The author proposes that more resources be devoted to another key component of new governance: a commitment to collecting systematic data on what processes are working.*

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# Introduction

"I know this much — what we do [in the criminal justice system] stinks. It doesn't work. . . . [A]nd we ignore this all the time. We just shut our eyes to the fact that what we do does not work."<sup>1</sup>

Such pessimistic accounts of Canada's criminal justice system are hardly novel. For decades, academics, policymakers, legislators and members of the judiciary have all sought solutions to the problems associated with the conventional criminal justice system. Restorative justice programs and processes have been one of the dominant responses to the perceived failings of Western criminal justice systems in the latter part of the twentieth century, particularly in New Zealand, Canada, Australia, Europe and the United States.<sup>2</sup> Restorative justice was once recognized as the dominant approach to crime in many Western and non-Western legal traditions prior to the rise of centralized state power.<sup>3</sup>

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1. Interview of Judge A (21 June 2005) at 12.

2. In the United States, one of the dominant solutions to the crime and punishment crisis in the past 15 years has been the development of problem solving courts, such as drug treatment and mental health courts. Although these courts are not often associated with restorative justice *per se*, they share a similar orientation, objectives and values. See generally Greg Berman & John Feinblatt, "Problem-Solving Courts: A Brief Primer" (2001) 23 Law & Pol'y 125; James L. Nolan, Jr., *Reinventing Justice: The American Drug Court Movement* (Princeton: Princeton University Press, 2001); James L. Nolan, Jr. ed., *Drug Courts: In Theory and Practice (Social Problems and Social Issues)* (Princeton: Princeton University Press, 2002); and the papers presented at the Winter 2003 Symposium, Community Courts and Community Justice: Michael C. Dorf & Jeffrey A. Fagan, "Problem-Solving Courts: From Innovation to Institutionalization" (2003) 40 Am. Crim. L. Rev. 1501; Candace McCoy, "The Politics of Problem-Solving: An Overview of the Origins and Development of Therapeutic Courts" (2003) 40 Am. Crim. L. Rev. 1513; James L. Nolan, Jr., "Redefining Criminal Courts: Problem-Solving and the Meaning of Justice" (2003) 40 Am. Crim. L. Rev. 1541; and William H. Simon, "Criminal Defenders and Community Justice: The Drug Court Example" (2003) 40 Am. Crim. L. Rev. 1595.

3. See e.g. John Braithwaite, *Restorative Justice & Responsive Regulation* (New York: Oxford University Press, 2002) at 5 [Braithwaite, *Restorative Justice*]; and Heather Strang & Lawrence W. Sherman, "Repairing the Harm: Victims and Restorative Justice" [2003] Utah L. Rev. 15 at 16.

In its more recent incarnation it has typically developed as an "alternative" to the traditional justice system.<sup>4</sup>

The principles of restorative justice have resonated throughout the Western world, no doubt in part because of the growing body of empirical research showing that restorative programs outperform traditional court processes on several outcomes, including recidivism.<sup>5</sup> Along with the ever-increasing number of restorative justice programs operating as "alternatives" to the conventional criminal justice system,<sup>6</sup> some jurisdictions have integrated restorative objectives and processes directly into their conventional justice systems. Such is the case in Canada, where 1996 sentencing reforms explicitly incorporated restorative justice values into the sentencing phase of the criminal process.

Despite the proliferation of restorative programs and processes, many questions remain about the nature of restorative justice. My research explores some of these, and focuses on the impact of the decision to incorporate principles of restorative justice into the criminal justice system's sentencing phase. Specifically, I studied judges who work (or who had worked) in trial courts in and around Toronto and who are responsible, when sentencing offenders, to assess whether the perceived benefits of "alternative" restorative processes could be incorporated into the mainstream criminal justice system.

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4. Braithwaite, *Restorative Justice*, *supra* note 3 at 10. See Leena Kurki, "Restorative and Community Justice in the United States" in Michael Tonry, ed., *Crime and Justice: A Review of Research* (Chicago: The University of Chicago Press, 2000) vol. 27, 235 at 265 and Lode Walgrave "Introduction" in Lode Walgrave, ed., *Restorative Justice and the Law* (Portland: Willan Publishing, 2002) xv.

5. See discussion *infra* note 18 and accompanying text.

6. One mid-1990s estimate indicated that there were over 300 restorative justice programs in North America and 500 in Europe: Mark S. Umbreit, "Avoiding the Marginalization and 'McDonaldization' of Victim-Offender Mediation: A Case Study in Moving Toward the Mainstream" in Gordon Bazemore & Lode Walgrave, eds., *Restorative Juvenile Justice: Repairing the Harm of Youth Crime* (Monsey, NY: Criminal Justice Press, 1999) 213 at 216. John Braithwaite has reported that the Canadian delegation to the 2000 UN Congress on the Prevention of Crime and Treatment of Offenders claimed that there were 400 restorative justice programs operating in Canada. Braithwaite, *Restorative Justice*, *supra* note 3 at 8.

This paper proceeds in five parts. In Part I, I briefly explore the rise of restorative justice as a response to the perceived failings of traditional criminal justice systems in the Western world. In Part II, I describe the Canadian experience of legislating restorative principles into the *Criminal Code*<sup>7</sup> when a new sentencing regime was adopted in 1996, and I review the jurisprudence interpreting these provisions. Part III summarizes the findings of my empirical research with Toronto judges on their views on restorative justice, and on sentencing practices more generally. I highlight the systemic difficulties obstructing real philosophical change in mainstream sentencing practices as well as areas where restorative processes do seem to be working, such as problem solving courts and youth justice initiatives. In Part IV, I explore specific changes that would help restorative justice function more effectively in Canada, drawing on both the theoretical insights of “new governance” and the practical experiences of the judges I interviewed. The paper concludes with a plea for more routinized and systematic data collection, and for research into both sentencing practices and restorative justice initiatives operating in Canada’s criminal justice system.

## I. The Rise of Restorative Justice

Given that restorative justice has been a response to perceived failings of the conventional criminal justice system, it is perhaps not surprising that it is “most commonly defined by what it is an alternative to.”<sup>8</sup> Restorative justice eschews the conventional criminal justice system’s focus on punishing a “decontextualized” offender for violating the state’s norms. It understands crime as harm done to victims and community — as distinct from the state<sup>9</sup>— and focuses on restoring victims and communities, repairing relationships and building

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7. *Criminal Code*, R.S.C. 1985, c.C-46 [*Criminal Code*].

8. John Braithwaite, “Restorative Justice: Assessing Optimistic and Pessimistic Accounts” in Michael Tonry, ed., *Crime and Justice: A Review of Research* (Chicago: The University of Chicago Press, 1999) vol. 25, 1 at 4. Few restorative justice advocates propose that it be a full alternative to legal justice. See e.g. Pollard, *infra* note 14 at 10-11.

9. See e.g. Susan M. Olson & Albert W. Dzur, “Reconstructing Professional Roles in Restorative Justice Programs” [2003] Utah L. Rev. 57 at 60.

communities. In contrast to the typical case — a guilty plea followed by a brief sentencing hearing — the *process* takes centre stage:<sup>10</sup> “Restorative justice is a process whereby all the parties with a stake in the offence come together to resolve collectively how to deal with the aftermath of the offence and its implications for the future.”<sup>11</sup>

There are a wide variety of programs and processes associated with restorative justice, but most share similar objectives, including: denouncing the offender’s unacceptable actions;<sup>12</sup> reintegrating offenders into the community by helping them accept responsibility for their actions;<sup>13</sup> supporting victims and creating space for the victims to be heard;<sup>14</sup> restoring community order and developing community; and rebuilding relationships between the offender, victim and the community.<sup>15</sup> Most restorative justice advocates believe that these objectives can best be accomplished by encouraging the victim, offender and community to participate in the restorative process. If the state makes room for such participation, there will be greater flexibility and responsiveness in the search for solutions to the crime problem.<sup>16</sup>

Many of the objectives and values that underpin restorative justice are similar to the traditional justice values of aboriginal communities in Canada and New Zealand, as well as those of certain religious communities.<sup>17</sup> This is no accident; many programs associated with the

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10. See e.g. Kurki, *supra* note 4 at 266: “[T]he essence of restorative justice is more in its processes than in its outcomes.”

11. Braithwaite, *Restorative Justice*, *supra* note 3 at 11 citing “the most acceptable working definition . . . offered by Tony Marshall” [emphasis added].

12. See e.g. John Braithwaite & Stephen Mugford, “Conditions of Successful Reintegration Ceremonies” (1994) 34 *Brit. J. Crim.* 139 at 142 and John Braithwaite, *Crime, Shame, and Reintegration* (New York: Cambridge University Press, 1989).

13. Braithwaite & Mugford, *ibid.* at 150.

14. See e.g. Barbara Hudson, “Victims and Offenders” in Andrew Von Hirsch *et al.*, eds., *Restorative Justice and Criminal Justice: Competing or Reconcilable Paradigms?* (Portland: Hart Publishing, 2003) 177 and Charles Pollard, “Victims and the Criminal Justice System: A New Vision” [2000] *Crim. L. Rev.* 5 at 10-11.

15. See e.g. Kurki, *supra* note 4 at 265-66; Law Commission of Canada, *Transforming Relationships Through Participatory Justice* (Ottawa: Law Commission of Canada, 2003) at 17.

16. *Ibid.* and see Braithwaite’s work generally.

17. Although this view seems to be accepted in much of the restorative justice literature, aboriginal and indigenous cultures and traditions vary widely and; we should not overstate

restorative justice movement were developed through the efforts and influence of religious and aboriginal groups who were seeking new approaches to dealing with crime.<sup>18</sup>

Restorative justice programs have generated much interest and, in addition to general academic commentary, much empirical research. This research has generally cast restorative justice in a positive light.<sup>19</sup> Restorative processes outperform conventional court processes on a variety of outcome measures, including victim and offender satisfaction, offender compliance with restitution orders, and rates of recidivism.<sup>20</sup>

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their "universality." See Chris Cunneen, "Community Conferencing and the Fiction of Indigenous Control" (1997) 30 *Austl. Crim. & N.Z.J.* 292.

18. For example, the first restorative justice program in North America was a victim-offender reconciliation program developed by the Mennonite Community in Kitchener, Ontario in 1974. See Dean E. Peachey, "The Kitchener Experiment" in Martin Wright & Burt Galaway, eds., *Mediation and Criminal Justice: Victims, Offenders and Community* (London: Sage Publications, 1989) 14; and Julian V. Roberts & Kent Roach, "Restorative Justice in Canada: From Sentencing Circles to Sentencing Principles" in Von Hirsch *et al.*, *supra* note 14, 237 at 239. The first officially sanctioned sentencing circle in Canada was convened by Judge Barry Stuart of the Yukon Territorial Court in an aboriginal community in the Yukon Territory: *R. v. Moses* (1992), 71 C.C.C. (3d) 347 (Y. Terr. Ct.). See Barry Stuart, "Circle Sentencing: Turning Swords into Ploughshares" in Burt Galaway & Joe Hudson, eds., *Restorative Justice: International Perspectives* (Monsey, NY: Criminal Justice Press, 1996) 193. Sentencing circles have been accepted by Canadian appellate courts and they are now used in non-aboriginal settings as well. Another restorative process heavily influenced by aboriginal traditions is Family Group Conferencing (FGC), which was first initiated in New Zealand following extensive consultation with Maori communities. See Kurki, *supra* note 4 at 273 and Cunneen, *ibid.* at 293.

19. That said, many academics are quite critical of restorative justice for a variety of reasons. See e.g. Annalise Acorn, *Compulsory Compassion: A Critique of Restorative Justice* (Vancouver: UBC Press, 2004); Adriaan Lanni, "The Future of Community Justice" (2005) 40 *Harv. C.L.L. Rev.* 359; Paul H. Robinson, "The Virtues of Restorative Processes, the Vices of 'Restorative Justice'" [2003] *Utah L. Rev.* 375 at 377-78; Stephanos Bibas & Richard A. Bierschbach, "Integrating Remorse and Apology into Criminal Procedure" (2004) 114 *Yale L.J.* 85 at 91; Julie Stubbs, "Domestic Violence and Women's Safety: Feminist Challenges to Restorative Justice" in Heather Strang & John Braithwaite, eds., *Restorative Justice and Family Violence* (Cambridge: Cambridge University Press, 2002) 42; and Curt Taylor Griffiths & Ron Hamilton, "Sanctioning and Healing: Restorative Justice in Canadian Aboriginal Communities" in Galaway & Hudson, *ibid.* 175.

20. See e.g. Jeff Latimer, Craig Dowden & Danielle Muise, *The Effectiveness of Restorative Justice Practices: A Meta-Analysis* (Justice Canada: 2001) and Barton Poulson, "A Third

Given these findings, it is not surprising that in recent years some countries have incorporated restorative justice principles into their traditional criminal justice system, as Canada has done.

## II. The Canadian Restorative Justice Experiment

### A. Criminal Code Amendments

In 1996 Parliament enacted Bill C-41, reforming Canada's sentencing regime and explicitly incorporating restorative principles into Part XXIII of the *Criminal Code*.<sup>21</sup> Restorative justice now informs the sentencing process in several ways.

First, two of the six objectives of sentencing that the *Criminal Code* requires a judge consider in all sentencing decisions explicitly incorporate principles of restorative justice: the reparation of harm done to victims or the community, and the promotion of a sense of responsibility and acknowledgment of the harm done by offenders.<sup>22</sup> If rehabilitation is understood as restorative in nature, as has been accepted by the Supreme Court of Canada,<sup>23</sup> half of the objectives are arguably restorative.

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Voice: A Review of Empirical Research on the Psychological Outcomes of Restorative Justice" [2003] Utah L. Rev. 167. See also Mark S. Umbreit, "Restorative Justice through Mediation: The Impact of Programs in Four Canadian Provinces" in Galaway & Hudson, *supra* note 18, 373; Strang & Sherman, *supra* note 3; and Kurki, *supra* note 4.

21. Although there had been much discussion of sentencing reform in the 25 years leading up to these changes, including restorative justice as part of this reform was not explicitly raised until 1988 when the House of Commons Standing Committee on Justice and the Solicitor General (the Daubney Committee) released its report following a year-long series of hearings into sentencing, conditional release and other related corrections concerns. See Kent Roach, "Changing Punishment at the Turn of the Century: Restorative Justice on the Rise" (2000) 42 Can. J. Crim. 249 at 253 and David Daubney & Gordon Parry, "An Overview of Bill C-41 (*The Sentencing Reform Act*)" in Julian V. Roberts & David P. Cole, eds., *Making Sense of Sentencing* (Toronto: University of Toronto Press, 1999) 31 at 32.

