Expanding Understandings of Access to Justice Through Restorative Justice and Alternative Philosophies of Justice

by

Will Jordan

A practicum submitted to the Faculty of Graduate Studies of

The University of Manitoba

in partial fulfilment of the requirements of the degree of

MASTER OF HUMAN RIGHTS

Faculty of Law

University of Manitoba

Winnipeg

Abstract

With definitions of access to justice encompassing a wide range of practices, there has been a growing interest to include increased availability to alternative practices and philosophies of justice among the list of practices included in understandings of access to justice. This is especially true with respect to restorative justice (RJ) in the context of the Canadian legal framework. The following study examines several significant pieces of Canadian legislation such as the *Criminal Code*, the *Youth Criminal Justice Act* (YCJA), and the *Canadian Victims Bill of Rights* (CVBR) to highlight provisions which support RJ as an important means of accessing justice. Analysis of these pieces of legislation with provisions concerning the use of RJ, the comments of Members of Parliament regarding the importance of RJ and the decisions of Supreme Court justices supporting the application of RJ in Canada's justice framework, it is clear that access to RJ practices is an important aspect of access to justice. Despite these considerations, several barriers prevent access to quality RJ programs or access to RJ altogether. These barriers include co-option of restorative programs through government policy and the institutionalization of restorative practices which results in the "sanitization" of restorative values through penal policy. In order to expand access to justice to include access to alternative practices and philosophies of justice, advocates and practitioners must emphasize these legal provisions as avenues for expanding understandings of access to justice while being cognisant of not allowing RJ processes to succumb to various phenomenon that create barriers to accessing RJ.

Table of Contents

Introduction..... 1

Understanding Alternative Philosophies of Justice 3

What are Alternative Philosophies of Justice?..... 3

RJ in the Canadian Context..... 7

Tools for Expanding RJ as a Right to Access to Justice in Canada..... 10

The Criminal Code..... 10

The Youth Criminal Justice Act 14

The Canadian Victim Bill of Rights..... 17

Barriers to Accessing Alternative Philosophies..... 19

Co-Option of Alternative Philosophies..... 19

Institutionalization of Alternative Philosophies 24

Conclusion..... 29

References..... 32

Expanding Understandings of Access to Justice Through Restorative Justice and Alternative Philosophies of Justice

When it comes to discussion of access to justice within the context of human rights, conversation is often focused on a narrow understanding of what access to justice means. Within international legal frameworks, access to justice has often been defined through Articles that can be found in the *International Convention on Civil and Political Rights* (ICCPR). Some examples include Article 14(1), which provides that all are equal before the courts and tribunals and must be afforded a fair hearing; Article 14(2), which outlines each person's right to the presumption of innocence; and Article 14(3), which highlights each person's rights to legal counsel, time to prepare an adequate defence, and a trial without undue delay, among other guarantees (UN General Assembly, 1966).

Within the Canadian context, access to justice is often understood in a very similar light as those highlighted in international legal frameworks. The *Canadian Charter of Rights and Freedoms* (1982) provides many of the standards of access to justice that are guaranteed to all Canadians. For example, equality rights provided under section 15(1) of the *Canadian Charter of Rights and Freedoms* state that "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination." While this is one of the most common definitions of access to justice in Canada, other significant figures such as Chief Justice of the Canadian Supreme Court, Richard Wagner, have argued that access to justice is best summarized as the following:

> "Access to justice" can mean many things. Having the financial ability to get legal assistance when you need it. Being informed of your right to counsel when your liberty is at stake. Having courts that can resolve your problem on time. But it also means knowing what tools and services are available, and how to get to them. It means knowing your rights and knowing how our legal systems work. It can even mean seeing people like yourself represented in all parts of the legal system. And it means having confidence that the system

> will come to a just result – knowing you can respect it, and accept it, even if you don't agree with it. Ultimately, it is about getting good justice for everyone, not perfect justice for a lucky few (2019).

While the meaning of access to justice can include a wide range of different meanings, the importance of access to justice is consistent. According to Currie (2007), nearly half of the Canadian population will experience some kind of law-related problem over a given three-year period (p. 10-12). With this significant number of Canadians encountering some sort of legal issue, it is important that individuals understand how to access justice appropriately. Unsurprisingly, legal issues can have major implications on numerous facets of an individual's life. For example, employment and housing are both important parts of an individual's life which be negatively impacted by way of having a criminal history. In more extreme circumstances, individuals accused of serious criminal offences can be deprived of their rights and freedoms by way of incarceration. Being able to access justice by way of legal representation, being informed of your rights, and having access to fair processes in a timely manner can help to ensure people's rights are protected.

When it comes to access to justice and achieving "good justice for everyone," an emerging perspective that has been gaining traction in the international community has been promoting access to practices that are considered alternative philosophies of justice. In many jurisdictions, different philosophies of justice such as Restorative Justice (RJ) and Indigenous legal practices have been implemented as a means of diverting cases from retributive Western legal systems or transforming the justice system in its entirety. While practices such as RJ have increased in popularity due to their "victim-oriented nature" (Wemmers, 2002), RJ and other legal philosophies have often been overshadowed or pushed to the side by Western legal traditions. Examples of this phenomena have been well documented at both the international and national level. In the aftermath of International Criminal Tribunal for the former Yugoslavia

(ICTY) and the International Criminal Tribunal for Rwanda (ICTR), commentators have noted that individuals who participated in the tribunals criticized the procedures for "a lack of emphasis on restorative justice" (Trumbull, 2008, p. 787). Further to this point, academics have also noted that institutions such as the International Criminal Court (ICC) that claim to have "a restorative justice mandate," do very little in the way of carrying out practices grounded in alternative justice philosophies like RJ (Garbette, 2017).

This paper will argue that we should expand narrow definitions of access to justice to include access to "alternative forms of justice" when applicable. Several legislative tools such as the *Criminal Code* (R.S.C., 1985, c. C-46), the *Youth Criminal Justice Act* (YCJA) (S.C. 2002, c. 1), and the *Canadian Victims Bill of Rights* (CVBR) (S.C. 2015, c. 13, s. 2) would support an expansion of the Canadian understanding of access to justice to include alternative philosophies of justice. In addition to expanding understandings of access to justice in the Canadian context, this paper will explore the various challenges alternative philosophies of justice face in terms of having access to their programs being recognized as a human right. Within the Canadian framework, co-option of alternative forms of justice by provincial and federal governments present significant barriers to accessing alternative justice programming. Other barriers to accessing alternative philosophies of justice include the displacement of alternative practices by more dominant western legal principles such as retribution. By highlighting these barriers, this study looks to address some of the concerns practitioners of alternative philosophies of justice have regarding promoting access to justice within the Canadian legal framework.

Understanding Alternative Philosophies of Justice

What are Alternative Philosophies of Justice?

Defining what constitutes an alternative philosophy of justice can be a difficult task given the large range of practices that fall under this label. To provide a better understanding of what makes an approach to justice an alternative philosophy of justice, it is useful to understand how they contrast with western criminal justice systems and how practitioners define alternative philosophies. Westernized criminal justice systems are primarily understood as frameworks that are offender-focused, attempt to assign blame to achieve punitive outcomes, and offer little support to victims in addressing their needs in the aftermath of a criminal offence (Szmania & Mangis, 2005, p. 335-336). Generally, criminal justice systems that prioritize determining guilt and assigning punishments as the primary outcome of the justice process are referred to as retributive justice systems. For some academics, retributive justice systems are considered "clumsy" or "ineffective" as they pay significant attention to identifying perpetrators and collecting evidence of their criminal behaviour, rather than identifying causes of and sustainable solutions to crime (Pedersen, 2019, p. 13).