22. See *Criminal Code*, *supra* note 7, s. 718.

23. *R. v. Gladue*, [1999] 1 S.C.R. 688 at para. 43 [*Gladue*]. Some academics have questioned the appropriateness of connecting restorative justice with rehabilitation. See e.g. Gordon Bazemore and Sandra O'Brien, "The Quest for a Restorative Model of Rehabilitation: Theory-for-Practice and Practice-for-Theory" in Lode Walgrave, ed., *Restorative Justice and the Law* (Portland: Willan Publishing, 2002), 31.



Second, s. 718.2(e) of the *Criminal Code* sets out further principles of sentencing and stipulates that judges consider “all sanctions other than imprisonment that are reasonable in the circumstances, with particular attention to the circumstances of aboriginal offenders.” This provision has been held to mandate that incarceration be the sanction of last resort for *all* offenders at sentencing.<sup>24</sup>

Finally, Parliament created a new type of sentence — the conditional sentence of imprisonment — whereby a court may order an offender to serve a sentence of imprisonment in the community, subject to a variety of both mandatory and optional conditions.<sup>25</sup> The conditional sentence of imprisonment has been interpreted as a sentence that can fulfill both restorative and punitive objectives.<sup>26</sup>

### *B. Jurisprudence Interpreting the Amendments*

In a series of relatively recent decisions,<sup>27</sup> the Supreme Court of Canada has sought to provide guidance to trial courts attempting to make sense of the sentencing reforms. The Court has made clear that the amendments marked a significant turning point in the Canadian approach to sentencing.<sup>28</sup>

#### (i) *R. v. Gladue* — Interpreting s. 718.2(e)

In *Gladue*, the Supreme Court of Canada was called upon to interpret the scope and application of s. 718.2(e) of the *Criminal Code*, the provision requiring that incarceration be the sanction of last resort, “with particular attention to the circumstances of aboriginal offenders.” In addition to determining the meaning of the reference to aboriginal offenders, the

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24. *Gladue*, *ibid.* at para. 36.

25. *Criminal Code*, *supra* note 7, ss. 742.1, 742.3, 742.6.

26. See *R. v. Proulx*, 2000 SCC 5, [2000] 1 S.C.R. 61 at para. 22 [*Proulx*].

27. See *Gladue*, *supra* note 23; *Proulx*, *ibid.*; *R. v. L.F.W.*, 2000 SCC 6, [2000] 1 S.C.R. 132; *R. v. R.A.R.*, 2000 SCC 8, [2000] 1 S.C.R. 163; *R. v. Bunn*, 2000 SCC 9, [2000] 1 S.C.R. 183; and *R. v. Wells*, 2000 SCC 10, [2000] 1 S.C.R. 207 [*Wells*].

28. *Gladue*, *supra* note 23 at para. 39.

Court also considered Parliament's sentencing reforms more generally.<sup>29</sup> In so doing, Iacobucci and Cory JJ., writing for the Court, rejected the view that s. 718.2(e) — and the sentencing reforms more broadly — were simply a restatement of existing law. As they explained, "[t]he enactment of the new Part XXIII was a watershed, marking the first codification and significant reform of sentencing principles in the history of Canadian criminal law."<sup>30</sup> The focus on restraint in sentencing was remedial, and not simply a codification of previous jurisprudence.

Iacobucci and Cory JJ. concluded that the purposes of the sentencing reforms were to reduce the use of imprisonment, to increase the use of restorative justice principles in sentencing and to pursue both of these objectives "with a sensitivity to aboriginal community justice initiatives when sentencing aboriginal offenders."<sup>31</sup> The Court did not provide a detailed definition of restorative justice, explaining that this was a task better left to sentencing judges: "The concept and principles of a restorative approach will necessarily have to be developed over time in the jurisprudence."<sup>32</sup>

The Court did conclude, however, that sentencing judges must adopt a different analytical method when determining what is a fit sentence for aboriginal offenders. It explained that when judges assess "the circumstances of aboriginal offenders," s. 718.2(e) requires them to consider: (1) "The unique systemic or background factors which have played a part in bringing the particular aboriginal offender before the courts;" and (2) "The types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular aboriginal heritage or connection."<sup>33</sup> If this information is not adduced by the lawyers, the judge has a duty to attempt to obtain it. This could require the judge to call witnesses on her own initiative.<sup>34</sup>

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29. *Gladue*, *supra* note 23 at para. 35ff.

30. *Ibid.* at para. 39.

31. *Ibid.* at para. 48.

32. *Ibid.* at para. 71.

33. *Ibid.* at para. 93.

34. *Ibid.* at para. 84. See *Wells*, *supra* note 27 at para. 44. In *Wells*, Iacobucci J., writing for the Court, reiterated that a different methodology is required in these cases, but he specified that it will not necessarily lead to a different result and that judges are not

(ii) *R. v. Proulx* and the Conditional Sentence Regime

In *Proulx*, the Supreme Court of Canada interpreted the scope and application of the new conditional sentence of imprisonment sanction. Chief Justice Lamer, writing for the Court, built upon the reasoning of *Gladue*, released just nine months earlier. He reasserted that Parliament's principal objectives in the reforms were to reduce the use of incarceration and to expand the use of restorative justice principles at sentencing. In his view the conditional sentence, which incorporates some aspects of both non-custodial measures and incarceration, was designed to achieve both of these objectives.<sup>35</sup>

More specifically, Lamer C.J.C. held that, like probation, a conditional sentence is served in the community and thus tends to be better suited to achieving sentencing's restorative objectives — "rehabilitation, reparation to the victim and community and the promotion of a sense of responsibility in the offender."<sup>36</sup> Unlike probation, however, the conditional sentence is not primarily a rehabilitative tool, but is also a punitive sanction capable of providing denunciation and deterrence.<sup>37</sup>

Lamer C.J.C. emphasized the value of sentencing's restorative objectives, explaining that "[t]he importance of these goals is not to be underestimated, as they are primarily responsible for lowering the rate of recidivism."<sup>38</sup> That said, he also highlighted the ways in which the conditional sentence could achieve sentencing's punitive goals, concluding that "[i]n certain circumstances, the shame of encountering members of the community may make it even more difficult for the offender to serve his or her sentence in the community than in prison."<sup>39</sup> Indeed, Lamer C.J.C. held that since a conditional sentence was intended to achieve both restorative and punitive objectives,<sup>40</sup> it

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required in all cases to emphasize restorative principles over denunciation and deterrence when sentencing aboriginal offenders.

35. *Proulx*, *supra* note 26 at paras. 15, 22.

36. *Ibid.* at para. 22.

37. *Ibid.* at paras. 22, 23.

38. *Ibid.* at para. 109.

39. *Ibid.* at para. 105.

40. *Ibid.* at paras. 15, 99.

should generally include punitive conditions that restrict the offender's liberty: "house arrest should be the norm, not the exception."<sup>41</sup>

The enactment of these sentencing reforms, and the Supreme Court's interpretation of them, has thrust Canadian trial judges onto centre stage in the restorative justice movement. They must not only adopt a new methodology when sentencing aboriginal offenders, but must also take restorative objectives into consideration in the sentencing of all offenders and attempt to craft restorative conditions when imposing conditional sentences of imprisonment. Although the Supreme Court has provided some guidance, it is clear that criminal court judges working on "the front line" are the ones responsible for determining how best to implement the reforms and integrate restorative processes into the conventional criminal justice system. Not only does the *Criminal Code* give judges a great deal of discretion in sentencing,<sup>42</sup> but the Supreme Court has repeatedly confirmed that appellate courts must adopt a deferential standard when reviewing sentencing decisions.<sup>43</sup> As a result, it is the sentencing judges who bear the weight of the reforms.

### (iii) Application of Sentencing Reforms by Lower Courts

The Supreme Court's decisions in *Gladue* and *Proulx* have had a clear impact on judicial practices in Canada. Although it is beyond the scope of this paper to analyze the many decisions citing those cases, what follows is a brief sketch of the current lay of the land with respect to sentencing aboriginal offenders and the use of conditional sentences.

#### (a) Sentencing Aboriginal Offenders

Since *Gladue*, judges responsible for sentencing aboriginal offenders have had to adopt a new methodology to ensure that the systemic background factors which bring aboriginal offenders before the court are considered. Three courts — the Tsuu T'ina Nation Peacemaking

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41. *Ibid.* at para. 103.

42. *Supra* note 7, s. 718.3.

43. *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500 at para. 90. See also *R. v. McDonnell*, [1997] 1 S.C.R. 948; *R. v. Shropshire*, [1995] 4 S.C.R. 227; and *Proulx*, *supra* note 26 at paras. 123-26.

Court in Alberta, the Saskatchewan Cree Court and the Gladue (aboriginal persons) Court in Toronto — were created to address the needs of aboriginal offenders and respond to the requirements of s. 718.2(e) of the *Criminal Code*.<sup>44</sup> Individual judges have also been making a concerted effort to adopt a restorative approach to sentencing aboriginal offenders. More and more reported cases refer to the use of sentencing circles, particularly in the western provinces.<sup>45</sup> Even for serious offences, courts of appeal have upheld unique terms of punishment suggested by sentencing circles — terms that fulfill both punitive and restorative objectives.<sup>46</sup>

Even though judges do not usually refer matters to sentencing circles for advice,<sup>47</sup> Canadian courts have generally taken *Gladue* seriously and have sought to use a different methodology when sentencing aboriginal offenders. When lower courts have not done so, appellate courts have not hesitated to intervene and alter the terms of sentences imposed, even in cases of serious offences.<sup>48</sup> Appellate courts have also extended the reach of the *Gladue* approach beyond the strict confines of sentencing. They have found it to be applicable in determining parole ineligibility

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44. See Amy Jo Ehman, "A People's Justice" (June-July 2002), online: The Canadian Bar Association's *National* <<http://proquest.umi.com/pqdweb?index=0&did=527371301&SrchMode=3&sid=1&Fmt=3&VInst=PROD&VType=PQD&RQT=309&VName=PQD&TS=1191425017&clientId=14119&aid=2>>.

45. See e.g. *R. v. Labelle (B)* (2002), 299 A.R. 78 (C.A.); *R. v. J.J.* (2004), 244 Nfld. & P.E.I.R. 24 (C.A.); *R. v. Johns* (1996), 1 C.N.L.R. (Y.C.A.) 172; and *R. v. Munson* (2003), 172 C.C.C. (3d) 515 (Sask. C.A.). For academic discussions of the use of sentencing circles see e.g. Ross Gordon Green, "Aboriginal Community Sentencing and Mediation: Within and Without the Circle" (1997) 25 Man. L.J. 77; Luke McNamara, "Appellate Court Scrutiny of Circle Sentencing" (1999) 27 Man. L.J. 309; Luke McNamara, "The Locus of Decision-Making Authority in Circle Sentencing: The Significance of Criteria and Guidelines" (2000) 18 Windsor Y.B. Access Just. 60.

46. See e.g. *R. v. Taylor* (1997), 122 C.C.C. (3d) 376 (Sask. C.A.) upholding a trial judge's decision to impose a sentence suggested by a sentencing circle that included a term banishing the accused to an isolated location.

47. No doubt in part because sentencing circles can be time-consuming and resource-intensive. This concern was raised by the Crown in *R. v. Morin* (1995), 101 C.C.C. (3d) 124 (Sask. C.A.).

48. See e.g. *R. v. A.A.E.*, 2004 BCCA. 220; *R. v. Sackanay* (2000), 47 O.R. (3d) 612 (C.A.) (Q.L.); *R. v. Brizard*, [2006] O.J. No. 729 (Ont. C.A.) (Lexis); *R. v. John* (2004), 182 C.C.C. (3d) 273 (Sask. C.A.). But see *R. v. Francis (J.)* (2001), 240 N.B.R. (2d) 159 (C.A.); and *R. v. Gopher* (2006), 205 C.C.C. (3d) 1 (Sask. C.A.).

periods<sup>49</sup> and when a review board is making a disposition in respect of an accused found not criminally responsible on account of mental disorder.<sup>50</sup>

(b) The Use of Conditional Sentences Post-*Proulx*

The conditional sentence of imprisonment has been widely embraced by the judiciary. Since its introduction in 1996, conditional sentences have been imposed in an increasing number of cases. Between 1997-1998 (the first year for which complete data were available) and 2004-2005, that number almost doubled, from 6,700 to 13,100.<sup>51</sup> Concerns that judges would use conditional sentences to “widen the net” of social control, by imposing such sentences on offenders who would have formerly received probation, do not seem to have been borne out. The degree of net widening has been very small (approximately one percent).<sup>52</sup> There has, however, been a significant decrease in the rate of custodial sentences in Canada since 1996, and this is attributable in large part to the introduction of conditional sentences.<sup>53</sup>

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49. *R. v. Jensen* (2005), 74 O.R. (3d) 561 at paras. 25-30 (Ont. C.A.).

50. *R. v. Sim* (2005), 78 O.R. (3d) 183 (Ont. C.A.). Sadly, aboriginal persons continue to be over-represented in Canada’s prisons despite the adoption of a more sensitive approach to sentencing. In 2000/2001, aboriginal people comprised 19% of provincial and territorial custodial admissions and 17% of federal custodial admissions, yet made up only 2% of the Canadian population. See Law Commission of Canada, *Transforming Relationships through Participatory Justice* (Ottawa: Law Commission of Canada, 2006) at 18, online: Depository Services Program <<http://dsp-psd.pwgsc.gc.ca/Collection/JL2-22-2003E.pdf>>. More recently, see The Correctional Investigator Canada, *Annual Report of the Office of the Correctional Investigator 2005-2006* (Ottawa: Minister of Public Works and Government Services, 2006) at 11ff, online: Office of the Correctional Investigator <[http://www.oci-bec.gc.ca/reports/pdf/AR200506-2\\_e.pdf](http://www.oci-bec.gc.ca/reports/pdf/AR200506-2_e.pdf)>.

51. See Statistics Canada, *Adult Correctional Services in Canada* by Karen Beattie, vol. 26, no. 5 (Ottawa: Canadian Centre for Justice Statistics, 2006) at 12, online: Juristat <<http://www.statcan.ca/english/freepub/85-002-XIE/85-002-XIE2006005.pdf>>.

52. See Julian V. Roberts & Thomas Gabor, “Living in the Shadow of Prison, Lessons from the Canadian Experience of Decarceration” (2004) 44 *Brit. J. Criminol.* 92 at 103.

53. See Julian V. Roberts, *The Virtual Prison: Community Custody and the Evolution of Imprisonment* (Cambridge: Cambridge University Press, 2004) at 123 [Roberts, *Virtual Prison*].