Given retributive justice's limited capacity to identify and address the root causes of criminal behaviour, advocates of justice reform have pushed for alternative philosophies of justice to fill the gaps left by retributive systems, or completely replace the retributive system in more extreme circumstances. These philosophies that have emerged to address the shortcomings of retributive systems have often been referred to as restorative justice practices. According to Maglione (2021), RJ refers to three distinct but overlapping objects that include the following:

> (1) a justice reform movement emerging in the 1970s in the Western world and then spreading globally, advocating for a (2) largely non-punitive and participatory approach to harmful behaviours (3) mainly implemented by facilitated and voluntary encounters between direct stakeholders, geared toward addressing those harms and their consequences (p. 4-5).

Further to this point, Maglione (2021) also suggests that alternative philosophies that fall under the category of RJ have taken different forms and adopted different practices based on the

geographical, political, and social context in which the RJ movement took place (p. 5). While Maglione's (2021) understanding of RJ as a non-punitive approach that emphasizes encounters between stakeholders is not new, his acknowledgment that RJ and alternative philosophies of justice are influenced by the systems in which they emerge is an important point.

It is in considering the influence of specific justice systems that many academics in the field of RJ have had issues coming to a consensus definition of alternative philosophies. For some academics, there has been a desire to define RJ based on the processes that are commonly practiced. An example includes Dünkel et al.'s (2015) definition which argues RJ "has come to be used to describe processes and practices that seek to employ a different approach to resolving conflicts" (p. 4). For experts who support definitions of RJ that emphasize processes, there are often certain caveats that must be met. Generally, those who support process-oriented definitions stipulate that offenders, victims, and community members must voluntarily come together to resolve harm caused by the offender in the wake of a criminal offence. This is best exemplified by Marshal's (1999) definition of RJ that states RJ is "a process whereby all the parties with a stake in a particular offense come together to resolve collectively how to deal with the aftermath of the offense and its implications for the future" (p. 5).

While some commentators are satisfied with process-oriented definitions, others have identified problems with these definitions. Those who oppose process-oriented approaches, such as Doolin (2007), suggest that Marshal's (1999) popular understanding of RJ is too vague. Doolin (2007) suggests that process-oriented definitions do little to indicate which stakeholders ought to be included in the restorative process, what is meant by appropriate processes to achieve resolutions, and what the outcomes of RJ processes should be (p. 428). Contrarily, understandings of RJ that emphasize restorative outcomes over the types of processes used allow

for a greater range of practices to fall under the category of RJ, while still ensuring some degree of restoration occurs for those who decide to participate in RJ processes. Although Doolin (2007) does not offer a standard definition of RJ, Doolin explains that RJ processes should be evaluated based on the outcomes of restorations sought with an emphasis on achieving the most restorative outcome possible (p. 440). Restorative outcomes can vary largely based on the specifics of the offence that brought the stakeholders together and can range from an apology to reparations being paid to the victim. With these types of definitions of RJ, practices where a victim or offender decide not to participate can still be considered a restorative process. These types of processes will often use a surrogate victim or offender so that some degree of restorative outcome is available for stakeholders who do want to participate.

Of course, outcome-oriented definitions present their own unique challenges when it comes to understanding RJ. Commentators have noted that outcome-oriented definitions are restrictive as RJ outcomes will vary based on the specific desires of stakeholders participating in the process with some participants achieving a greater sense of restoration than others (Daly, 2016, p. 21). This criticism recognizes that a victim and an offender may meet to participate in RJ but leave the process without coming to a resolution. Even though an outcome has not been reached, it would be inaccurate to suggest that no RJ process has occurred at all. What can be made of this difficulty in determining what constitutes a restorative practice is that RJ needs to be understood in the context of the jurisdiction in which it is being practiced and the policy which enables RJ processes to occur.

Because of difficulties attempting to define RJ, authors such as Woolford & Nelund (2019) and Van Ness & Strong (2015) have moved away from formal definitions of RJ and adopted a more appropriate and flexible understanding. These authors have attempted to

establish understandings of RJ through core elements of restorative processes. For example, Van Ness and Strong (2015) identify three pillars of restorative processes which include an encounter, reparation or amends, and transformation or reparation. For any process to be considered a restorative process under Van Ness and Strong's (2015) conceptualization of RJ, the process needs to include an encounter between stakeholders, amends need to be made in some way by the offender towards the victim, and steps need to be taken to ensure the seamless reintegration of both the offender and victim back into society. Similarly, Woolford & Nelund (2019) suggest that there are several significant traits of restorative processes that include open and active participation, empowering participants, and offering satisfying relational healing processes (p. 10-11).

While both Woolford & Nelund (2019) and Van Ness & Strong (2015) lay out defining traits for restorative processes, they are also flexible in their understandings of RJ. This is ultimately one of the most important features in a definition of RJ as RJ processes are highly adaptable to fit the needs of those participating. In recognizing this important feature of RJ, Woolford & Nelund (2019) state that "[i]n any specific application of restorative justice, moments may arise when these ideals are unreachable or temporarily suspended" (p.11). This is because authors with flexible understanding of RJ recognize that RJ is a living model that is a "continuously evolving body of ideas intended to articulate a method of justice built upon the active participation of stakeholders" (p. 13). This means that RJ will evolve or be revised to "meet future challenges" (Woolford & Nelund, 2019, p. 13-14). Ultimately, it is clear that these versions of understanding RJ are more appropriate as they represent a more dynamic and flexible definition of RJ.

RJ in the Canadian Context

RJ and alternative philosophies of justice have a long history in Canada. The Canadian justice system is often accredited with the first use of RJ in tandem with the traditional criminal justice system. In 1974, two teens living in Elmira, Ontario engaged in a vandalism spree that led to numerous victimizations in the small community. As a result of the spree, a probation officer named Mark Yantzi took the teens to confront their victims and listen to how their actions affected them. This process was the first instance of a victim-offender mediation (VOM) and ultimately led to many communities establishing victim-offender reconciliation programs across Canada with the support of Mennonite communities (Watchel, 2016, p. 2). While this was the first instance of VOM being used for RJ, it is important to note that many modern RJ practices have been significantly influenced by Indigenous legal traditions. Authors such as Tomporowski et al. (2011) have explained that Indigenous practices such as sentencing circles predate Canada's legal framework but have been worked into Canada's judicial system as commonly used restorative practices.