It is difficult to assess whether judges are using conditional sentences to achieve restorative objectives. Post-*Proulx*, appellate decisions have tended to emphasize the punitive nature of conditional sentences.<sup>54</sup> Appellate courts have cautioned judges against underestimating the denunciatory and deterrent effect of conditional sentences.<sup>55</sup> They have also held that it is an error in principle for a trial judge to fail to explain why the goals of denunciation and deterrence could only be satisfied by incarceration,<sup>56</sup> or to treat conditional sentences as only serving restorative purposes.<sup>57</sup>

If judges were using conditional sentences to attain restorative objectives, this might be evident in the type of optional conditions they ordered. Unfortunately, there is a dearth of data on optional conditions imposed by sentencing judges. The data that do exist suggests that, initially, few conditions were imposed as part of a conditional sentence, and those that were imposed were similar to those which were made a part of probation.<sup>58</sup> That has changed since the release of *Proulx*. The length of conditional sentences has increased, as have the number of optional conditions imposed and the use of punitive conditions, such as curfews and house arrest.<sup>59</sup> In 2003-2004 in Ontario, the most common optional condition was house arrest (54%).<sup>60</sup> Other common optional

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Between the periods pre- and post-conditional sentence, rates of admissions to custody in Canada declined by 13%. Much of the decline can be attributed to conditional sentences.

54. This is perhaps not surprising given that the decision in *Proulx* contrasts the conditional sentence, which can accomplish both punitive and restorative objectives, to probation, which is primarily focused on rehabilitation. See *Proulx*, *supra* note 26 at paras. 32-34.

55. See e.g. *R. v. Kutsukak* (2006), 213 C.C.C. (3d) 80 (Ont. C.A.); *R. v. Watkinson* (2001), 153 C.C.C. (3d) 561 (Alta. C.A.); and *R. v. Kozma*, [2000] B.C.J. No. 1595 (C.A.) (Q.L.).

56. See e.g. *R. v. Duchominsky* (2003), 171 C.C.C. (3d) 526 (Man. C.A.); *R. v. McLea* (2004), 190 C.C.C. (3d) 472 (Alta.C.A.).

57. See *R. v. Clough*, 2001 BCCA 613.

58. Julian V. Roberts, Dan Antowicz & Trevor Sanders, "Conditional Sentences of Imprisonment: An Empirical Analysis of Optional Conditions" (2000) 30 C.R. (5th) at 113.

59. Julian V. Roberts, "The Evolution of Conditional Sentencing: An Empirical Analysis" (2002) 3 C.R. (6th) 267 [Roberts, "Conditional Sentencing"]; see also Statistics Canada, *Conditional Sentencing in Canada: A Statistical Profile 1997-2001* (Ottawa: Canadian Centre for Justice Statistics, 2003) [Statistics Canada, *Conditional Sentencing*].

60. Justice Casey Hill, "Optional Conditions in Conditional Sentence Orders" (Paper presented in the Criminal Law Seminar of Vancouver, Canada, 30 March 2005) at 25 [unpublished] [Hill, "Conditional Sentence Orders"].

conditions included both those addressing rehabilitative goals (e.g. participation in drug treatment programs (38%) and alcohol abstinence (35%)) and punitive objectives (such as non-association conditions (38%) and curfew (36%)).<sup>61</sup>

There is almost no way to assess whether the conditions imposed as part of a conditional sentence are being routinely enforced.<sup>62</sup> In the early days of the conditional sentence regime, trial judges in different jurisdictions expressed concern about the adequacy of resources being devoted to monitoring offenders on conditional sentences.<sup>63</sup> Appellate courts have concluded that where a conditional sentence would otherwise be appropriate, a judge cannot refuse to impose it out of concern that there are not enough resources in the community to supervise the offender.<sup>64</sup> Judges, including those interviewed for this study, have expressed frustration with the limited data available to them when imposing conditional sentences.<sup>65</sup> On the whole, there appears to be insufficient information on what is working in terms of restorative justice.

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61. *Ibid.*

62. There has been some limited research into the question of breaches of conditional sentences. See e.g. Roberts, "Conditional Sentencing," *supra* note 59.

63. See e.g. *R. v. F.(R.)* (1997), 10 C.R. (5th) 394 at 408-10 (Ont. Ct. J. (Gen. Div.)); *R. v. Patterson* (2000), 33 C.R. (5th) 45 at para. 72 (Ont. C.A.); *R. v. Juteau* (1999), 34 C.R. (5th) 168 (Qc. C.A.). A recent Ontario study of those responsible for supervising offenders on conditional sentences suggests that these fears were not unfounded: see Julian V. Roberts, Cathy Hutchison & Rebecca Jesseman, "Supervising Conditional Offenders: The Perceptions and Experiences of Probation Officers in Ontario" (2005) 29 Crim. Rep. (6th) 107. Ontario probation officers were responsible for supervising, on average, more than 70 cases per month. Almost half indicated that they were never or almost never able to ensure compliance with curfew or house arrest.

64. See e.g. *R. v. Makar*, [2000] M.J. No. 458 at para. 6 (C.A.) (QL); *R. v. Roberts*, [2000] O.J. No. 3750 (C.A.) (QL); and *R. v. Nault* (2002), 59 O.R. (3d) 388 (C.A.).

65. See e.g. Department of Justice, *The Future of Conditional Sentencing: Perspectives of Appellate Judges* by Julian V. Roberts & Allan Manson (Ottawa: Department of Justice, Research and Statistics Division, 2004); and Department of Justice, *Judicial Attitudes to Conditional Terms of Imprisonment: Results of a National Survey* by Julian V. Roberts, Anthony Doob & Voula Marinos (Ottawa: Department of Justice Canada, Policy Sector, Research & Statistics Division, 2000). See Hill, "Conditional Sentence Orders," *supra* note 60 at 27.



### III. Research Findings — Judges' Understanding and Use of Restorative Justice

#### A. Purpose

To date, there has been very little study of how judges have handled the incorporation of restorative justice into the Canadian sentencing process.<sup>66</sup> There has been some critical commentary on the use of the conditional sentence of imprisonment, particularly following the release of the Supreme Court's decision in *Proulx*,<sup>67</sup> as well as some empirical research into the use of this form of sentence.<sup>68</sup> There has also been some study of the impact of the sentencing reforms in sentencing aboriginal offenders.<sup>69</sup> Finally, there has also been some research into

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66. Two studies have explored the more limited question of judges' views on conditional sentencing. See e.g. Roberts, Doob & Marinos, *ibid.*; and Roberts & Manson, *ibid.*

67. See e.g. Patrick Healy, "The Punitive Nature of the Conditional Sentence" (Paper presented to The Changing Face of Conditional Sentencing Symposium, Department of Justice, 2000) 1; Allan Manson, "The Conditional Sentence: A Canadian Approach to Sentencing Reform or, Doing the Time-Warp Again" (Paper presented to The Changing Face of Conditional Sentencing Symposium, Department of Justice, 2000) 9; Kent Roach, "Conditional Sentences, Restorative Justice, Net-Widening and Aboriginal Offenders" (Paper presented to The Changing Face of Conditional Sentencing Symposium, Department of Justice, 2000) 25; and Julian V. Roberts, "Discovering the Sphinx: Conditional Sentencing After the Supreme Court Judgment in *R. v. Proulx*" (Paper presented to The Changing Face of Conditional Sentencing Symposium, Department of Justice, 2000) 39.

68. See e.g. Dawn North, "An Empirical Analysis of Conditional Sentencing in British Columbia" (Paper presented to The Changing Face of Conditional Sentencing Symposium, Department of Justice, 2000) 73; Statistics Canada, *Conditional Sentencing*, *supra* note 59; Department of Justice, *Conditional Sentencing in Canada: An Overview of Research Findings* by Julian V. Roberts & Carole LaPrairie (Department of Justice, Research and Statistics Division, 2004) [Roberts & LaPrairie, *Conditional Sentencing*]; Roberts, "Conditional Sentencing", *supra* note 59; and Julian V. Roberts, Dan Antowicz & Trevor Sanders, "Conditional Sentences of Imprisonment: An Empirical Analysis of Optional Conditions" (2000) 30 C.R. (5th) 113. The most comprehensive comparative work on conditional sentencing and community imprisonment generally thus far is Roberts, *Virtual Prison*, *supra* note 53.

69. See e.g. Philip Stenning & Julian V. Roberts, "Empty Promises: Parliament, The Supreme Court, and the Sentencing of Aboriginal Offenders" (2001) 64 Sask. L. Rev. 137;

victims' perceptions of one aspect of the reforms — for example, conditional sentences.<sup>70</sup> No research has asked, however, how judges are working to incorporate restorative justice into the sentencing process and whether they feel adequately equipped to do so. My research explores how (and if) restorative justice functions within the confines of the traditional criminal justice system, from the perspective of judges working on the front lines of sentencing in Toronto.

### *B. Methodology*

The objective of my research was to study how restorative justice functions in Ontario courts, and how this process is understood by judges responsible for sentencing. For the first phase of the research, I spent approximately two weeks observing public sentencing hearings in lower courts in Ontario, to better understand how those courts were dealing with the 1996 sentencing reforms.<sup>71</sup> Although I spent most of this time in sentencing hearings in traditional courts, I also observed proceedings in two problem solving-courts — the Gladue (aboriginal persons) court and the mental health court — both of which are located in the provincial courthouse at Old City Hall in Toronto.<sup>72</sup>

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Board of Editors, "Colloquy on 'Empty Promises: Parliament, The Supreme Court, and the Sentencing of Aboriginal Offenders'" (2002) 65 Sask. L. Rev. 1; Jonathan Rudin & Kent Roach, "Broken Promises: A Response to Stenning and Roberts' 'Empty Promises'" (2002) 65 Sask. L. Rev. 3; Kent Roach & Jonathan Rudin, "*Gladue*: The judicial and political reception of a promising decision" (2000) 42 Can. J. Crim. 355; and Julian V. Roberts & Carol LaPrairie, "Sentencing Circles: Some Unanswered Questions" (1996) 39 Crim. L.Q. 69.

70. Julian V. Roberts & Kent Roach, "Conditional Sentencing and the Perspectives of Crime Victims: A Socio-Legal Analysis" (2005) 9 Queen's L.J. 560 at 587.

71. Most of this time was spent in courthouses in the Toronto area; two days were spent in the Ottawa courthouse.

72. The Gladue court deals with sentencing matters, but also addresses other aspects of criminal proceedings including bail hearings. The mental health court has the jurisdiction to determine whether an accused is fit to stand trial, to consider applications for diversion of the accused from criminal proceedings, to impose sentences following guilty pleas and, more generally, to handle proceedings through the setting of trial dates.

During the second phase of the research, I conducted in-depth, semi-structured interviews with twelve judges working in courts<sup>73</sup> in and around Toronto, all of whom had expertise in sentencing and/or had worked in problem solving courts such as the Gladue and mental health or drug treatment courts at Old City Hall. Although I did not set out to interview judges working in the youth courts, almost half had some experience with youth court proceedings. The judges I interviewed were all referred to me by one of three people: an Ontario Court of Appeal judge with an interest and expertise in sentencing; a University of Toronto criminology professor supervising the study in Canada; and a provincial court judge who was contacted about the study. I met with judges willing to participate in the study, and gave them a detailed letter explaining the study's objectives and the safeguards being used to ensure that its results would remain confidential.<sup>74</sup>

All interviews were conducted in person in June 2005 at various sites in the Toronto area. Ten of the twelve interviews were recorded and transcribed *verbatim*,<sup>75</sup> and I took detailed notes during the other two. The interviews focused on several themes, including how judges understood the process of restorative justice in their courts and how the 1996 sentencing reforms had affected their role.<sup>76</sup>

The judges I interviewed had different backgrounds and life experiences. Some had been members of the judiciary for more than fifteen years; others had been appointed to the bench more recently. Ten of the twelve sat in provincial courts; the other two were current or former superior court judges. Most were men; two were women. The majority had been appointed to the bench following careers in criminal practice, either as defence lawyers or crown prosecutors. All had experience in sentencing offenders in the traditional criminal courts. More than half had also sentenced offenders in a problem solving court, such as the drug treatment, mental health, Gladue and youth courts.

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73. One of the judges interviewed was no longer working as a trial judge at the time of the interview.

74. On file with the author.

75. Information that could be used to identify the judge (or anyone) was removed in the transcription process.

76. A detailed interview guide is on file with the author.

The findings from this study are limited by its qualitative nature: the sample size is obviously too small to result in highly generalizable data. That said, it offers a vivid snapshot of how a specific group of judges, working in trial courts in and around Toronto in June 2005, were responding to the 1996 sentencing reforms.

### *C. Findings*

The interviews reveal both interesting variations and commonalities in the judges' views on — and the use of — restorative justice and their use of it. In this paper, I explore five of the more noteworthy themes that arose in the course of the interviews: (1) the judges' general understandings of the nature of restorative justice; (2) the impact of sentencing reforms on the judiciary; (3) the judges' own sentencing practices; (4) systemic problems in incorporating restorative justice into the mainstream criminal justice system; and (5) restorative justice successes in the criminal justice system.

#### *(i) Judges' Understanding of Restorative Justice*

Although restorative programs and processes have become increasingly prominent over the last 30 years, "restorative justice" is not often defined in concrete terms, so it is perhaps inevitable that the judges I interviewed had different understandings of its appropriate parameters.<sup>77</sup> Some believed that restorative justice only occurs when cases are diverted from the traditional criminal justice system, while others felt it could take place in the mainstream. That said, most understood restorative justice as working at least in part to repair the harm done to victims and communities and to reintegrate offenders into society. For example, Judge H explained:

[I]t is a way to help restore people back to what they were before. That includes the victims . . . [I]t sort of restores them back to help them have a sense of well being. It

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77. Interview of Judge E (14 June 2005) at 4. Judge E suggested that, in a country as diverse as Canada, it made sense to leave the concept of restorative justice open so that it could evolve differently in different contexts.

gives them a sense of participation in the process. With respect to the accused, I'm hopeful by restorative justice . . . with the help of all of the participants in the process, [they get] an understanding of how their crime affected everybody and therefore how they can work to make sure that doesn't happen again.<sup>78</sup>

Similarly, Judge J put it in simple terms: "To me, [restorative justice] is victim, victim's family, accused, accused's family, members of the community, meeting with a facilitator and coming to some sort of resolution."<sup>79</sup> Several of the judges, when asked how they understood restorative justice, referred to specific processes such as sentencing circles, family group conferencing or victim-offender reconciliation programs.<sup>80</sup>

Others saw restorative justice as something to incorporate into their personal approach to sentencing. For example, Judge B explained,

For me, it's perhaps more contextual than some of the sentencing we did prior to 1996. And I think a greater attempt to try to see a connectedness between sort of the offender and the victim, and the offender and the community in which she lived.<sup>81</sup>

Similarly, Judge K felt that it could involve an individual judge "just taking the time to say, you know, I'm not going to run a sausage factory taking 50 pleas."<sup>82</sup> Judge E believed that restorative justice would ideally be more than just an add-on to certain parts of the justice system, and was "designed to challenge the hegemony of fault finding."<sup>83</sup> He lamented that the criminal justice system is "obsessed" with fault finding and with what flows from it, and that "as long as you have that as the dominant paradigm, I think that restorative justice is forever condemned to be at the margin."<sup>84</sup>

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78. Interview of Judge H (16 June 2005) at 1.

79. Interview of Judge J (24 June 2005) at 5.

80. See e.g. Interview of Judge L (20 June 2005) at 4; interview of Judge A, *supra* note 1; and interview of Judge C (22 June 2005).

81. Interview of Judge B (13 June 2005) at 2.

82. Interview of Judge K (23 June 2005) at 3.

83. Interview of Judge E, *supra* note 77 at 4.

84. *Ibid.* at 5.

The judges were divided on whether restorative justice could be integrated directly into the traditional criminal courts. Even those who believed that it could be fully integrated felt that the current system created some obstacles to it.<sup>85</sup> About a third expressed some optimism that restorative justice is already, or could be, a part of mainstream criminal justice. For example, Judge B thought that the sentencing reforms had created “legitimate room” for restorative justice in criminal courts. He did allow, however, that it had taken some time for this reform to take hold.<sup>86</sup>

Other judges were more sceptical of the current system’s ability to adopt restorative approaches to sentencing. As noted above, Judge E felt that it would be very difficult to incorporate restorative justice into a system that focuses on “fault finding.”<sup>87</sup> Similarly, Judge L believed that the adversarial nature of the court system is antithetical to restorative justice. He maintained that the formal court structure, with its specific rules about who sits where and who speaks when, and the training of lawyers in the adversarial context are both inconsistent with the very nature of restorative justice.<sup>88</sup> These judges, and others, seemed to believe that restorative justice worked best when it happened outside the formal structure of the courts as part of a diversion program.

Finally, Judge C bristled at the very suggestion that restorative principles had any place in the adult criminal justice system.<sup>89</sup>

I cannot imagine a victim offender reconciliation program in a case where there has been a violent home invasion by an adult with a three-page record. Why would the victim want to sit down with the offender in that type of situation? . . . It is simply not necessary in the bulk of cases in criminal courts. I just don’t see a role for criminal mediation with adults.<sup>90</sup>

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85. See discussion below starting at 41.

86. Interview of Judge B, *supra* note 81 at 3.

87. *Ibid.*

88. Interview of Judge L, *supra* note 80 at 5.

89. Judge C allowed that the one exception was in cases with aboriginal offenders. She indicated that she had referred about 20% of aboriginal offenders to sentencing circles for input into sentencing. See Interview of Judge C, *supra* note 80 at 2.

90. *Ibid.* at 3.

## (ii) Impact of Sentencing Reforms on the Judiciary

There was no consensus among the judges on whether the 1996 reforms had significantly impacted the judiciary. Some believed that the reforms had brought real philosophical changes in the judicial approach to sentencing, but some felt that while there had been changes in the types of sentences imposed, there had been no underlying shift in how judges understood their role in sentencing.

All of the judges working in problem solving courts believed that there had been a fundamental change in how the judiciary approached sentencing and that the 1996 reforms helped make problem solving courts possible. One judge felt that the work of Toronto's drug treatment court, all of which is either pre-sentencing or sentencing-related, marked a fundamental change in the approach to the criminal process. He admitted that the 1996 reforms had not necessarily changed his own approach to sentencing; they had, however, given him the confidence to continue doing what he had been doing earlier.<sup>91</sup>

A slight majority of judges believed that the sentencing reforms had not resulted in a new "restorative" approach to sentencing but had created more choices, primarily in the form of the conditional sentence of imprisonment. For example, Judge J, a strong proponent of restorative justice generally, was blunt in his assessment of the reforms:

Conditional sentences [now] happen all the time and [have] had a tremendous effect on the way you do business in criminal courts. The restorative justice . . . included in the Code [has made] no difference at all as far as I can see.<sup>92</sup>

Judge H echoed this view, noting that judges have focused on conditional sentences, "but not the philosophy behind it—you know—explore . . . avenues other than going to jail."<sup>93</sup> Judge L maintained that the inclusion of restorative justice in the sentencing reforms was largely "rhetoric that's not been taken up with the same kind of enthusiasm as other parts of that amendment," such as the focus

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91. Interview of Judge K, *supra* note 82 at 7.

92. Interview of Judge J, *supra* note 79 at 8.

93. Interview of Judge H, *supra* note 78 at 3.

on restraint in sentencing aboriginal persons and conditional sentences.<sup>94</sup> He saw the problem as follows:

[T]he reference to restorative principles is simply wasted in the absence of some sort of generalized understanding across the criminal justice system of what that means; how it plays out in practice; how it can be properly equipped and funded/resourced so that it can take place.<sup>95</sup>

Judge E maintained that the 1996 sentencing reforms had not led to real changes in sentencing practices, except possibly in aboriginal communities. Part of the reason was that when the legislative changes were enacted, too much discretion was left to the judiciary.<sup>96</sup> He did not believe most judges felt their role and responsibilities had changed, even after *Gladue* and *Proulx*. He saw this problem as endemic to the system: “[the] criminal justice system is very, very resistant to change. And judges particularly so.”<sup>97</sup>

### (iii) The Judges’ Sentencing Practices

The judges’ analyses of their own sentencing practices were also revealing; it was clear that there was no standard approach to sentencing, nor agreement about the utility of the new sentencing regime.

#### (a) Use of Pre-sentence Reports and Victim Impact Statements

Pre-sentence reports (PSRs) are prepared by probation officers at the request of the court. They can be ordered in all cases before sentencing, and they can include a wide range of information, including the offender’s background and previous convictions.<sup>98</sup> The court can order “information

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94. Interview of Judge L, *supra* note 80 at 6-7.

95. *Ibid.* at 7.

96. Interview of Judge E, *supra* note 77 at 7.

97. *Ibid.* at 11. He contrasted this with the change in the youth justice system that had followed the enactment, in 2002, of the *Youth Criminal Justice Act* (see *YCJA*, *infra* note 186), *ibid.* at 7. See also discussion starting at 56, below.

98. *Criminal Code*, *supra* note 7, ss. 721(1)-(5).



on any other matter . . . after hearing argument from the prosecutor and the offender, to be included in the report.”<sup>99</sup> Most of the judges indicated that they rarely request pre-sentencing reports in traditional adult courts.<sup>100</sup> For example, Judge C reported that she received them in about five percent of adult sentencing cases; and Judge L once in every thirty cases. This is consistent with what I saw; only one pre-sentence report was provided to the court during the period in which I observed proceedings.

The judges indicated that the PSRs they receive vary in quality. “[S]ome are very good and some . . . just take up space,”<sup>101</sup> Judge K said. Judge D doubted that probation officers put much time and energy into producing the reports, which they saw merely as “an adjunct to their job.”<sup>102</sup> Some, including Judge J, did not think PSRs were concerned with restorative justice.

Pre-sentencing reports seldom will not make recommendations to you as to how to restore. It’s more what should the terms of probation be, and there’ll be things like . . . suggesting community service, suggesting anger management or suggesting alcohol abuse counseling or something like that, which is not so much restorative justice but kind of rehabilitative . . .<sup>103</sup>

Even if judges wanted to see PSRs more often, there were some systemic obstacles to this happening. Judge L explained that the time it took to get PSRs was often a problem.

[I]f the person’s out of custody, they often don’t want a PSR because it could dredge up things that they really don’t want the judge to know about them. If they’re in custody, it takes too long because they’ll have to sit there for a month while the report’s being

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99. *Ibid.* at s. 721(4). Judge B noted that this provision was not used enough by judges.

100. The one exception was Judge F, who indicated that he received PSRs in about 40% of his sentencing cases. Interview of Judge F (15 June 2005). Judges received PSRs more frequently when presiding in youth courts or problems solving courts.

101. Interview of Judge K, *supra* note 82 at 8.

102. Interview of Judge D (21 June 2005) at 7.

103. Interview of Judge J, *supra* note 79 at 14. (Note that this is not consistent with the Supreme Court of Canada’s understanding of rehabilitation as a restorative principle. See *Gladue*, *supra* note 23 at para. 43.)

produced unless it's a stand down PSR but they generally can't get you much information in . . . just an afternoon or something.<sup>104</sup>

Similarly, Judge K noted that Gladue reports — pre-sentence reports specifically designed to explore and obtain the types of information mandated by *Gladue* — were often very useful, but could take six to eight weeks to produce. If the accused were in custody and would be receiving a short sentence, it would not make sense to order a Gladue report.<sup>105</sup>

Unlike PSRs, which can be ordered at the discretion of the court, the court is required to ask the prosecutor whether the victims have been advised that they can give a victim impact statement (VIS) at sentencing.<sup>106</sup> Thus, not surprisingly, the judges received such statements more often than PSRs. For example, Judge G, who sits in the superior court, was given a VIS in about 75% of sentencing matters, and provincial court judges received them in 5% to 70% of cases.<sup>107</sup>

Although many of the judges indicated that they found the VIS useful, several qualified this by adding comments such as “you need to be careful; it can be a tool for the victim to vent;”<sup>108</sup> or “I find what I expect to find in them.”<sup>109</sup> Judge J again questioned whether a VIS could possibly be restorative. As he saw it, a VIS is only a statement of consequence to the victim — including the emotional impact. He believed that, in the traditional court process, it is difficult to address the victim’s needs as effectively as in a restorative process. As he explained, “. . . you can make terms like ‘apologize to the victim’ . . . but how much does it really mean if you are ordering someone to do it? . . . [I]n the restorative justice conference, the victim can tell whether there’s a heartfelt apology.”<sup>110</sup>

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104. Interview of Judge L, *supra* note 80 at 12.

105. Interview of Judge K, *supra* note 82 at 8.

106. *Criminal Code*, *supra* note 7, s. 722.2(1) (In my observations, this inquiry still did not happen routinely).

107. Interview of Judge G (24 June 2005) at 4.

108. Interview of Judge C, *supra* note 80 at 5.

109. Interview of Judge F, *supra* note 100 at 21.

110. Interview of Judge J, *supra* note 79 at 14. The Ontario Court of Appeal has held that it is not appropriate to order an offender to apologize to a victim as a condition of the sentence. See *R. v. Pine*, [2002] O.J. No. 280 (C.A.) (QL).

## (b) Views on Conditional Sentences

Most of the judges saw the conditional sentence of imprisonment as a useful innovation. They associated a range of benefits with conditional sentences: keeping offenders out of the prison system; allowing for the imposition of treatment; and allowing offenders to retain their employment. However, some expressed both practical and ideological concerns about such sentences.

Almost all of the judges saw the conditional sentence of imprisonment as a meaningful alternative to incarceration. For example, Judge H told me she liked the conditional sentence regime because it has “given judges more room to think outside the box of imprisonment.”<sup>111</sup> Judge K saw the benefits of the conditional sentence as being both about avoiding the overuse of prisons and allowing for the crafting of a sentence that could affect the long term prospects of the offender in a positive way:

I think it's a significant advance over what we had before. It really allows people who . . . would otherwise be in jail to be serving time in the community in a creative way that allows them (a) to maintain their jobs; (b) retain connection with their family; and (c) get the treatment they need in whatever area that may be. Otherwise they'd be rotting, quite frankly, in jail and not learning anything, and then be ripe for reoffending again when they get out — so definitely an advance.<sup>112</sup>

Some of the judges who were most positive about the conditional sentence regime noted that they had practical concerns about its use. Several indicated that they did not have enough information about the types of programs available in the community for offenders.<sup>113</sup> Others were concerned about the availability of resources to enforce conditional sentences. For example, Judge B did not believe the province had devoted sufficient resources to monitoring conditional sentences and funding treatment programs,<sup>114</sup> and that this had created difficulties for trial judges.

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111. Interview of Judge H, *supra* note 78 at 7.

112. Interview of Judge K, *supra* note 82 at 13.

113. See e.g. Interview of Judge D, *supra* note 102 at 13 and see discussion at 47, below.

114. Judge B saw this as a problem resulting from the federal nature of the criminal justice system. See discussion starting at 73, below.

Initially, he explained, judges read the decision in *Proulx* as requiring that they not order a conditional sentence if there were no programs or supports for it in the community, but the Court of Appeal disagreed.<sup>115</sup> Judge L also noted that “the only thing I’m concerned about is that there’s no way of knowing whether the stringent restrictions you sometimes impose are ever carried out and enforced.”<sup>116</sup> He worried that this lack of enforcement could erode the public’s support for the regime.

One judge expressed serious skepticism about the conditional sentencing regime, and clearly rejected the view that conditional sentences were punitive: “I think [the conditional sentence] is a joke. I think offenders think it’s a joke. I see it as ‘fake jail.’ I have a close friend who is a probation officer and have heard stories about people laughing when they are given a conditional sentence. They see it as getting off.”<sup>117</sup>

It was clear from our interview that Judge C had ideological concerns with the conditional sentencing regime. She did not think it was an appropriate substitute for incarceration. Although she said she imposed conditional sentences when a case fell within the *Criminal Code*’s parameters for so doing, she did not agree “that a conditional sentence is real imprisonment.”<sup>118</sup> She was also emphatic that conditional sentences were not “restorative” in nature: “restorative justice cannot mean simply an alternative to prison.”<sup>119</sup>

Other judges raised ideological concerns at the other end of the spectrum. Two were concerned that conditional sentences “widened the net,” in that offenders who would have previously received probation were now receiving conditional sentences.<sup>120</sup>

Those judges who discussed the types of optional conditions they incorporate into conditional sentences seemed to agree on a need to try to “keep the good in a person’s life and remove the time for the

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115. See discussion, *ibid.* note 114; and interview of Judge B, *supra* note 81 at 14.

116. Interview with Judge L, *supra* note 80 at 13.

117. Interview of Judge C, *supra* note 80 at 6.

118. *Ibid.* at 7.

119. *Ibid.* at 2.

120. Interview of Judge H, *supra* note 78 at 7; and interview of Judge L, *supra* note 80 at 15. This does not appear to have happened. See interview of Judge D, *supra* note 102 and accompanying text.

bad.”<sup>121</sup> Judge I typically imposed a curfew in conditional sentences: “I’m a firm believer that bad things happen at night so I like them in at night.”<sup>122</sup> Judge K explained that he wanted counsel to show that there was a plan in place, so that the offender would not be “simply sitting at home.”<sup>123</sup> His goal was to use the conditional sentence to get at the “root cause” of the issues that brought the offender before the court.