Restorative practices have become widespread in Canada as a result of s.717(1)(a) of the *Criminal Code* which came into effect through sentencing reforms in 1996. Tomporowski et al. (2011) have noted that the lack national data collection on RJ has made it difficult to measure the impact of the sentencing reforms on the increase of RJ on Canada (p. 826). However, recent data collection of RJ referrals indicate that 22,576 referrals were made to RJ programs across 18 ministries in 2017/18 because of the provision (Public Safety Canada, 2020). S.717(1)(a) reads:

> **717 (1)** Alternative measures may be used to deal with a person alleged to have committed an offence only if it is not inconsistent with the protection of society and the following conditions are met:
>
> **(a)** the measures are part of a program of alternative measures authorized by the Attorney General or the Attorney General's delegate or authorized by a person, or a person within a class of persons, designated by the lieutenant governor in council of a province…

Because of the language used in s. 717(1)(a) of the *Criminal Code*, alternative philosophies of justice such as restorative justice practices are often referred to as alternative measure in the context of adult offenders. Young offenders can be afforded similar opportunities in the aftermath of a criminal offence by way of the YCJA (2002). In a similar vein to alternative measures, provisions in the YJCA (2002) allow young offenders access to alternative philosophies of justice to address concerns of "overuse of the courts and incarceration in less serious cases, disparity and unfairness in sentencing, a lack of effective reintegration of young people released from custody, and the need to better take into account the interests of victims" (Government of Canada, 2021a, para. 2). Unlike adult offenders however, when young offenders are referred to alternative justice processes the youth is being assigned to an extrajudicial sanction.

There are several important points to note about alternative measures and extrajudicial sanctions in terms of their relationship with alternative philosophies of justice and restorative practices. The first point is that alternative measures and extrajudicial sanctions include a range of practices that can be a part of restorative practices but do not result from a restorative process. For example, the Public Prosecution Services of Canada (2015) has stated that alternative measures can range from rehabilitative programming for offenders to paying restitution to victims and community through means such as community service (para. 8). While these can be outcomes of restorative processes, they can also be a disposition without having the victim and offender engaging in a restorative process. Rather, it is possible that the sentencing justice mandated an outcome based on the traditional criminal process alone. Despite this consideration, it is not uncommon for the Government of Canada to identify these alternative measures and restorative processes as one and the same (Government of Canada, 2021b).

The second point to highlight regarding alternative measures and extrajudicial sanctions is that the practices and policy can vary by province. Although s.717 of the *Criminal Code* (1985) and the YCJA (2002) give legislative authority for the use of RJ processes, provinces are ultimately responsible for developing, funding, and regulating their respective RJ programs (Government of Saskatchewan, 2013a, p. 6). As a result, the range of restorative processes available in a province can vary wildly and there is no federally legislated understanding of RJ to create consistency across provinces. However, it is important to note there have been efforts to establish some uniformity for RJ across the nation through federal, provincial, and territorial (FPT) working groups. As a part of their work, the FPT Working Group on Restorative Justice has established a definition for RJ in Canada which explains that RJ is "an approach to justice that seeks to repair harm by providing an opportunity for those harmed and those who take responsibility for the harm to communicate about and address their needs in the aftermath of a crime" (Public Safety Canada, 2020). Furthermore in 2018, the FPT Working Group on Restorative Justice has also committed "to increase the use of restorative justice processes by a minimum target of 5% per jurisdiction, where possible, over the next 3 years" (Public Safety Canada, 2020). With clear interest in expanding access to RJ across Canada, it is worthwhile examining other legislative tools that can be used to support further access to RJ in the nation.

Tools for Expanding RJ as a Right to Access to Justice in Canada

The Criminal Code

When it comes to expanding understanding of access to justice to include access to alternative philosophies of justice and their practices, the *Criminal Code* (1985) is one of the pieces of Canadian legislation that needs to be at the centre of the conversation. As previously mentioned, s.717 is often identified as the most important section in terms of enabling RJ and

alternative philosophies of justice to take place in the Canadian criminal justice framework. However, s.717 is far from the only piece of enabling policy that should be considered when making an argument for accessing alternative philosophies of justice as a right. While alternative measures speak (albeit not in direct fashion) to the use of RJ processes, s.718 of the *Criminal Code* (1985) outlines both the purpose and principles of sentencing with respect to Canada's legal system. Of course, several of these sentencing principles include more punitive aspects of western legal systems, such as the need to denounce unlawful conduct, to deter the offender from committing crime, and to separate offenders from society (*Criminal Code*, 1985, s.718(a)-(c)). In contrast to these more retributive principles, s.718(2) of the *Criminal Code* include several principles which speak to the importance of restorative principles in Canadian legal frameworks. These principles read as follows:

> **718(2)** A court that imposes a sentence shall also take into consideration the following principles:
>
> **(d)** an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and
>
> **(e)** all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders (*Criminal Code*, 1985).

In many respects, the acknowledgement of restorative principles in Canadian legal frameworks is a recent development. Commentators such as Roach (2000) have pointed out that, during the 1990s, the Canadian House of Commons expressed interest in RJ while federal and provincial Ministers of Justice "recognized the 'holistic' and 'healing' approach of aboriginal justice as essential to reform" (p. 253). These interests and admissions led to significant sentencing reform in 1996 through the introduction of Bill C-41 to Parliament that introduced the previously highlighted principles in s.718(2). Additionally, the 1996 sentencing reforms also

entrenched other RJ principles within the *Criminal Code* (1985), which indicated provisions of "reparations to victims and the community are legitimate goals of sentencing" by way of s.718(e)-(f) (Roach, 2000, p. 253-254).

Shortly after their introduction into Canadian legislation, several pieces of Bill C-41 became a topic of controversy within the Canadian Supreme Court. In 1999, a case called *R v. Gladue* came to the attention of the Canadian Supreme Court and justices hearing the case were asked to comment on s.718(2)(e) of the *Criminal Code* (1985). At the heart of the case was the appellant Mrs. Gladue who was looking to have her sentence reduced because of the trial judge's comments that the defendant shouldn't be given any special considerations in terms of a sentence as it related to her Indigenous heritage (*R v. Gladue*, 1999, para. 18). Upon considering that s.718(2)(e) of the *Criminal Code* (1985) reads that all sanctions other than imprisonment should be considered with particular attention being paid to Indigenous persons, it appeared that Gladue had grounds to appeal her sentence. Despite this, the Supreme Court dismissed her case. However, what did emerge from *R v. Gladue* was important history on the development of Bill C-41 and commentary on the importance of RJ in Canada.

Upon reviewing the criminal justice system in the *R v. Gladue* case, the presiding justices noted that Canada's incarceration rate of approximately 130 inmates per 100,000 population places it second or third highest among industrialized democracies (para. 52). As a means of responding to the Canadian reliance on incarceration, the justices explained that Parliament passed the first codification of sentencing reform with two objectives in mind: "(i) reducing the use of prison as a sanction, and (ii) expanding the use of restorative justice principles in sentencing" (*R v. Gladue*, 1999, para. 48). Further to this point, the justices state that "[t]he 1996 sentencing reforms embodied in Part XXIII, and s. 718(2)(e) in particular, must be understood as

a reaction to the overuse of prison as a sanction, and must accordingly be given appropriate force as remedial provisions" (*R v. Gladue*, 1999, para. 57). Finally, the justices argued that "Parliament's choice to include (e) and (f) alongside the traditional sentencing goals must be understood as evidencing an intention to expand the parameters of the sentencing" (*R v. Gladue*, 1999, para. 43).

When it comes to reflecting on the 1996 sentencing reforms established through Bill C-41, it is clear that both Parliament and justices of the highest court in Canada agree that restorative outcomes are necessary within the Canadian legal framework. In response to the *R v. Gladue* (1999), the Canadian criminal justice system has taken measure to provide processes in which Indigenous offenders can have their historical circumstances considered by courts to become eligible for alternative justice processes such as Indigenous-run healing lodges (Correctional Services Canada, 2021). While provisions such as s.718(2)(e) have been criticized as being "unfair for non-Indigenous offenders because it was a 'race-based discount' on sentencing" (Department of Justice, 2017, p. 13) they should not be understood in this light. At their core, the principles established through the 1996 sentencing reforms reflect the need to rely less on the use of incarceration in exchange for restorative outcomes for all Canadians. This is made clear by previously highlighted comments of the justices in the *R v. Gladue* (1999) case as well as the following statement by the same justices:

> The next question is the meaning to be attributed to the words "with particular attention to the circumstances of aboriginal offenders". The phrase cannot be an instruction for judges to pay "more" attention when sentencing aboriginal offenders. It would be unreasonable to assume that Parliament intended sentencing judges to prefer certain categories of offenders over others. Neither can the phrase be merely an instruction to a sentencing judge to consider the circumstances of aboriginal offenders just as she or he would consider the circumstances of any other offender. There would be no point in adding a special reference to aboriginal offenders if this was the case (para. 37).

Ultimately it is clear that through the 1996 sentencing reforms, Parliament intended to make alternative philosophies of justice more accessible for all Canadian and not just a particular group. With this in mind, advocates for alternative philosophies of justice need to leverage the comments of Parliament, justices of the Supreme Court of Canada, and Canadian legislation as they clearly indicate processes such as RJ are fundamental in accessing better justice in Canada.

The Youth Criminal Justice Act

In a similar vein to provisions included in the 1996 sentencing reforms for the *Criminal Code*, the YCJA (2002) was a response on the behalf of the Canadian Parliament to address issues pertaining to the extremely punitive *Young Offenders Act*. This is made clear in the "Preamble" of the YCJA (2002) that articulates the following points:

- Society has a responsibility to address the developmental challenges and needs of young persons.
- Communities and families should work in partnership with others to prevent youth crime by addressing its underlying causes, responding to the needs of young persons.
- The youth justice system should reserve its most serious interventions for the most serious crimes and reduce the over-reliance on incarceration.

To be able to meet the objective of reducing over-reliance on incarceration, s.10 of the YJCA (2002) allows prosecutors and sentencing judges to consider the aforementioned extrajudicial sanctions for youth offenders when appropriate. Under the YCJA, the number of custody charges and incarcerated youth dropped by 64 percent and 50 percent respectively between 2002-03 and 2009-10 (Government of Canada, 2021a). Criteria that would qualify young offenders for an extrajudicial sanction include the fully informed and free consent of the youth to participate in the process, opportunity for the youth to consult with legal counsel throughout the process, acceptance of responsibility by the youth for their actions that resulted in an offence, and authorization of the program of sanctions by the Attorney General (YJCA, 2002, s.10).

Much like alternative measures and s.717 of the *Criminal Code* (1985), a significant amount of attention is given to s.10 of the YCJA (2002) when looking to increase access to alternative practices and philosophies of justice. However, the YCJA (2002) contains numerous other provisions that support the increased right to access alternative measures, some of which include alternative practices of justices. The most notable of these provisions include s.38.2 of the YCJA (2002), which emphasizes the following sentencing principles in terms of young offenders:

> **38(2)** A youth justice court that imposes a youth sentence on a young person shall determine the sentence in accordance with the principles set out in section 3 and the following principles:
>
> **(d)** all available sanctions other than custody that are reasonable in the circumstances should be considered for all young persons, with particular attention to the circumstances of aboriginal young persons;
>
> **(e)** subject to paragraph (c), the sentence must
>
> **(i)** be the least restrictive sentence that is capable of achieving the purpose set out in subsection (1),
>
> **(ii)** be the one that is most likely to rehabilitate the young person and reintegrate him or her into society, and
>
> **(iii)** promote a sense of responsibility in the young person, and an acknowledgement of the harm done to victims and the community.

S.38(2)(d) closely resembles the provisions for adult offenders found in s.718(2)(e) of the *Criminal Code* (1985), and thusly, has also been subjected to the same criticism of racial favouritism in sentencing. Commentators such as Anand (2003) have noted in the wording of s.38(2)(d) of the YJCA (2002) that Indigenous young offenders are not subjected to the same standard of proportionality as other offenders (p. 959). As a result of this consideration, it is possible to conclude that youth court judges "can impose disproportionately lenient youth sentences" regarding Indigenous young offenders (Anand, 2003, p. 959). To a degree, there is some merit to this argument as Anand (2003) notes that, during debates on this section of the YCJA (2002), Members of Parliament insisted that "that such an amendment was needed in

order to address the overrepresentation of Aboriginal young people in youth custody centres" (p. 960).

Despite specific intentions from Members of Parliament to establish differential treatment in sentencing Indigenous young offenders, s.50(1) of the YCJA (2002) pushes back against this narrative as it stipulates that s.718(e) of the *Crimin*al *Code* (1985) and all relevant jurisprudence applies to the sentencing with respect to Indigenous youth. With the inclusion of s.50(1) in the YCJA (2002), this means that the decisions and considerations from watershed cases such as *R v. Gladue* (1999) also apply to youth sentencing. As a result of s.50(1) of the YCJA (2002), unique sentencing innovations and diversions methods specific to Indigenous offenders established through the *R v. Gladue* (1999) also need to be considered for youth. The inclusion of s.50(1) within the YCJA (2002) means that the comments made by the justices in the *R v. Gladue* (1999) case about *Gladue* sentencing principles not being "race-based" or favouring certain groups through restorative sentencing are also relevant with young offenders. Rather, s.50(1) suggests that both s.718(2)(e) of the *Criminal Code* (1985) and s.38(2)(d) of the YCJA (2002) should be understood as looking to apply greater use of extrajudicial sanctions for all youth accused of committing a criminal offence as opposed to relying on incarceration. This is especially true for s.38(2)(d) of the YCJA (2002) when one considers that outcomes for youth sentencing are meant to be "the least restrictive" while imposing meaningful consequences for young offender under s.38(2)(e)(i) of the YJCA (2002). Extrajudicial sanctions that rely on restorative processes such as conferencing have been demonstrated to lower youth incarceration rates in Canada while adequately holding youth accountable for their actions (Government of Canada, 2021a). Advocates looking to explore greater use of restorative philosophies should keep these

considerations as they serve as clear examples for increased use of alternative philosophies of justice in the Canadian legal framework.

The Canadian Victim Bill of Rights

The CVBR is by far one of the most interesting of the legislative tools that can be used to advocate for expanding understandings of access to justice to include access to alternative philosophies of justice. This is in large part due to the CVBR containing several sections that specifically mention the use of RJ which other key legislation does not. According to s.6(b) of the CVBR (2015), every victim has the right to request information about "the services and programs available to them as a victim, including restorative justice programs." While this section mentions RJ and restorative programs specifically, it is also important to note that this section does not guarantee victims a right to partake in restorative processes. Rather, this particular section only guarantees victims the right to request information pertaining to restorative program. However, victims right to access RJ programs becomes more concrete when considering s.47 of the CVBR (2015), which states that all victims registered under the *Corrections and Conditional Release Act* will be provided with information about RJ programs and, upon the victim's request, measures for victims to participate in RJ processes.