Many judges noted that they crafted conditions that focused on rehabilitative or restorative principles.<sup>124</sup> Several tended to order treatment as part of a conditional sentence, explaining that “it’s the only place in the criminal law where you can make a treatment order.”<sup>125</sup> Finally, at least two judges specifically told me they did not include unrealistic conditions that “beg to be breached.”<sup>126</sup> For example, Judge D would never include alcohol prohibitions in a conditional.

### (c) Feedback on Sentencing

The judges rarely received systematic feedback on the impact of the sentences they imposed, at least in the traditional adult court system. Almost all indicated they would like more information of this sort and felt their work would benefit from it. Some suggested that feedback might affect the type of sentence given in similar cases<sup>127</sup> or validate the

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121. Interview of Judge H, *supra* note 78 at 7.

122. Interview of Judge I (22 June 2005) at 11.

123. Interview of Judge K, *supra* note 82 at 13.

124. See interview of Judge G, *supra* note 107; interview of Judge L, *supra* note 80; interview of Judge D, *supra* note 102; and interview of Judge B, *supra* note 81, who explained at 14 that the conditional sentence is where “restorative justice is most . . . transparent.”

125. See interview of Judge D, *supra* note 102 at 12.

126. Interview of Judge H, *supra* note 78 at 7.

127. Interview of Judge D, *supra* note 102 at 10. For example, Judge D indicated that he stopped sending people to one rehabilitation program when he learned, at an accused’s breach of conditional sentence hearing, that he had left the residence because bed bugs had bitten him all over his torso.

decision to “take a chance.”<sup>128</sup> Some indicated that they had started to incorporate conditions into sentences — either conditional sentences of imprisonment or probation — requiring the offenders to report back to the court on their progress.<sup>129</sup>

In contrast, all of the judges who worked in the problem solving courts at Old City Hall had received more feedback, specifically positive feedback, in those settings than in traditional adult courts. Similarly, those who worked in youth courts indicated that the rare feedback they had received on sentencing was in this setting.<sup>130</sup> Any such feedback, however, was impromptu, when offenders stopped by the courts or sent the judge a letter about their progress.<sup>131</sup>

Interestingly, the sentencing reforms coupled with the court practice at Old City Hall led Judge D to comment that the reforms had seriously impacted on his work in that court in a way that he might not have expected. He noted that in a large multi-judge jurisdiction, an offender can sit before Judge X on one day and Judge Y on another day when he is brought in on a breach of the terms of release. At Old City Hall, however, the judges have adopted the practice that an offender alleged to have breached a term of a conditional sentence is returned before the judge who imposed the initial sentence. Judge D maintained that this had “personalized”<sup>132</sup> his relationship with the accused. Some offenders had written him long letters detailing their post-sentencing progress. He felt they were motivated to do so,

knowing that they’re going to see the same judge . . . and knowing that they’re back ‘cause they’ve breached a sentence, and knowing that the judge told them on sentencing that they were going to be serving the rest of their time in jail if they breached a sentence . . .<sup>133</sup>

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128. Interview of Judge I, *supra* note 122 at 9.

129. See e.g. interview of Judge B, *supra* note 81 at 11; interview of Judge F, *supra* note 100. Roberts, “Conditional Sentencing” *supra* note 59 also reported that judges were imposing these types of conditions.

130. See e.g. interview of Judge C, *supra* note 80; and interview of Judge F, *supra* note 100.

131. See e.g. interview of Judge D, *supra* note 102; and interview of Judge I, *supra* note 122.

132. Interview of Judge D, *supra* note 102 at 4.

133. *Ibid.* at 5.

This was seen as a welcome change in a system where the accused persons typically think they are “never going to have to account to a real individual human being — just to the system.”<sup>134</sup>

#### (iv) Systemic Obstacles to Incorporating Restorative Justice into the Mainstream Criminal Justice System

Even those judges who supported the use of restorative justice at sentencing encountered obstacles to its routine integration into the criminal justice system. The key difficulties included: (a) a lack of time or resources; (b) limited political support for restorative justice; (c) insufficient training and support from legal counsel; (d) a dearth of information about available community resources; and (e) difficulties in defining community and in engaging citizens in a large urban setting.

##### (a) Lack of Time and Resources

In interview after interview, the judges spoke of the daily challenge of moving a huge volume of cases through Ontario’s courts.<sup>135</sup> Volume and delay, especially in the provincial courts, appear to be among the biggest obstacles to incorporating restorative processes into the mainstream criminal justice system. Judges working in downtown Toronto courthouses told me they were expected to handle twenty to fifty guilty pleas a day.<sup>136</sup> As another judge bluntly explained, “For me to be serious about restorative justice, I can’t sentence fifteen people a day.”<sup>137</sup>

In the busy plea courts, the judges acknowledged that they “can’t give any sensitivity to sentencing in the way you should be.”<sup>138</sup> Others did not

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134. *Ibid.*

135. Statistics Canada reported that in 2003 Ontario’s adult criminal courts processed almost 200,000 cases. See Statistics Canada, *Cases in Adult Criminal Court, by Province and Yukon Territory (Ontario)* (2003), online: Statistics Canada <<http://www40.statcan.ca/l01/cst01/legal19g.htm>>.

136. See e.g. interview of Judge K, *supra* note 82 at 6; and interview of Judge L, *supra* note 80 at 7.

137. Interview of Judge E, *supra* note 77 at 12.

138. Interview of Judge L, *supra* note 80 at 8.

have the time to review victim impact statements seriously, or write reasons to support their decisions.<sup>139</sup> Several judges maintained that the plea court work was the most brutal part of their jobs. Judge K explained: "one of the worst things for any judge . . . [is] to sit in our plea court . . . . It doesn't look like justice is being done."<sup>140</sup> Another told me that after a day of sitting in the plea court, "you come out and you feel like you've lost half your brain . . . . You really feel like you're looking at the main source of brutality in the whole system you know on a daily basis."<sup>141</sup>

That said, plea court work was generally seen as an essential part of the justice system. One judge described it as "the most important court in the building."<sup>142</sup> Concerns about limited resources and time delays have helped to ensure that the busy plea courts retained a central role in the criminal justice system, and that the volume of cases moving through them remains high. One judge explained that although there would be better outcomes if there were a second plea court and thus more time to approach each sentencing decision with the care he felt was warranted, "we'd have to find another judge, another courtroom and we're short of judges, short of courtrooms, short of Crowns."<sup>143</sup>

It also became evident in my interviews that the memory of *R. v. Askov*, and its aftermath, looms large in Ontario's criminal courts.<sup>144</sup>

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139. See e.g. interview of Judge E, *supra* note 77.

140. Interview of Judge K, *supra* note 82 at 6-7.

141. Interview of Judge L, *supra* note 80 at 8.

142. Interview of Judge I, *supra* note 122 at 1.

143. Interview of Judge K, *supra* note 82 at 7.

144. In 1990, the Supreme Court of Canada held that an unreasonable delay in bringing an accused to trial was a violation of an accused's rights under s. 11(b) of the *Canadian Charter of Rights and Freedoms* and that the appropriate remedy in such cases was to grant a stay. *R. v. Askov*, [1990] 2 S.C.R. 1199 at 1219, 1225-26. From the date the decision was issued until April 1991, almost 35,000 charges were stayed, dismissed or withdrawn in Ontario alone. See Library of Parliament, Current Issue Review, 91-8E, "Criminal Trial and Punishment: Protection of Rights Under the Charter" (24 February 2000), online: Depository Services Program <<http://dsp-psd.pwgsc.gc.ca/Collection-R/LoPBdP/CIR/918-e.htm>>. See also Superior Court of Justice, Report, "New Approaches to Criminal Trials: The Report of the Chief Justice's Advisory Committee on Criminal Trials in the Superior Court of Justice" (12 May 2006), online: Guide to Ontario Courts <[http://www.ontariocourts.on.ca/superior\\_court\\_justice/reports/NCTR/CTRReport.htm](http://www.ontariocourts.on.ca/superior_court_justice/reports/NCTR/CTRReport.htm)> (detailing problems facing the



Several judges openly acknowledged that “courts are still driven by the specter of *Askov* — that is to say trial delay.”<sup>145</sup> They also indicated that they saw new delay reduction initiatives regularly, but seemed sceptical of them. Some felt that the efficiency concerns forced the system to “lose sight of the person.”<sup>146</sup> At least one judge indicated that these initiatives impeded his ability to adopt different approaches to sentencing: “with delay being what it is, there’s not enough time in the court day for the justice system to attempt something like restorative justice.”<sup>147</sup> Others believed that delays could be reduced more effectively if more cases were diverted out of the court system and if it were reserved for the more serious cases: “there are situations that you need the adversarial system for. But you can deal with the vast bulk of your cases outside, in a problem-solving way.”<sup>148</sup>

#### (b) Limited Political Support For Restorative Justice

Almost half of the judges cited the lack of political support for restorative justice as an obstacle to its widespread integration into the criminal justice system. They were quite cognizant of how criminal justice issues play out in politics; they realized that politicians do not want to be seen as being “soft on crime.” As Judge E put it, “[t]he business of criminal justice is arrest, prosecution, sentencing. . . . It would be a very, very brave Attorney General who would [challenge that paradigm].”<sup>149</sup> Similarly, Judge J believed that politicians were not yet willing to put widespread support into restorative justice initiatives, for fear that it could embarrass them politically.<sup>150</sup> These judges explained that because of such concerns, restorative justice programs were often poorly funded, never knowing

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Superior Court as a result of the increasingly lengthy criminal trials being brought before the courts.)

145. Interview of Judge I, *supra* note 122 at 3.

146. *Ibid.* at 3.

147. Interview of Judge L, *supra* note 80 at 7.

148. Interview of Judge I, *supra* note 122 at 3.

149. Interview with Judge E, *supra* note 77 at 6.

150. Interview of Judge J, *supra* note 79 at 7.

whether they would get sufficient resources to continue operating in the next fiscal period.<sup>151</sup>

Others felt that it was difficult to effect real change because those processed by the system lacked the skills and resources to lobby for change. According to Judge L, “these are folks who don’t have the resources or the political clout to complain or have any impact on the system.”<sup>152</sup>

### (c) Insufficient Training and Support from Legal Counsel

There was general agreement among the judges that criminal lawyers — both defense counsel and prosecutors — are not adequately prepared to handle the new responsibilities required of them following the 1996 sentencing reforms. Not only are there more options available with the addition of conditional sentences, but more information is necessary to support sentencing submissions. Several judges bemoaned the poor advocacy skills and sentencing training of lawyers appearing in criminal courts in general.<sup>153</sup> Although these judges reported that they were often disappointed with lawyers’ sentencing submissions, they saw this as part of “a wider issue — it’s about competence and who’s becoming criminal lawyers.”<sup>154</sup> As they saw it, being a criminal lawyer is no longer considered prestigious; as a result, those who end up in the defence bar were seen to be either “zealots” or “people who did not have other options.”<sup>155</sup>

Other judges suggested that lawyers’ sentencing submissions were typically inadequate because the criminal justice system, and legal training more specifically, failed to recognize the importance of the sentencing process:

It seems to me, in terms of what we do, in terms of our training, in terms of our ideology, in terms of our orientation, we have it ass backwards. That we should be

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151. See e.g. interview of Judge E, *supra* note 77 at 13.

152. Interview of Judge L, *supra* note 80 at 8.

153. See e.g. Interview of Judge B, *supra* note 81 at 6.

154. Interview of Judge H, *supra* note 78 at 4.

155. *Ibid.*

spending a lot more time thinking about sentencing, preparing for sentence, speaking to sentence. But we don't. We spend all our time — or the majority of our time — in courts arguing over principled exceptions to the hearsay rule. . . . I mean there's only about four law schools or five law schools that teach sentencing as a law school course . . . it's always seen as an add-on.<sup>156</sup>

Judge D expressed similar frustration with the lack of time and effort lawyers put into sentencing submissions:

It's absolutely appalling what we get on sentencing. I think it's by far the most important work I do . . . get virtually no help from counsel with the rarest of exceptions. . . . But, I swear these folks believe they're going to win every case and their clients are never going to plead guilty so why would they need to know anything about sentencing.<sup>157</sup>

Several judges noted that the legal aid tariff operates as a disincentive to spending much time on sentencing.<sup>158</sup> Judge I, who often works in the problem solving courts at Old City Hall, explained:

[T]he legal aid tariff that they pay actively discourages them from spending more time on the case. Because most of these offenses are minor — mischief, theft, you know, urinating in public, and things of that nature. . . . [L]egal aid might get a \$200 certificate for that. Well, by the time you do the bail hearing, by the time you do the other stuff, and . . . you have to spend three hours running around trying to find a home and then probably drive him there yourself, that asks a lot of lawyers.<sup>159</sup>

Similarly, Judge H explained that because legal aid pays so poorly, lawyers often take on more cases than they can handle properly. As she

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156. Interview of Judge E, *supra* note 77 at 2.

157. Interview of Judge D, *supra* note 102 at 2.

158. See e.g. interview of Judge I, *supra* note 122; interview of Judge B, *supra* note 81; interview of Judge D, *supra* note 102; and interview of Judge A, *supra* note 1. The tariff does not specify how much time legal aid lawyers can spend on sentencing in criminal cases. Presumably, time spent on sentencing must be included as part of the overall time devoted to working on a guilty plea or a trial. See Legal Aid Ontario, *Tariff and Billing Handbook* (28 August 2002) c. 3, online: Legal Aid Ontario <[http://www.legalaid.on.ca/en/info/pdf/Tariff\\_Criminal.pdf](http://www.legalaid.on.ca/en/info/pdf/Tariff_Criminal.pdf)>.

159. Interview of Judge I, *supra* note 122 at 4-5. Judge I continued to explain that he was proud that many lawyers would do so despite the insufficient legal aid funding.

noted, "How can you possibly do good work if you are doing 18 cases a day?"<sup>160</sup>

Finally, I asked those judges who had worked to incorporate restorative approaches into their courts about lawyers' reactions to these efforts. Some suggested that lawyers had gotten used to restorative processes.<sup>161</sup> Others indicated that lawyers reacted by avoidance. For example, Judge L felt that when he had asked for more information in youth sentencing matters, lawyers started diverting their cases away from his court: "the more I'd say we need the parents in and the more I'd put cases over for a better plan on the part of counsel, the more they'd steer the case away from me."<sup>162</sup> Several judges acknowledged that "judge shopping" took place openly in the courts.<sup>163</sup>

#### (d) Little Information Available on Community Resources to Support Sentences

Many judges were concerned that they were not getting adequate information on resources available in the communities to support the sentences imposed. This concern was particularly pronounced in the adult criminal courts. There was a lack of information on the availability of electronic monitoring programs,<sup>164</sup> on what conditions are working in other jurisdictions,<sup>165</sup> on the practicalities of enforcing specific conditions in a conditional sentence,<sup>166</sup> and on the programs for offenders in the community.<sup>167</sup> Judge L was once so frustrated with the dearth of information on resources for youth in the community that he convened a town hall meeting and invited people to explain "what they

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160. Interview of Judge H, *supra* note 78 at 5.