Although s.6(b) of the CVBR (2015) does not specifically outline a right to access alternative philosophies of justice, it is still important to examine in some detail. This is because when victims have access to information pertaining to restorative programs, they can make informed decisions and push for justice processes they prefer given their own circumstances. This is best exemplified by an individual named Marlee Liss who participated in what may have been Canada's first instance of using RJ to resolve a sexual assault crime, rather than adjudication. Liss was the victim of a sexual assault that was initially assigned to be dealt with

through the traditional justice system. Throughout the process however, Liss shared with her legal team that she felt that prison would not benefit her assaulter and that the court process would only serve to re-traumatize her (Zarzour, 2019). Upon researching alternatives to the traditional justice system, Liss discovered RJ processes and requested that a VOM take place between herself and her assailant. Initially, prosecutors resisted Liss's request until she threatened to drop all charges against her assailant unless a restorative process was granted. Eventually, Liss was granted the restorative process and has gone on to advocate for greater use of RJ in the criminal justice system by way of her Re-Humanize Movement (Liss, 2021).

There are several points to take away Liss's experience and the CVBR (2015) as a tool for advocating for greater access to alternative philosophies of justice. The first point is that, although the CVBR (2015) makes it a right for victims to be able to request information about RJ processes, the onus is on the victim to make the request for information and to understand what RJ is in the first place. In returning to Liss's experience, Liss indicates that she had no prior knowledge of RJ or alternative processes until she researched them herself (Zarzour, 2019). Further to this point, it is clear that Liss's right to information by way of s.6(b) of the CVBR (2015) could never be accessed as Liss had no knowledge about RJ to ask for information pertaining to restorative processes. The problem that Liss faced regarding her rights as a victim is emblematic of a problem most victims similarly face. According to a study conducted by the Department of Justice (2018), 52% of Canadians reported a low familiarity with RJ with an additional 30% saying they only had a moderate understanding.

This transitions to the second point to highlight with regard to Liss and the CVBR (2015) as a tool for expanding access to justice. When Canadians are informed of RJ processes, they are generally favourable towards these processes and would support greater education regarding the

processes. In the same study conducted by the Department of Justice (2018), a majority of Canadians supported the use of RJ after receiving an explanation of what RJ is. In addition to this, 80% of Canadians agreed that "criminal justice officials should be required to inform victims, survivors and accused of the availability of RJ processes" (Department of Justice, 2018). What should be taken away from this is that, even though s.6(b) of the CVBR only guarantees access to information, Canadians with information pertaining to RJ are very likely to pursue RJ processes. Given this information, advocates for expanding access to justice to include access to alternative philosophies and criminal justice professionals need to raise greater awareness around the CVBR (2015). Furthermore, it is crucial that advocates push criminal justice officials to uphold their obligations under both s.6(b) and s.47 of the CVBR (2015) to ensure access to alternative philosophies are better understood as a right within the Canadian legal framework.

Barriers to Accessing Alternative Philosophies

Co-Option of Alternative Philosophies

One of the most significant barriers to greater access to alternative philosophies of justice within the Canadian legal framework is government co-option of alternative philosophies of justice. Commentators such as Christie (1997) have explained that lawyers and the state have been known to steal conflict, so much so that conflict becomes become their "property" and not that of any other person or group (p. 4). At their core, restorative philosophies of justice attempt to address this concern outlined by Christie (1997) by allowing greater victim and community participation in the wake of an offence. In its most simple form, co-option of alternative philosophies of justice is the fear that, "through legislated standards of practice, the government will be re-exerting its influence over [restorative processes]" (Leverton, 2008, p. 526).

The fear that government will exert influence over restorative processes is not unfounded and can be seen throughout the Canadian legal framework. One of the most troubling ways in which government can reclaim its possession over criminal matters is through establishing policy that significantly limits who can qualify for processes. While some advocates for alternative philosophies of justice may argue that RJ can be used for any type of offence if the participants are willing, federal and provincial policy significantly limits the types of offences that can be referred to RJ programs. Within federal government policy, it is a general principle that RJ is "most suitable for offenders with no record, who have committed less serious offences and are unlikely to reoffend" (Public Prosecution Services of Canada, 2015). In addition to this, the following circumstances strictly exclude RJ from being used at the federal level:

- the offence involved the use of, or threatened use of, violence reasonably likely to result in harm that is more than merely transient or trifling in nature;
- a weapon was used or threatened to be used in the commission of the offence
- the offence is a sexual offence;
- the offence had a serious impact upon the victim or victims (physical, psychological or financial);
- the conduct demonstrated sophisticated planning (for example, the offence was part of an ongoing criminal enterprise) (Public Prosecution Services of Canada, 2015).

Although this list of circumstances that preclude RJ is not exhaustive, it is obvious that these restrictions are meant to both protect vulnerable victims and denounce serious criminal offences. While these are necessary considerations, it is important to note that victims such as Marlee Liss may find RJ processes more empowering while viewing traditional justice systems more traumatizing. By not allowing certain victims to choose whether RJ processes would be appropriate for them, government effectively "steals" conflict from victims.

In addition to "stealing conflict" by limiting which offences can be referred to restorative programs, in rare circumstances, governments have engaged in developing their own restorative programs and then deciding which community programs receive certain cases. Across a majority

of Canadian provinces, it is most common that prosecutors, judges, and defence counsel work together to determine whether an offender qualifies for an alternative measure. If the Crown counsel approves the offender to receive an alternative measure, a referral for the offender will usually be sent directly to a community organization that is being contracted to by a provincial ministry of justice (Government of Saskatchewan, 2013b, p. 4). However, in what might be one of the most egregious examples of government co-option, the Government of Manitoba has established its own restorative program called the Restorative Justice Centre.

According to the Government of Manitoba (2018), the Restorative Justice Centre is meant to be a part of their "Criminal Justice Modernization Strategy" that aims to "more effectively use restorative justice options to improve public safety, reduce delay in the court system and ultimately reduce reliance on incarceration" (p. 2). The Restorative Justice Centre receives all referrals from the criminal justice system and has the capacity to either mediate the referral itself or delegate the referral to the proper restorative program "to better address risk and underlying causes of criminal behaviour" (Government of Manitoba, 2018, p. 5). In reality, what has actually occurred through the development of the Restorative Justice Centre is that the involvement of community programs in RJ are pushed to the side. By conducting their own mediations through the Restorative Justice Centre, the Government of Manitoba has effectively removed conflict resolution from the capable hands of community organizations that specialize in restorative processes and claimed it as their own. Authors such as Gavrielides (2013) have noted that government-run programs tend to be less effective than community organizations as government programs rely on "1-3 day training packages" for police officers, probations staff and prison guards with no practical experience in the field of RJ (p. 84-85). Gavrielides (2013) adds that governments have expiration dates that incentivize quick and cheap programming

whereas community organization do not have these same deadlines and have often been well established in communities for long periods of time.

Furthermore, by being the arbiter of which community programs can be delegated the remaining RJ referrals, the Restorative Justice Centre (and the Government of Manitoba by proxy) wields significant power over community organizations which rely on referrals for funding. What can stem from this is a dynamic where "facilitators are forced to meet arbitrary training and credentialing criteria in order to be placed on an 'approved list to practice'" RJ that forces community organizations to alter this manner of practice to fit into the government's definition of appropriate practice (Leverton, 2008, p. 526). Ultimately, it is clear that government co-option can vary in the degree it harms access to alternative philosophies of justice, but nonetheless significantly limits who can participate in these highly desirable programs.