161. See e.g. interview of Judge K, *supra* note 82.

162. Interview of Judge L, *supra* note 80 at 3.

163. See e.g. interview of Judge H, *supra* note 78 at 6; and interview of Judge I, *supra* note 122 at 10.

164. Interview of Judge K, *supra* note 82 at 14.

165. Interview of Judge B, *supra* note 81. Judge B specifically noted that it would be useful to have counsel present information at sentencing on what is working in other Canadian and international jurisdictions.

166. Interview of Judge K, *supra* note 82.

167. Interview of Judge L, *supra* note 80.

do and how they're involved with youth supports in some way."<sup>168</sup> He claimed that he learned of at least six programs during this meeting.

#### (e) Difficulty Engaging "Community" in Urban Settings

Several of the judges saw community involvement as essential to restorative justice. Judge A maintained that this was key to a goal of restorative justice, namely determining "what will allow this person to become . . . clean in the eyes of the community."<sup>169</sup> Similarly, Judge E saw restorative justice as one way to address the alienation plaguing those traditionally marginalized by the criminal justice system, including aboriginal peoples and members of the black community. Nevertheless, some of the judges suggested that, in large urban settings such as Toronto, it was difficult to identify and engage community members in the restorative justice process.

Judge E maintained that it was easier to adopt restorative processes in smaller communities, such as more remote aboriginal communities "where you don't have our western European or common law traditions of judgment."<sup>170</sup> In his view, it was much more difficult for this to happen in urban settings where, as he put it, "I'm not even sure half the time what the community is."<sup>171</sup> By way of example, Judge E explained that various people working at the court had tried, without success, to reach out to the Somali community to address a local problem with youth crime. When the court organized educational evenings and invited various community groups to attend, it failed to rally large audiences. Only a handful of participants who were either members of "faith communities" or "nice middle class people who want to volunteer their time"<sup>172</sup> had shown up. In his view, these evenings went "nowhere."<sup>173</sup> He explained that the members of these

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168. *Ibid.* at 3.

169. Interview of Judge A, *supra* note 1 at 11.

170. Interview of Judge E, *supra* note 77 at 4.

171. *Ibid.* at 15.

172. *Ibid.*

173. *Ibid.*

marginalized communities did not want to participate in these education evenings, let alone restorative processes:

[b]ecause people don't view the court system as theirs. It's a foreign system. We speak in tongues . . . 'cause you're dealing with poor people. You're dealing with disenfranchised people. You're dealing with people who don't speak the language, with people who don't have concepts of western justice.<sup>174</sup>

#### (v) Where Restorative Justice is Working in the Criminal Justice System

Although many of the judges were rather pessimistic about the widespread integration of restorative principles and processes into the mainstream criminal justice system any time soon, the interviews did highlight those places where restorative approaches were working, including cases dealing with aboriginal persons, youth and, at least in Toronto, drug-addicted and mentally-ill offenders.

##### (a) Aboriginal Offenders and Restorative Justice

Many of the judges mentioned that the 1996 sentencing reforms — and the follow-up decision of the Supreme Court of Canada in *Gladue* — have had the greatest impact on the approach taken to sentencing aboriginal offenders. Even those judges who were sceptical of sentencing reform's impact generally allowed that, in the context of aboriginal offenders, there had been a methodological change in sentencing practices.<sup>175</sup> One such judge estimated that she had referred approximately 20% of aboriginal cases to sentencing circles.<sup>176</sup> Even when judges were not using sentencing circles, they were trying to obtain relevant information about an offender's aboriginal background prior to sentencing. Judge E had requested a Gladue report to help him

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174. *Ibid.* at 15-16.

175. See e.g. interviews of Judge L, *supra* note 80; interview of Judge E, *ibid.*; interview of Judge C, *supra* note 80; interview of Judge A, *supra* note 1; and interview of Judge F, *supra* note 100.

176. Interview of Judge C, *supra* note 80 at 2.

prepare for a sentencing hearing he had later that morning for an aboriginal offender.<sup>177</sup>

Several of the judges I interviewed had worked in the Gladue court. One explained that the court had grown out of some provincial court judges' frustration, and their belief that there was a need to "create a way to do what the Supreme Court had said all trial judges were supposed to do."<sup>178</sup> He saw the court's work as quite simple: "we have organized a method of getting the information that we're mandated to get and then with that information, formulating a fair and just sentence."<sup>179</sup> Despite his assertion that the Gladue court was only unique in terms of its proactive search for relevant information, there were other significant changes in how the court functioned.

First, many non-legal actors, — often aboriginal, — persons, provided input into Gladue proceedings. Some were responsible for supporting the aboriginal accused and helping her understand the court proceedings. Second, the Gladue reports produced for the court by Aboriginal Legal Services of Toronto<sup>180</sup> provided more relevant background information on offenders than a typical pre-sentence report.<sup>181</sup> As Judge D explained,

they're tailored specifically to the fact of colonialism and [how] it's destroyed the aboriginal communities of Canada, whether it be residential schools or alcohol or whatever the issue — lost community, lost culture . . . and they're written by people who have the background to write them."<sup>182</sup>

Finally, the Gladue court judges have a lot of information on the resources available to aboriginal persons in the Toronto region. Judge D indicated that the court has a 150 page manual of programs geared towards the aboriginal community.<sup>183</sup>

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177. Interview of Judge E, *supra* note 77 at 9.

178. Interview of Judge D, *supra* note 102 at 1.

179. *Ibid.* at 3.

180. More information on this organization is available at "Aboriginal Legal Services of Ontario", online: Aboriginal Legal Services of Toronto <<http://www.aboriginallegal.ca/index.php>>.

181. See interview of Judge D, *supra* note 102 at 7; and interview of Judge K, *supra* note 82.

182. Interview of Judge D, *supra* note 102 at 7.

183. *Ibid.* at 13.

Although many of the judges agreed that there had been a concerted attempt to change the approach used in sentencing aboriginal offenders, they also recognized that there was no quick fix to the problems plaguing the aboriginal community. As one judge explained:

I believe . . . [the evaluation of the Gladue court] is going to show . . . that our regular clientele are still our regular clientele but we're not seeing them nearly as often. So, whereas you have an offender who might come into court every month, now we're seeing [him] two or three times a year . . . Some of these guys have 150-200 convictions. You're not going to change that overnight — and all of the systemic problems they've gone through in their lives — and their alcohol abuse and the fact that there are probably fetal alcohol syndrome or fetal alcohol effects . . . slowing them down is probably as much as we can really hope for. There's a lost generation of aboriginal males out there — not just males, aboriginal persons.<sup>184</sup>

Even if the Gladue court cannot change the crime problems in aboriginal communities overnight, it has been recognized as providing a useful service in the Toronto region. Since these interviews were conducted in June 2005, two new Gladue court sites have been set-up in Toronto — one in a different central courthouse and a second north of the city.<sup>185</sup>

#### (b) Young Persons and Restorative Justice

Almost half of the judges I interviewed had been involved in the youth criminal justice system as judges or as lawyers. All agreed that there was more scope within the youth justice framework for restorative initiatives than in the adult system. Most believed that this had increased with the implementation of the *Youth Criminal Justice Act*<sup>186</sup> in 2002. The judges identified three ways in which the *YCJA* supported the use of restorative processes: by diverting cases out of the courts, by providing for the use of conferences to resolve disputes and by eliminating jail as a possible disposition for almost all offences.

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184. *Ibid.* at 4.

185. Aboriginal Legal Services of Toronto, "Gladue (Aboriginal Persons) Court", online: Aboriginal Legal Services of Toronto <<http://www.aboriginallegal.ca/gladue.php>>.

186. *Youth Criminal Justice Act*, S.C. 2002, c. 1. [*YCJA*].



The *YCJA* emphasizes the appropriateness of diverting youth out of the court system in a wide range of matters. In fact, the *YCJA* specifies that non-judicial proceedings “are often the most appropriate and effective way to address youth crime.”<sup>187</sup> Although the judges were aware of all youth matters diverted from the court system, they clearly knew it was happening — and thought it was appropriate.<sup>188</sup>

Judge J had been involved in the work of two restorative justice initiatives operating in the Toronto region — Youth Justice Committees and PACT.<sup>189</sup> Both programs set up conferences with the young person charged with a criminal offence, the victims and members of the community in an attempt to address the harm caused by the criminal behaviour. He believed, for all parties, that the diversion of youth into these restorative programs was a much more effective way to deal with youth crime for all parties. In his view, the restorative processes for youth resulted in more significant consequences than they would have received in the court system and produced greater victim satisfaction. He explained:

I watched [the restorative programs] and I thought, this is great. This is way better than sending a lot of cases to court . . . [E]veryone thinks it’s soft on crime . . . it’s a slap on the wrist, go to this program and everything is going to be okay. But the reality is, it’s actually tougher than going to court and has all the added benefits . . . like the victim satisfaction, the accused . . . being engaged because they actually have to talk and explain themselves and explain how to make it right. Whereas you go to court, 88% of them plead guilty, and don’t have to explain anything and the lawyer does all the talking and the matter gets resolved quickly.<sup>190</sup>

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187. *Ibid.*, at s. 4(a).

188. For example, Judge E estimated that 30% of youth cases were diverted from the courts following first appearance. See interview of Judge E, *supra* note 77 at 13. Similarly, prior to his appointment, Judge J indicated that, as a lawyer, he had tended to divert approximately 40% of youth cases out of the courts. See interview of Judge J, *supra* note 79 at 2.

189. For more information on PACT, see PACT, “Participation Acknowledgement Commitment Transformation”, online: PACT <<http://www.pactprogram.ca/Home.html>>. For more information on Ontario’s youth justice committees see Youth Justice Committees of Ontario, “Overview”, online: Youth Justice Committees of Ontario <<http://www.yjcontario.ca/overview.php>>. *YCJA*, *supra* note 186, s. 18 specifically authorizes the Attorney General of Canada or the provinces to set up youth justice committees.

190. Interview of Judge C, *supra* note 80 at 2.

According to these judges, non-legal professionals played an important role in the initial development and ongoing work of these restorative justice diversion programs.<sup>191</sup> For example, the Youth Justice Committees were composed primarily of volunteer citizens, who were neither legally trained nor professional facilitators. They met with youths charged with minor non-violent offenses such as mischief and minor thefts, and with their parents and victims, to help "by virtue of their good judgment as citizens . . . come to a conclusion as to what the appropriate consequence should be in conjunction with the young person and the family."<sup>192</sup> One judge maintained that the *process* itself was as important, if not more so, than the actual consequences agreed to at the end of the conference. As he explained, "I think that facing the victim and having to answer to it . . . why you did this, . . . what you have done, how it has impacted somebody's life, is an incredible experience."<sup>193</sup>

Besides diverting cases away from the formal court system, the *YCJA* authorizes judges to convene conferences to address issues relating to youth crime.<sup>194</sup> The scope of the conferences' mandate is large and can include providing advice on extrajudicial measures, conditions for interim release, sentences or reintegration plans.<sup>195</sup> Judge C explained that she had ordered restorative conferences in a variety of cases, but felt they were ideally suited to cases involving intra-familial violence because they helped resolve the matter quickly and restore harmony in the

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191. Judge J told me that the PACT program was co-founded by two Toronto businessmen, who had heard about a similar program, Sparwood, in British Columbia. He explained that they "were looking for something to do in the community, so saw this and thought well this is a great idea." The two men, after consulting with several professionals working in the youth justice system, brought in facilitators from the BC program to help train interested people in the restorative approach. Interview of Judge J, *supra* note 79 at 2.

192. *Ibid.* at 2.

193. *Ibid.* at 11.

194. *YCJA*, *supra* note 186, s. 19.

195. *Ibid.*, s. 19(2), s. 41.

family.<sup>196</sup> Conferences played an important role because “you want to get to them early before they become ingrained with criminality.”<sup>197</sup>

Judge C also believed that non-legal actors were extremely helpful in youth court matters. For example, Youth Court Action Planning Program workers frequently informed the court of the programs available to young persons and their families in the Toronto area.<sup>198</sup> Also, mental health and Children’s Aid Society case workers often appeared in court to provide advice on youth matters. She explained that, in the conferences, although she had no social work training, she often felt like she was taking on the role of a social worker, and she believed it was important to have social workers present to provide insight into relevant non-legal issues.<sup>199</sup>

Finally, the *YCJA* places very strict limits on when a judge can choose to sentence a young person to custody. The *YCJA* provides that judges must consider “all available sanctions other than custody that are reasonable in the circumstances,”<sup>200</sup> and it sets out stringent limits on when a young person can be incarcerated.<sup>201</sup> The majority of the judges who worked in the youth courts believed that by limiting the use of imprisonment in youth court, the *YCJA* had provided an important impetus for both lawyers and judges to think creatively about sentencing.

Several judges maintained that they were starting to see more imaginative proposals for sentencing under the *YCJA*. They generally agreed that this change was related to the drafting of the *YCJA*: “once you factor jail . . . out of a *YCJA* disposition . . . you have to jump

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196. Interview of Judge C, *supra* note 80 at 2.

197. *Ibid.* at 3.

198. The Youth Court Action Planning Program, a pilot project operating in four locations in and around Toronto, is a diversion program working to reduce the number of youth detained in custodial facilities. For more information see <http://www.operationspringboard.on.ca/justice/youthcourt.html>. Like many such initiatives, it struggles to find a source of continual funding. See <[http://www.legalaid.on.ca/en/news/sustainability/Sustain\\_I.html](http://www.legalaid.on.ca/en/news/sustainability/Sustain_I.html)> .

199. Interview of Judge C, *supra* note 80 at 4.

200. *YCJA*, *supra* note 186, s. 38(2)(d) further provides this must be done for all young people, but “with particular attention to the circumstances of aboriginal young persons.”