Even though practitioners of RJ such as Christie (1997) and Braithwaite (2002) frequently highlight criticisms of criminal justice systems usurping power from victims and local communities, many practitioners have not imagined RJ as operating independently from the criminal justice system. Pavlich (2005) highlights this notion among RJ practitioners and suggests that theories of RJ often see themselves as possessing a different rationale from the criminal justice system all while still entrenching their visions of RJ inside that system. According to Pavlich (2005), RJ and the criminal justice system contain two separate "governmentalities," a term that can best be understood as "the 'mentalities' that establish apparatuses of understanding, meaning horizons, to enable particular methods of ruling" (p. 10). More specifically, Pavlich (2005) focuses on "the 'mentalities' of governance that supporters use to make sense of the practices claiming the name 'restorative justice'" (p. 10).

To Pavlich (2005), restorative governance is understood as "future-directed, pragmatic, problem-solving processes designed to repair, restore and effectively redress the harms of crime" as opposed to criminal justice governance that "focuses its adversarial methods on past events to determine guilt" (p. 13). Furthermore, Pavlich (2005) notes that governors of criminal justice processes (i.e., police, lawyers, judges, correctional officers, etc.) fundamentally oppose those who govern restorative processes (stakeholders such as victims and other community agents) by way of the state's ability to exert dominate restorative processes. Even though restorative and criminal justice governance fundamentally oppose one another, Pavlich (2005) notes that "[RJ] also predicates itself on key concepts within the criminal justice system" that produces a phenomenon called an "imitor paradox" (p. 14). Pavlich describes the RJ "imitor paradox" as "a seemingly singular, internally consistent entity even though it is simultaneously committed to two opposing foundations: namely, as substitute for and imitator of criminal justice concepts and institutions" (p. 14).

While Pavlich (2005) points out that recognizing the paradox RJ finds itself in does not discredit the achievements or claims RJ has made, Pavlich suggests that there is a need to address the consequences the paradox presents RJ through its need to replicate itself within the criminal justice framework (p. 15). In many respects, the paradox Pavlich (2005) highlights carries many of the same consequences previously outlined through government co-option. Unlike government co-option of RJ that identifies criminal justice governing bodies as actively seeking to establish control over RJ processes, the "*imitor* paradox" identifies proponents of RJ as already imagining RJ as an appendage to the criminal justice system because they tend to think and practice RJ within the terms and delimitations of the criminal justice system (Pavlich, 2005). By suggesting that RJ operate as an alternative to certain criminal justice processes but

remain embedded within the criminal justice system, Pavlich (2005) argues that RJ practitioners "enhance (perhaps even expand) existing criminal justice and/or legal institutions" through a self-inflicted form of co-option (p. 18). Although Pavlich (2005) concedes there are political advantages to "maintaining the paradoxical stance" RJ finds itself in, it is also important for proponents of RJ to reflect on the paradox as opportunity to imagine RJ independent from the criminal justice system, or more radically, becoming the system itself (p. 23). This is to suggest that, in order to move beyond both the consequences of both government and self-inflicted co-option, RJ practitioners need to adhere to the common notion that RJ is an independent philosophy of justice and begin identifying potential avenues that RJ can use to operate independently.

Institutionalization of Alternative Philosophies

Although the inclusion of alternative philosophies within western criminal justice frameworks represents important progress in terms of establishing more holistic justice systems, it is important to recognize that this can come at a cost to restorative values. In a variety of western justice systems, RJ and other alternative philosophies of justice have been worked into these legal frameworks as both an afterthought and as way to supplement traditional justice processes. This is obviously the case in the Canadian context as the 1996 sentencing reforms to the *Criminal Code* (1985) and the reforms to youth sentencing by way of the YCJA (2002) emphasize the need to use more restorative outcomes rather than relying on incarceration. However, authors such as Maglione (2021) have noted that combining restorative and traditional justice policy into one framework often results in "sterilizing the transformative potential of RJ due to the conflicting values underpinning criminal justice and RJ" (p. 5). In his studies, Maglione (2021) presents three examples of different jurisdictions where RJ values are diluted

into penal policy. According to Maglione (2021), with penal policy "one is either a 'victim' or an 'offender', there is no room for (social, personal, cultural) overlaps between those two positions" (p. 13). This is fundamentally opposed to core values of RJ practices as they often look to address the history of victimization within those who caused harm to better address root causes of criminal behaviour. However, Maglione (2021) notes that in jurisdictions such as England and Wales, France and Norway, their RJ processes are often set up in a way where the "'victim' appears as disempowered and vulnerable whilst the 'offender' is presented as the harm-maker/wrongdoer neatly separated from their victim" (p. 13). Further to this point of institutionalization, Maglione (2021) notes that "community members" participating in these processes are often reduced to social workers and police officers (p. 14). This presents a significant loss to RJ values as other significant stakeholders that would typically fall under the "community member" category, such as neighbours or family member, are barred from participating through a sort of criminal justice gatekeeping (Maglione, 2021, p 14).

Commentators on this phenomenon have pointed out that when RJ is situated within traditional criminal justice systems, the effectiveness of RJ practices are often measured against traditional criminal justice objectives such as offender rehabilitation and lowered recidivism rates rather than restorative values of repairing harm or meeting victim needs (Pavlich, 2005). Maglione (2021) suggests this occurs as adopting the terminology of the criminal justice system "is a crucial condition for 'mainstreaming'" RJ practices (p. 13). While lower recidivism rates can be a positive by-product of restorative processes, Pavlich (2005) notes that RJ practitioners should be fundamentally concerned with focusing on upholding core values of RJ such as "helping stakeholders to define, and develop ways to heal, the harms of crime" (p. 13). Pavlich

(2005) argues such as over-emphasizing values traditionally held by the criminal justice system plays into the previously highlighted "*imitor* paradox."

Canadian legislation often reinforces the notion of institutionalization of RJ as many of the enabling frameworks for alternative philosophies of justice also emphasize the importance of criminal justice objectives. For example, among the various restorative sentencing principles outlined by the *Criminal Code* (1985), the following retributive sentencing principles also appear:

> **718** The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:
>
> **(a)** to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
>
> **(b)** to deter the offender and other persons from committing offences;
>
> **(c)** to separate offenders from society, where necessary;
>
> **(d)** to assist in rehabilitating offenders;

Further to this point, the YCJA (2002) also includes numerous objectives that emphasize retributive objectives such as ensuring accountability of young offenders through meaningful consequences, rehabilitation and reintegration.

The consequences of "mainstreaming" processes with traditional criminal justice systems have also been explored extensively. Authors such as Marder (2020) have argued that the hybridization of restorative processes and criminal justice processes often results in stakeholders losing the capacity to make decisions collectively through the restorative processes while consolidating the control justice systems can impose on citizens engaging in these processes (p. 503). For commentators such as Daly (2003), the hybridization of RJ and criminal justice processes can be used to explain why RJ programs often produce more modest results than

advocates of RJ expect (p. 234). Further to this point, Laxminarayan (2014) explains that "the mainstreaming of restorative justice may lead to a clash between safeguarding the quality of restorative justice and institutionalising these programmes" (p. 43).

At its worst, the institutionalization of RJ can allow processes that are meant to have restorative elements to be completely overtaken or dominated by traditional justice processes. This is extremely apparent when one considers the use of conditional sentences in the Canadian justice system. The Department of Justice (2015) defines a conditional sentence as a term of imprisonment that the offender serves within the community, and that is aimed at reducing the use of incarceration. Although the restorative nature of conditional sentences could be debated, Justice Lamer of the Supreme Court of Canada in the case *R v. Proulx* (2000) determined conditional sentences possess restorative traits and are "better than incarceration at achieving the restorative objectives of rehabilitation, reparations to the victim and the community, and promotion of a sense of responsibility in the offender and acknowledgment of the harm done to the victim and the community" (para. 127). Despite this admission, Roberts (2015) notes that Justice Lamer avoids giving primacy of importance to either punishment or restorative elements of sentencing when it comes to understanding conditional sentencing in the *R v. Proulx* (2000) case. As a result, conditional sentences can be seen as the epitome of hybridization of RJ and traditional criminal justice process in Canada.

Even though conditional sentences were conceived as a means of achieving restorative outcomes with punitive outcomes acting as a type of insurance policy to guarantee good behaviour of offenders who receive them, studies have demonstrated that punitive outcomes tend to occur more frequently. In a study conducted by Roach (2015), he discusses the implications conditional sentences have in the Canadian legal framework and how restorative values are often

undermined by conditional sentences through an effect called “net-widening.” According to Roach (2015), net-widening can be understood as “any process in which offenders are subject to more intrusive sanctions than before. Thus net widening would occur if offenders who would be fined or subject to a probation order are now subject to a conditional sentence” (para. 6). When an offender is serving a conditional sentence, they are subjected to a number of potentially demanding conditions, such as curfews, in which any unjustified breach of the conditions can result in the offender being incarcerated (Reid & Roberts, 2019, p. 2).

Roach’s (2015) study reveals that, in the first two years of their existence, 28,000 conditional sentences were ordered but statistics show that no meaningful reduction in the number of incarcerated persons occurred. In a similar national study of Canadian use of conditional sentences, Reid and Roberts (2019) found that conditional sentences only resulted in decarceration in 2008, and in the twelve years after this, resulted in a 3% increase in custodial admissions (p. 28). What can be made of this information is that the requirements of conditional sentences are often being breached by those who receive them and are resulting in incarceration. Roach (2015) argues that breaches of conditional sentences occur with great frequency as sentencing judges are not reserving conditional sentences for the most serious cases, but rather, giving out conditional sentences to less-serious offenders with “draconian breach provisions” that seek to provide reparations for the victims and community (para. 13-14). What is observed in Roach’s (2015) study is the effect of net-widening and institutionalization of RJ. Although conditional sentences are supposed to contain restorative elements and reduce incarceration, the onerous nature of the punitive elements of the conditional often overpower or outweigh any potential benefits conditional sentences have to offer. Of course, this is an example at its worst,

but should nonetheless serve as a cautionary example of how restorative philosophies of justice can be sterilized when operating too closely to traditional criminal justice processes.

Conclusion

When it comes to expanding access to justice to include access to alternative philosophies of justice, influential Canadian legislation provides clear avenues for establishing alternative justice processes as a means of accessing justice and as a right within the Canadian justice framework. In both the *Criminal Code* (1985) and the YCJA (2002), Canada has established provisions that establish frameworks for alternative processes of justice such as RJ to take place, as well as entrenched various restorative principles within their sentencing principles for both adult and young offenders. Further to this point, the CVBR (2015) has established information pertaining to RJ and RJ processes as a right for all victims in the Canadian justice system. Although the means for victims accessing these rights can be challenging as a result of the nature of the CVBR (2015), it does not diminish the importance of these rights and places a greater need to address the provisions that make the right difficult to access. If the Canadian legislative framework leaves any room to doubt the importance RJ plays in terms of access to justice in Canada, decisions from Canada's Supreme Court largely put the intent behind these provisions to rest by explaining how they should be interpretated moving forward. The reasoning behind the justices' interpretation also speaks highly of the importance of access to RJ as their decision relies heavily on the comments of Parliament regarding the purpose of several legislative provision within the *Criminal Code* (1985) and the YCJA (2002).

Despite the importance RJ carries both historically and in the present Canadian context, it is clear that there exist several significant barriers which can limit access to alternative philosophies of justice, and in turn, access to justice. Both co-option and institutionalization of

RJ processes present a similar challenge to RJ in Canada. On one hand, co-option of RJ through government exerting its influence over RJ or through practitioners attempting to consolidate RJ within the criminal justice typically results in criminal justice governing bodies dominating these processes. The power these governing bodies exert over RJ processes ultimately goes against the core principles of RJ which seek to allow stakeholders outside of the criminal justice governing bodies resolve crime. Through government and self-inflicted co-option, these principles are largely pushed to the side. In a similar vein to co-option, the institutionalization of RJ examines the potential contributions RJ can have to increasing punitive outcomes such as incarceration when hybridizing RJ processes with criminal justice processes. While RJ is not fundamentally opposed to punitive outcomes (reparations can be understood as a form of punishment), the institutionalization of RJ sees RJ values completely overlooked to produce harsher outcomes than RJ would typically prescribe. Ultimately, this results in the sanitization of RJ processes.

Two recommendations can be made in terms of correcting the course for RJ. First, more funding needs to be allocated to community organizations. Academics such as Gavrielides (2013) have highlighted the capacity of community organizations to handle caseloads of around 100 offences on a budget of $100,000 (less than $1,000 per case) (p. 83). This increase in funding can support community organizations' ability to take on larger caseloads and return conflict resolution back to community. Secondly, policy that governs restorative frameworks need to be less restrictive to ensure greater access to RJ. Governments can enact policy that can limit which offences are eligible for RJ and who can conduct restorative processes. For these procedures to be changed, government and the criminal justice institutions need to be willing to let go of power they have traditionally held over this policy which may prove to be a challenge moving forward. What can be made of these barriers should be examined through the lens Pavlich (2005) offers in

his work. In order to increase access to justice through alternative philosophies of justice, it may be time to imagine how RJ can exist independently of the criminal justice system to better serve individuals requesting these processes.

References

Anand, S. (2003). Crafting Youth Sentences: The Roles of Rehabilitation, Proportionality, Restraint, Restorative Justice, and Race under the Youth Criminal Justice Act. *Alberta Law Review*, 40(4), 943-964.

Braithwaite, J. (2002). *Restorative Justice and Responsive Regulation*. Oxford: OUP.

Canadian Charter of Rights and Freedoms, Part 1 of the *Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11.

Canadian Victims Bill of Rights, SC 2015, c 13.

Christie, N. (1977). Conflicts as Property. *The British Journal of Criminology*, 17(1), 1–15.

Correctional Services Canada (2021). *Indigenous Healing Lodges*. Government of Canada. https://www.csc-scc.gc.ca/002/003/002003-2000-en.shtml.

Criminal Code, RSC 1985, c C-46.

Currie, A. (2007). *The Legal Problems of Everyday Life: The Nature, Extent and Consequences of Justiciable Problems Experienced by Canadians*. Department of Justice Canada. https://justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr07_la1-rr07_aj1/rr07_la1.pdf.