201. See e.g. *YCJA*, *supra* note 186, s. 39. Even if a young person falls within the limited range of cases where custody can be considered, the *YCJA* further requires judges to consider alternatives to incarceration. See e.g. *YCJA*, *supra* note 186, s. 39(2)-(6).

through so many hoops to jug someone under the *YCJA* that you look for alternatives.”<sup>202</sup>

That said, although these judges believed the *YCJA* required creative thinking around alternative approaches to sentencing, they still felt that change was slow to come. Some indicated that this was partly because the youth justice system can be overwhelmed by the culture of the adult criminal justice system. Because few lawyers specialize in youth justice, they rarely approach youth cases any differently than they would approach adult criminal matters.<sup>203</sup> Moreover, Judge L questioned whether some of the initiatives attempted in youth courts were truly restorative:

[T]here are some forms of restorative justice that are attempted in youth court — where a judge closes the door and sits down with everybody in a less formal atmosphere, with the counsel and everybody that’s there. But I frankly don’t think that’s what’s being discussed by restorative justice. I think that’s a model that’s still in the courtroom, on the record, and everybody speaks still like they’re making a speech for the transcript, and the judge needs the transcript to protect them from somebody saying they said the wrong thing . . . I don’t think we’ll ever have restorative justice in the youth system as long as courts don’t understand that what’s really meant by restorative justice is to truly get the community involved . . . [to] use the process as a means of advising the judge . . . without the judge being involved in the process particularly.<sup>204</sup>

Despite these concerns, even Judge E, who was a self-described pessimist about incorporating restorative principles into the adult criminal justice system, allowed that he was “a little more optimistic about the youth justice side.”<sup>205</sup> One of the reasons that he had sought out youth court work was that “there are lessons to be learned from the youth side that you can translate into the adult side.”<sup>206</sup> Judge J was

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202. Interview of Judge E, *supra* note 77 at 10. Judge E felt that the lack of discretion given to judges on this front was in stark contrast to the 1996 sentencing reforms. See also interview of Judge F, *supra* note 100 at 6; and interview of Judge L, *supra* note 80 at 6. See also *YCJA*, *supra* note 186, s. 39(9).

203. See e.g. interview of Judge E, *supra* note 77; and interview of Judge L, *supra* note 80.

204. See interview of Judge L, *supra* note 80 at 6.

205. See interview of Judge E, *supra* note 77 at 13.

206. *Ibid.*

quite optimistic about the possibility of working these initiatives into the adult system. As he put it, "it should work at least as well, if not better, in the adult system."<sup>207</sup>

### (c) Problem Solving Courts and Restorative Justice

Restorative principles also seem to have a more central role in other problem solving courts, such as the drug treatment and mental health courts, than in traditional criminal courts. Four of the judges I interviewed had experience presiding over matters in the drug treatment and mental health courts. They worked to incorporate restorative principles into their work by attempting to limit the negative impact of the criminal law on mentally ill and drug-dependent accused, to create more space for the voice of the accused in the court's deliberations and to draw on the expertise of non-legal actors in attempting to craft creative solutions to the accused's socio-legal problems.

The judges working in the drug treatment and mental health courts attempted to limit the negative consequences that an accused could face from his or her encounters with the criminal justice system. Judge I told me that it was an advantage of the mental health court to be able to divert an accused with mental health problems out of the mainstream justice system and avoid criminalizing the behaviour. An accused in the mental health court need not plead guilty to benefit from support services. She would first be given access to relevant programs and services and required to report back to the court regularly. Once the accused had demonstrated that her condition had stabilized and that the incident which initially brought her into contact with the criminal justice system was a result of illness, the crown would often stay the charges.<sup>208</sup> Judge I estimated that approximately 70% of accused persons in mental health court were dealt with this way.<sup>209</sup>

Judge K, who worked in drug treatment court, indicated that he often reserved his sentencing decision to ensure lawyers had time to come up with a creative plan to address an accused's addiction problem.

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207. Interview of Judge J, *supra* note 79 at 12.

208. See interview of Judge I, *supra* note 122 at 3.

209. *Ibid.* at 4.

In some cases this meant that the lawyers were asked to appear before the judge several times prior to sentence, to show that they had devised “a plan for sentence.”<sup>210</sup> In his view, the root causes of the accused’s behaviour, namely drug addiction, had to be addressed, or offenders were “just going to be cycled through the system.”<sup>211</sup>

The judges working in these courts sought to adopt a different and more personal approach to dealing with accused persons. In many cases, instead of going through her lawyers, as is more common in the adversarial environment of traditional criminal courts, the judges spoke directly to the accused.<sup>212</sup> Judge K explained that after a plea has been entered he liked

... to go and ask this person ... what is it that you think you need to do in order to change your behaviour? In order to stop using drugs? Stop using alcohol? Stop engaging in criminal behaviour? If you say you’ll do X, Y and Z, then I might do A, B and C for you but let’s see what works.<sup>213</sup>

The judges indicated that non-legal actors played a very important role in the work of the problem solving courts. For example, social workers and psychiatrists were an integral part of the team in the Toronto mental health court. Psychiatrists were available to provide assessments of the accused’s fitness, and social workers provided the accused with support both during court appearances and on an ongoing basis as they worked with programs and services in the community. In some cases, social workers appeared before the court on behalf of the accused.<sup>214</sup> Non-legal actors also helped train the judges and lawyers on mental health problems facing the accused in the courts.

A variety of non-legal actors work with the judges and lawyers in the drug treatment court. Probation officers and addiction counsellors from the Centre of Addiction and Mental Health regularly meet with

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210. Interview of Judge K, *supra* note 82 at 1.

211. *Ibid.*

212. I found this to be one of the more remarkable differences when I observed the proceedings in the mental health and Gladue courts.

213. Interview of Judge K, *supra* note 82 at 2.

214. Interview of Judge I, *supra* note 122 at 13.

the judges and lawyers in that court. A community advisory committee also convenes on a bi-monthly basis to help provide the drug treatment court with information on issues such as the types of housing and training programs available.<sup>215</sup> Judge K suggested this not only helped his work in court but ensured that he included relevant actors in discussions of how best to address drug addiction problems in the community:

We've got a community advisory committee with close to forty players that meet every other month . . . . [H]ousing, education and all sorts of other . . . people are now part of the play . . . . [T]hey [previously] felt excluded from the criminal justice system. But now they feel . . . they have something to say . . . . [It's] amazing what they will do because they're feeling that their voices are being listened to.<sup>216</sup>

Judges working in problem solving courts maintained that they benefited from the insights of non-legal actors into the problems facing the accused in their court. These actors helped the judges determine how best to address the problems underlying the criminal behavior, and helped craft creative remedies that might help repair the harm done and reintegrate the offenders back into the community.

## IV. Revisiting Canada's Restorative Justice Experiment

Based on my interviews with the judges, restorative justice has not yet been fully integrated into the Canadian criminal courts. Despite the apparent disconnect between the theory and practice of restorative justice at sentencing in the mainstream criminal justice system, it would be a mistake to declare Canada's experiment with restorative justice a failure. There are important lessons to be learned from those places where the restorative justice experiment does seem to be working. In what follows, I draw on both the practical experiences of the judges I interviewed and the theoretical insights of "new governance" to propose

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215. *Ibid.* at 5.

216. *Ibid.*

concrete ways to improve the use of restorative justice and its integration into the criminal justice system.

*A. Drawing on New Governance Insights to Improve Restorative Justice in Canada*

(i) New Governance Explained

In the past 30 years, restorative justice has been a key response to the perceived failings of criminal justice systems in many Western countries and, in particular, to the concern that a “one size fits all” approach has simply not worked. During this period, similar criticisms have been levied at the legal system more generally. Critics have lamented that following the rise of the administrative state in the New Deal era, the law lost its ability to deal with the dynamic nature of social reality by the end of the twentieth century.<sup>217</sup> New governance or experimentalist scholars have argued that the traditional model of the regulatory state — with its characteristic hierarchical approach that privileges the insights of experts — has begun to give way to a more participatory and collaborative approach to addressing the complex socio-legal problems facing today’s societies.<sup>218</sup>

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217. See e.g. Michael C. Dorf & Charles F. Sabel, “A Constitution of Democratic Experimentalism” (1998) 98 Colum. L. Rev. 267 [Dorf & Sable, “Democratic Experimentalism”]. See also Orly Lobel, “The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought” (2004) 89 Minn. L. Rev. 342 at 357 [Lobel] describing new governance approaches as being, in part, a response to the recognition that “life has reached a new degree of complexity which renders a central control-and-command structure impossible.”

218. See generally Gráinne De Búrca & Joanne Scott, “Introduction: New Governance, Law and Constitutionalism” in Gráinne De Búrca & Joanne Scott, eds., *Law and New Governance in the EU and US* (Oxford: Hart Publishing, 2006) 1. New governance or experimentalist scholars have identified the promise of such a change in a wide range of legal disciplines. See e.g. Michael C. Dorf & Charles F. Sabel, “Drug Treatment Courts and Emergent Experimentalist Government” (2000) 53 Vand. L. Rev. 831 [Dorf & Sabel, “Drug Treatment Courts”]; Brandon Garrett, “Remedying Racial Profiling” (2001) 33 Colum. H.R.L. Rev 41; Debra Livingston, “Police Discretion and the Quality of Life in Public Places: Courts, Communities and the New Policing” (1997) 97 Colum. L. Rev 551; Archon Fung, “Accountable Autonomy: Toward Empowered Deliberation in Chicago Schools and



Although there have been different iterations of<sup>219</sup> and nomenclature associated with<sup>220</sup> new governance, there is some consensus about its key tenets. First, new governance emphasizes the merit of adopting a collective approach to deal with the diversity and volatility of today's problems. No single institution can regulate all issues in today's society; different approaches, methods and practices are needed to effectively address complex socio-legal problems.<sup>221</sup> The scope of processes is best left open as too much specificity can undermine both the search for solutions and the learning that ideally flows from adopting iterative, dynamic approaches to problem solving.<sup>222</sup> The system must be adaptable enough to allow for continuous change and improvement.

Flowing from their emphasis on dynamic and adaptable problem solving approaches, new governance theorists privilege the notion of subsidiarity, arguing that power must be shifted from the centre to states, localities and the private sector.<sup>223</sup> Local areas must be given broad scope to define problems themselves, since those closest to the problem possess the best information to craft creative solutions.<sup>224</sup>

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Policing" (2001) 29 *Politics & Society* 73, exploring the operation of new governance in the criminal justice sphere. For examples of its application in different contexts, see Susan Sturm, "Second Generation Employment Discrimination: A Structural Approach" (2001) 101 *Colum. L. Rev.* 458; Cristie L. Ford, "Toward a New Model for Securities Law Enforcement" (2005) 57 *Admin. L. Rev.* 757; and James S. Liebman & Charles F. Sabel, "A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform" (2003) 28 *N.Y.U. Rev. L. & Soc. Change* 183.

219. See e.g. De Búrca & Scott, *ibid.* at 293.

220. Other terms associated with this school of thought include "democratic experimentalism," "responsive regulation," "Toyota jurisprudence" or "problem-solving jurisprudence". See e.g. Dorf & Sabel, "Democratic Experimentalism", *supra* note 217; John Braithwaite, *supra* note 3; and William H. Simon, "Toyota Jurisprudence: Legal Theory and Rolling Rule Regimes" in De Búrca & Scott, *supra* note 217, 37.

221. Lobel, *supra* note 217 at 380.

222. This is perhaps most explicit in the experimentalists' embrace of pragmatism, or the reciprocal determination of ends and means, as set out in the works of Dewey, Pierce and Mead. See e.g. Dorf & Sabel, "Democratic Experimentalism", *supra* note 217 at 285-86.

223. Lobel, *supra* note 217 at 382.

224. See e.g. Dorf & Sabel, "Democratic Experimentalism", *supra* note 217 at 315-16. See also Susan Sturm, "Gender Equity Regimes and the Architecture of Learning" in De Búrca & Scott, *supra* note 217, 323 at 329ff [Sturm, "Gender Equity Regimes"], discussing the importance of grassroots participation in new governance.

New governance theorists also criticize the traditional concentration of power in the hands of experts and professionals.<sup>225</sup> These scholars maintain that more actors need to be involved in different stages of the problem solving process, to help diversify the expertise on different issues and to give citizens a more active role in governance.<sup>226</sup> The benefits of diversifying the participants in the problem solving process are two-fold: to help ensure better and more effective solutions to complex social problems,<sup>227</sup> and to help build deliberative capacities by enhancing the participation of citizens in political and civic life.<sup>228</sup>

Recognizing the potential accountability concerns that could follow from the diversification and localization of problem solving processes, new governance scholars place a heavy emphasis both on learning by pooling information and on ensuring the accountability of public officials. Private sector methods of benchmarking, simultaneous engineering and error detection are imported into the public sector in order to allow for "learning by monitoring,"<sup>229</sup> thus guarding against the isolation of problems<sup>230</sup> and helping to make public officials accountable to citizens. This gives citizens the opportunity to participate in deliberations about matters that concern and affect them.<sup>231</sup> Under this model, national institutions or administrative agencies play a key role in collecting data and research to provide feedback to local jurisdictions, and in providing resources to fund effective problem solving models.<sup>232</sup>

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225. Lobel, *supra* note 217 at 373.

226. This manifests itself in Dorf & Sabel's vision of a "directly deliberative polyarchy." See Dorf & Sabel, "Democratic Experimentalism", *supra* note 217 at 320. See also Sturm, "Gender Equity Regimes", *supra* note 224 at 329.

227. This is also related to what Lobel, *supra* note 217 at 385-86 identifies as the governance model's "holistic approach to problem solving, aiming for a synoptic view of conditions as they exist simultaneously over a broad disciplinary spectrum."

228. Such diversification can also help new governance regimes in their claims to legitimacy. See Sturm, "Gender Equity Regimes", *supra* note 224 at 330.

229. See Dorf & Sabel, "Democratic Experimentalism", *supra* note 217 at 287, 299-302 for more detailed discussion of the private sector roots of learning by monitoring.

230. See e.g. Lobel, *supra* note 217 at 396-97.

231. See Dorf & Sabel, "Democratic Experimentalism", *supra* note 217 at 314.

232. Lobel, *supra* note 217 at 400. See Dorf & Sabel, "Democratic Experimentalism", *supra* note 217 at 336ff, for a discussion of the need for national coordinating mechanisms. See also Sturm, "Gender Equity Regimes", *supra* note 224 at 332, exploring

The law's role is understood as building competencies, coordinating local efforts and communicating lessons in a comprehensive manner. Emphasizing the need for data collection and learning by monitoring will result in an iterative, dynamic approach to problem solving and will give citizens the information needed to engage in direct deliberations.

The areas where restorative justice is working in Canada share some of the tenets of a new governance approach to problem solving, such as using flexible processes that include those outside the legal profession. However, these areas are missing the essential elements of a commitment to data collection and sustained funding by central public bodies.

## (ii) New Governance and Restorative Justice

Where restorative justice is happening in Canada, it occurs in decentralized and collective processes, and addresses local concerns and needs. Restorative justice processes also create space for a broader range of participants, beyond simply legal professionals. My research reveals no one approach to restorative justice operating in Toronto, let alone all of Canada. The processes operate at the local or community level, tend to be flexible, and endow professionals and non-professionals with responsibility in sentencing matters. For example, in the context of sentencing aboriginal offenders, judges may choose to convene a sentencing circle with members of the community, along with both the victim, the offender and their respective families. In Toronto, several Gladue courts help judges obtain the best possible information about the aboriginal offender and about resources available in the community to address her particular needs at sentencing. These courts may be more formal than sentencing circles, but they obtain input from a broader range of non-legal actors and community members than the traditional criminal courts.