Daly, K. (2003). Mind the gap: Restorative justice in theory and practice. In A. Von Hirsch, J. Roberts, A. Bottoms, K. Roach, & M. Schiff (Eds.), *Restorative Justice and Criminal justice: Competing or Reconcilable Paradigms?* (pp. 219–236). Hart Publishing.

Daly, K. (2016). What is Restorative Justice? Fresh Answers to a Vexed Question. *Victims & Offenders*, 11(1), 9-29.

Department of Justice (2015). *The Future of Conditional Sentencing: Perspectives of Appellate Judges*. Government of Canada. https://www.justice.gc.ca/eng/rp-pr/csj-sjc/ccs-ajc/rr04_8/p1.html.

Department of Justice (2017). *Spotlight on Gladue: Challenges, Experiences, and Possibilities in Canada's Criminal Justice System*. Research and Statistics Division. http://publications.gc.ca/collections/collection_2018/jus/J4-46-2017-eng.pdf.

Department of Justice (2018). *Research at a Glance – Restorative Justice*. Research and Statistics Division. https://www.justice.gc.ca/eng/rp-pr/jr/rg-rco/2018/mar08.pdf.

Doolin, K. (2007). But What Does It Mean? Seeking Definitional Clarity in Restorative Justice. *The Journal of Criminal Law*, 71(5), 427-444.

Dünkel, F., Horsfield, P., & Parosanu, A. (2015). Introduction. In F. Dünkel, P. Horsfield, & A. Parosanu (Eds.), *European research on restorative juvenile justice— Vol. 1, Research and selection of the most effective juvenile restorative justice practices in Europe: Snapshots from 28 EU member states* (pp. 1–17). Brussels, Belgium: International Juvenile Justice Observatory.

Garbett, C. (2017). The International Criminal Court and Restorative Justice: Victims, Participation and the Processes of Justice. *Restorative Justice*, 5(2), 198-220.

Gavrielides, T. (2013). Where is Restorative Justice Heading? *Probations Junior*, 2(4), 79-95.

Government of Canada (2021a). *Youth Criminal Justice Act Summary and Background*. https://www.justice.gc.ca/eng/cj-jp/yj-jj/tools-outils/back-hist.html.

Government of Canada (2021b). *Restorative Justice – Legislation and Policy*. https://www.justice.gc.ca/eng/cj-jp/rj-jr/lp.html.

Government of Manitoba (2018). *Criminal Justice System Modernization Strategy*. https://www.gov.mb.ca/justice/pubs/criminaljusticereform.pdf.

Government of Saskatchewan (2013a). *The Alternative Measures and Extrajudicial Sanctions: Policies.* Ministry of Justice. https://www.saskatchewan.ca/residents/justice-crime-and-the-law/courts-and-sentencing/alternatives-to-going-to-court/alternative-measures-extrajudicial-sanctions-programs.

Government of Saskatchewan (2013b). *Alternative Measures and Extrajudical Sanctions - Program Manual*. Ministry of Justice. https://www.saskatchewan.ca/residents/justice-crime-and-the-law/courts-and-sentencing/alternatives-to-going-to-court/alternative-measures-extrajudicial-sanctions-programs.

Laxminarayan, M. (2014). *Accessibility and Initiation of Restorative Justice*, European Forum for Restorative Justice, https://www.euforumrj.org/sites/default/files/2019-11/accessibility_and_initiation_of_rj_website_0.pdf.

Leverton, W. (2008). The Case for Best Practice Standards in Restorative Justice Processes. *American Journal of Trial Advocacy*, 31(3), 501-530.

Liss, M. (2021). *Marlee Liss*. https://www.marleeliss.com/.

Maglione, G. (2021). Restorative Justice and the State. Untimely Objections Against the Institutionalisation of Restorative Justice. *British Journal of Community Justice*, 17(1), 4-22.

Marder, I. (2020). Institutionalising Restorative Justice in the Police: Key Findings from a Study of Two English Police Forces. *Contemporary Justice Review*, 23(4), 500-526.

Marshall, T. (1999). *Restorative Justice: An Overview*. London: Home Office.

Pavlich, G. (2005). *Governing Paradoxes of Restorative Justice*. London: GlassHouse Press.

Pedersen, M. (2019). The ICC, the Rohingya and the Limitations of Retributive Justice. *Australian Journal of International Affairs*, 73(1), 9-15.

Public Prosecution Services of Canada (2015). *Public Prosecution Services of Canada Deskbook*. Government of Canada. https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p3/ch08.html.

Public Safety Canada (2020). *Increasing the Use of Restorative Justice in Criminal Matters in Canada - Baseline Report*. Government of Canada https://www.publicsafety.gc.ca/cnt/rsrcs/pblctns/2020-resjus-jusrep/index-en.aspx.

R. v. Gladue, [1999] 1 S.C.R. 688

R. v. Proulx, [2000] 1 S.C.R. 61

Reid. A. & Roberts, J. (2019). Revisiting the Conditional Sentence of Imprisonment After 20 years: Is Community Custody Now an Endangered Species? *Canadian Criminal Law Review*, 24(1), 1-37.

Roach, K. (2000). Changing Punishment at the Turn of the Century: Restorative Justice on the Rise. *Canadian Journal of Criminology*, 42(3), 249-280.

Roach, K. (2015). *The Changing Face of Conditional Sentencing***.** Department of Justice. https://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/op00_3-po00_3/p3.html.

Roberts J. (2015). *The Changing Face of Conditional Sentencing*. Department of Justice. https://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/op00_3-po00_3/p4.html#foot148.

Szmania, S. J., & Mangis, D. E. (2005). Finding the Right Time and Place: Case Study Comparison of the Expression of Offender Remorse in Traditional Justice and Restorative Justice Contexts. *Marquette Law Review*, 89(2), 335-358.

Tomporowski, B., Buck, M., Bargen, C. & Binder, V. (2011). "Reflections on the Past, Present, and Future of Restorative Justice in Canada" *Alberta Law Review*, 48(4), 815-829.

Trumbull, C. P. (2008). The victims of victim participation in international criminal proceedings. *Michigan Journal of International Law*, 29(4), 777-826.

UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: https://www.refworld.org/docid/3ae6b3aa0.html [accessed 29 November 2021].

Van Ness, D. & Strong, K. (2015). *Restoring Justice: An Introduction to Restorative Justice*. New York: Routledge.

Wagner, R. (2019). *Access to Justice: A Societal Imperative*. Supreme Court of Canada. https://www.scc-csc.ca/judges-juges/spe-dis/rw-2018-10-04-eng.aspx.

Watchel, T. (2016). *Defining Restorative Justice*. International Institute for Restorative Practices. https://www.nassauboces.org/cms/lib/NY01928409/Centricity/Domain/1699/Defining%20Restorative.pdf.

Wemmers, J. (2002). Restorative Justice for Victims of Crime: A Victim-Oriented Approach to Restorative Justice. *International Review of Victimology*, 1(9), 43-59.

Woolford, A. & Nelund, A. (2019). *The Politics of Restorative Justice: A Critical Introduction*. Halifax & Winnipeg: Fernwood Publishing.

Youth Criminal Justice Act, SC 2002. c. 1.

Zarzour, K. (2019). *How a Markham Sex Assault Survivor Found Justice — and Peace*. The Toronto Star. https://www.thestar.com/news/gta/2019/11/02/how-a-markham-sex-assault-survivor-found-justice-and-peace.html?rf.