Similarly, young persons charged with criminal offenses may find their circumstances addressed through different restorative processes, through programs such as PACT or youth justice committees (diversion

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why public bodies must provide centralized accountability for "inducing and supporting deliberative problem solving."

programs giving citizens a central role in the sentencing process and creating space for victim input) or through conferencing that may take place within the confines of the courts. The drug treatment and mental health courts also have flexible procedures for dealing with offenders. These courts routinely draw on the expertise of policy-sector professionals, such as mental health or addiction counsellors, probation workers and housing advocates, to help address the varying needs of an accused.

### (iii) New Governance Principles Missing from Canada's Restorative Justice Experiment

Unfortunately, my research also highlights two key aspects of new governance that are missing from that Canada's restorative justice experiment: a commitment to collection of data on what processes are working and where, and a dedication to providing sustained funding to restorative justice programs and processes.

New governance scholars emphasize the need for information pooling to assess whether localized problem solving practices are working, and to ensure the accountability of public officials.

Locales may be diverse and changing, but they are not unique. To the extent that there are similarities in their current situations or the kinds of changes they face, the efficient search for large improvements to current practice, or for early warning that apparently promising alternatives are in fact dead ends, starts with the experience of the units facing analogous problems.<sup>233</sup>

The judges I interviewed received very little feedback on the impact of the sentences imposed. They also tended to have limited information on the community resources available to address offenders' needs, as well as on victims' or communities' concerns about reintegrating offenders into society. Although judges have called for more effective information in the context of the new sentencing regime, little seems to have changed.

The judges interviewed did indicate that they were more likely to receive feedback on sentencing when working in courts where

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233. Dorf & Sabel, "Democratic Experimentalism", *supra* note 217 at 315-16.

restorative processes were taking place, but only in an *ad hoc* manner. Similarly, although they seemed to get better information on the community resources available for offenders in the problem solving courts, some of the judges suggested that good information was still not readily available, nor was systematic information on the effectiveness of different resources. This *ad hoc* data collection is not the type imagined by new governance. The limited information that these judges receive about the impact of their sentencing or their use of restorative processes does not give them much scope to learn from their own problem solving efforts.

Unfortunately, with little or no data on what is working in their own jurisdictions, let alone in other similar locales, those attempting to make restorative justice work cannot learn from each other. In a country as large and varied as Canada, it seems all the more essential to collect information on what is working in different communities. As Judge E pointed out, "What fits [in terms of restorative justice] in a fly-in aboriginal community in northern Manitoba where everybody's related to one another . . . is very, very different from North York."<sup>234</sup> Better data collection could also guard against accountability concerns that might otherwise arise in circumstances where local units have discretion to solve complex socio-legal problems. Under the new governance framework, feedback on local practices is part of the bargain for being given a broad scope to experiment with different solutions.<sup>235</sup>

This type of information need not unduly fetter judicial discretion to make use of new and creative restorative processes. It should actually guard against concerns that judges are abusing their discretion and thus need to be reined in through the enactment of more stringent sentencing guidelines.<sup>236</sup> Effective data collection can help avoid the need for a trade-off between efficiency and accountability:

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234. Interview of Judge E, *supra* note 77.

235. See Dorf & Sabel "Drug Treatment Courts", *supra* note 218 at 838:

[A]s a condition of this autonomy the respectively local entities must in effect render themselves accountable by providing explanations of their motives and reports on their results rich enough to allow critical comparisons with the different choices of others acting under similar conditions.

236. The current Canadian government, led by Prime Minister Stephen Harper, does seem to want to reign in judicial discretion. It has recently introduced two bills to limit

Taken together, the [pooled experience of actors undertaking similar activities and reporting on their intentions and progress] defines a range of possibilities that permit fine-grained distinctions among, on the one hand, irresponsible acts (that duplicate efforts that have repeatedly failed) and caprice (where measures can be undertaken with scant attention to what the record suggests about the chances of success), and on the other hand, genuine experiments (where analysis of previous failures suggests the possibility of a new demarche).<sup>237</sup>

Such data should not lead to a fixed set of rules about when and where restorative processes would be used; this would be antithetical to the open and flexible nature of restorative justice. Instead, the data should be seen as “a method of using self-explication as a prod to continuing self-examination and revision.”<sup>238</sup>

Finally, if such data were routinely collected and publicly disseminated, it might remedy another problem identified in my interviews: the difficulty of engaging community members in restorative processes.<sup>239</sup> Several of the judges lamented that it was often difficult to involve the community in restorative justice programs, partly because in large, urban settings like Toronto, the communities most plagued by crime do not feel connected to the justice system.<sup>240</sup>

The Chicago community policing experience highlights how even those community members seen as most disenfranchised, as a result of poverty and a lack of education or skills, can be motivated to participate in problem solving processes in their communities.<sup>241</sup> That project made extensive use of “beat meetings,” where community members and the police officers worked together to identify local problems and determine

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the use of conditional sentences and create more mandatory minimum sentences. See Bill C-9, *An Act to Amend the Criminal Code (Conditional Sentence of Imprisonment)*, 1st Sess., 39th Parl., 2006 and Bill C-10, *An Act to amend the Criminal Code (minimum penalties for offences involving firearms)*, 1st Sess., 39th Parl., 2006.

237. Dorf & Sabel, “Drug Treatment Courts”, *supra* note 218 at 858.

238. *Ibid.* at 859.

239. See discussion starting at 55, above.

240. *Ibid.* Some U.S. research has found that community justice initiatives have difficulty obtaining meaningful participation that is representative of the whole community. Those willing to partake in these initiatives tend to be wealthier than the community as a whole or are activists with time to volunteer. See Lanni, *supra* note 19 at 380.

241. See e.g. Dorf & Sabel, “Democratic Experimentalism”, *supra* note 217 at 327ff.

the most effective responses.<sup>242</sup> Interestingly, one study of the Chicago community policing project found higher participation rates among residents of communities with the highest crime rates (and lower rates of education and higher poverty rates) than in communities that were relatively better off.<sup>243</sup>

If the citizens most directly affected by crime in their communities are given reason to believe that their input will be taken seriously, they may see greater value to becoming involved in such processes. Publicly disseminating information about where and how restorative justice is working could be an important step in communicating the key role that community members' input can and does play in this process.

In Canada, the federal government seems well situated to coordinate, analyze and disseminate such information. Justice Canada's Research and Statistics division has been involved in much of the research on Canada's sentencing reforms, often in partnership with the country's leading criminologists and legal academics. Similarly, Statistics Canada's Justice Statistics division has produced the most comprehensive study to date on the use of the conditional sentencing regime<sup>244</sup> and has much experience in collecting and analyzing complex research. However, neither agency has routinized the collection of data on the outcomes of restorative justice programs and practices, or on the work of problem solving courts across the country. This stands in stark contrast to the drug treatment court model in the United States, where the Justice Department's Drug Courts Program Office, the National Association of Drug Court Professionals, the Drug Court Clearinghouse and Technical Assistance Project are all actively involved in pooling information and evaluating the performances of the country's numerous drug courts.<sup>245</sup>

Although there is a need for better and more systematic collection of data on those restorative programs that seem to be working on the periphery of Canada's criminal justice system, it is imperative that the government improve monitoring information on more routine sentencing practices in mainstream criminal justice. Specifically, gaps in

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242. *Ibid.* at 329-31.

243. *Ibid.*

244. Roberts, "Conditional Sentencing", *supra* note 59.

245. Dorf & Sabel, "Drug Treatment Courts", *supra* note 218.

conditional sentence data have been identified in six areas: the level of supervision of conditional sentences, the failure or success rate of conditional sentences, the optional conditions imposed within different jurisdictions, the conditions most likely associated with breach hearings, the judicial responses to breaches, and the recidivism rates of offenders who have served conditional sentences.<sup>246</sup> Similar information about probation would also be useful. This data would help to assess whether judges are imposing conditions that seek to fulfill restorative goals, and if so, whether these conditions have been successful. It would also allow judges to better determine what seems to be working in similar locales.

New governance recognizes that centralized public bodies have an important role in “declar[ing] a need and an intention to address an issue and express[ing] a willingness to provide resources.”<sup>247</sup> By enacting Bill C-41, the federal government declared a need for a new approach to sentencing, and an intention to address problems (such as the country’s increasing incarceration rates) by incorporating restorative principles into the sentencing phase. However, my interviews highlight the fact that neither the federal government nor the Ontario government has dedicated sufficient resources to allow the widespread integration of restorative principles into the criminal justice system.

According to the judges I interviewed, the sheer volume of cases being processed through the Ontario courts remains perhaps the greatest barrier to the meaningful integration of restorative justice. This was particularly pronounced in the provincial plea courts. Even if court volumes were not an issue, funding problems would remain; restorative programs and processes take time and cost money. Part of the difficulty in ensuring adequate funding stems from the federal-provincial division of powers under Canada’s constitution. The federal Parliament has exclusive jurisdiction over criminal law,<sup>248</sup> however the provinces are responsible for the administration of justice in the province, and have the power to establish courts of criminal

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246. Roberts & Manson, *supra* note 65.

247. Lobel, *supra* note 217 at 400.

248. *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (U.K.), 1982, c. 11., s. 91(27).



jurisdiction.<sup>249</sup> As a result, the federal government can enact legislation, such as the sentencing reforms or the *YCJA*, but it is typically the provinces who are responsible for deciding which programs to set up (and fund) in support of federal initiatives. Several of the judges I interviewed were concerned that this had resulted in the failure of provinces to provide sufficient funding, in particular for the conditional sentence regime.<sup>250</sup> Similar concerns were raised about how this played out in the field of youth justice.<sup>251</sup>

Federalism issues aside, the judges suggested there was a lack of political support for restorative justice initiatives generally, which undoubtedly affects the amount of funding governments allocate to restorative processes and programs.<sup>252</sup> Many of the judges believed that politicians were reluctant to support restorative justice programs because they saw them as being soft on crime.

There is little doubt that if restorative justice is to be further integrated into the mainstream criminal justice system, resources will need to be dedicated to this project. Again, more systematic data collection on how restorative processes are working could provide politicians with the information they need to best decide where to concentrate taxpayer resources. Until proper evaluation mechanisms are in place, rhetoric will continue to dominate discussions about which programs should receive financial support.

## Conclusion

Ten years into the Canadian experiment incorporating restorative principles into *Criminal Code's* sentencing regime, the verdict is still out on whether the experiment has been a success. However, there have been some positive outcomes of the 1996 sentencing reforms. First, Canada's incarceration rates have declined significantly. As a prominent criminologist has noted, this country has experienced "a reduction in

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249. *Ibid.*, s.92(14).

250. Interview of Judge B, *supra* note 81 at 14.

251. Interview of Judge L, *supra* note 80 at 11.

252. See discussion starting at 51, above.

the use of custody on a scale unparalleled in western nations.”<sup>253</sup> Given the high economic and human costs associated with imprisonment, this should be recognized for what it is — a welcome change in sentencing practices.

Second, my interviews with provincial and superior court judges working in and around Toronto reveal that restorative justice programs and processes have found a niche for themselves, at least on the periphery of the criminal justice system. Judges have adopted more flexible processes and have carved out the space to allow for greater participation and input from non-legal professionals, including community members. In the period since my interviews, the number of problem solving courts in Canada has continued to increase and so has the use of restorative approaches.<sup>254</sup>

On the other hand, if Parliament’s goal was to incorporate restorative principles into all sentencing in the traditional criminal justice system, this has yet to happen, at least in Toronto criminal courts. There are a number of reasons for this. One is that the huge volume of cases moving through provincial courts. Continuing concerns about delays in criminal proceedings have forced plea courts into a vital role in the justice system and have required judges to sentence large numbers of offenders on any given day. The system would collapse if judges tried to adopt restorative approaches in every case. Another reason is that judges do not get enough help from legal counsel in sentencing matters. This contributes to the judges’ concerns that they simply do not have sufficient information about the resources that exist in the community (let alone about which of them are the most effective) to support restorative sentencing.

Sentencing in Canada remains a rather opaque process. Although data are collected on the number of annual admissions to custody and

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253. Roberts, “Conditional Sentencing”, *supra* note 59 at 268. He attributes this decarceration trend to the increasing use of conditional sentences.

254. For example, there was just one Gladue court operating in the Toronto area in June 2005, but there are now three. Similarly, the federal government announced in June 2005 that it had agreed to fund new drug treatment courts in Edmonton, Regina, Winnipeg and Ottawa and to continue funding such courts in Toronto and Vancouver. See Department of Justice, Press Release, (June 2005), online: Expanding Drug Treatment Courts in Canada <[http://www.doj.ca/en/news/nr/2005/doc\\_31552.htm](http://www.doj.ca/en/news/nr/2005/doc_31552.htm)>.

on community sentences, little information is routinely available on other aspects of Canadian sentencing practices. Ideally, the federal government would coordinate the collection of data on particular restorative programs and processes in different locations throughout the country. This would include data on the use of and outcomes associated with conditional sentences of imprisonment and probation.

The routine collection and dissemination of this type of information could allow for “learning by monitoring,” so that best practices in sentencing (and restorative processes more specifically) could be replicated in like jurisdictions across the country. It would also help build greater accountability into Canada’s sentencing regime. Judges now have a great deal of discretion both in the procedures and the actual sentences they impose. They do not, however, receive systematic feedback on whether their sentencing work is effective. In the worst case scenario, this combination of broad discretion without systematic monitoring could result in judges abusing their power and imposing sentences “on a whim.”<sup>255</sup> In the best case scenario, judges are forced into “the invidious position of sentencing in the dark;”<sup>256</sup> they simply do not have the data necessary to determine what works. Public dissemination of data on sentencing and on the role of restorative justice in the criminal justice system might improve the public’s perceptions of judicial sentencing practices and encourage community members to become more actively involved in restorative processes.

Although the Canadian experiment with restorative justice has had some successes, improvement is needed. For this to happen, the federal and provincial governments must start taking restorative justice seriously — in terms of collecting and disseminating data on what is working and where, and in terms of providing sustained funding for the necessary resources. Although the federal government seems best situated to coordinate more effective data collection and dissemination on restorative processes and on sentencing more generally, the provincial governments must be willing to provide the resources to fund restorative programs and to help ensure that best practices can be

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255. Of course, truly aberrant behaviour would likely be curtailed by appellate courts.

256. Roberts, “Conditional Sentencing”, *supra* note 59 at 281.

replicated in different jurisdictions. These key changes would go a long way toward ensuring that Canada's restorative justice experiment could be declared a success at home and could be seen as a model for other countries looking to integrate restorative justice into their criminal justice systems.