

**FORMAL RESTORATIVE JUSTICE IN NOVA SCOTIA:  
A PRE-IMPLEMENTATION OVERVIEW**

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## Introduction

Nova Scotia has embarked on what appear to be an ambitious reform of its justice system. Restorative Justice initiatives, arguable with roots in pre-industrial dispute resolution, have developed in many parts of the world in the last decade, notably in Australia, New Zealand, and Britain. Growing out of the mediation movement of the 1970s, and inspired by reforms in aboriginal justice in Canada, Restorative Justice is putatively the hallmark of progressive thinking in the justice system. The Nova Scotia initiative (Dept. of Justice 1998) is especially noteworthy for its province-wide breadth and its depth (involving programmes at all stages from pre-charge to pre-release from incarceration).

The immediate catalyst of this programme was a perception that some recent reforms in the justice system were being apparently misunderstood by the public. In one case in particular, *R v. Parker*, the accused killed two sisters as a result of dangerous driving (not involving alcohol). The judge imposed a conditional sentence including long hours of community service and stringent house arrest, a disposition that was subsequently endorsed by the Court of Appeal. Public response, however, was immediate and negative. The lawyer in the Parker case, acting as a moral entrepreneur, became convinced that what was needed was a more systematic alternative justice approach in Nova Scotia accompanied by appropriate publicity and information so that the public would see that real justice was being accomplished.

In 1997, a Steering Committee was established by the Department of Justice in Nova Scotia to develop a Restorative Justice initiative. By June 1999, a philosophical basis for the reform has been elaborated; Working Committees had been established for the province as a whole and in the four target areas of the province; Restorative Justice Agencies had been identified and were being expanded in personnel; a two-year, multi-phase programme had been designed; furthermore, protocols had been worked out or were in the discussion-stage; plans for system-wide education had been laid; and training for recently recruited volunteers had been planned.

During the months of May and June, 1999, in collaboration with Don Clairmont of Dalhousie University, we conducted pre-implementation interviews with stake holders and members of the RJ Working Committees which had been established in the Annapolis Valley and Cumberland Counties, the two primarily rural areas of the province slated for Phase One implementation. We held pre-implementation, in-depth discussions with twenty-two stake-holders: a judge, two representatives of Victim's Services, three probation officers, a Crown Attorney, six police officers, four members of Alternative Measures societies, two defence lawyers, and three correctional service professionals. The main concerns in these interviews were, first, with strategies to evaluate the effectiveness of the programme, and second to identify important issues that will affect the implementation of the programme. This paper provides an overview of the key components of the initiative, and discusses key issues that were identified by the respondents.

## The Restorative Justice Initiative: Philosophical Foundation

Philosophically, the Nova Scotia RJ programme is established on the basis of a sharp contrast between what is termed the "adversarial system" currently in practice, and a Restorative Justice focus. The differences are highlighted by contrasting the respective principles of these two approaches. The following Table, drawn from the Department of Justice publication (1998: 2), provides the theoretical basis for the RJ initiative.

<b>ADVERSARIAL SYSTEM</b>	<b>RESTORATIVE JUSTICE</b>
Crime is defined as a violation of rules, and a harm to the state	Crime is seen as a harm done to victims and communities
Victim is inhibited from speaking about his/her real losses and needs	Victim is central to the process of defining the harm and how it might be repaired
Offender, victim and community remain passive and have little responsibility for a resolution	Offender, victim and community are active and participate in the resolution resulting from the restorative forum
Community's role is limited	Community is actively involved in holding offenders accountable, supporting victims, and ensuring opportunities for offenders to make amends
Restitution is rare	Restitution is normal
Controlled and operated by the state and professionals who seem remote	Overseen by the state, but usually driven by communities
Offender is blamed, stigmatized and punished	The long-term protection of the public mandates a focus on the methods of problem solving that include the reintegration of the offender into the community, and the preservation of his/her dignity
Repentance and forgiveness are rarely considered	Repentance and forgiveness are encouraged
Assumes win-loss outcome	Makes possible win-win outcome

This set of principles is the foundation for what might be regarded as a fundamental critique of the "adversarial approach" and the current administration of justice, necessitating some substantial overall reforms to the system. It appears, however, more like the construction of a theoretical elephant used to justify a relatively minor change in programme delivery. This construction of philosophical differences is actually indicative of the pragmatic and opportunistic use of "theory" in mainstream justice.

The role of the victim is central to Restorative Justice and to the Nova Scotia programme. It implies a fundamental role for the victim in the process. It is not the case, however, that Restorative Justice is emerging as a victim-specific demand for reform. The victim rights' movement may be highly critical of the current justice system, but its critique is embedded within the adversarial approach which is defined as too liberal. The Department of Justice does not pretend that the RJ initiative is a grass-roots movement for change; in fact, it acknowledges explicitly the Department's "leadership in the development" of the initiative (1998: 5). This begs the question of how victims can, practically, be integrated into the programme given their likely proclivity to be among the most vocal advocates of the competing view that "our system is not tough enough" (1998: 1). The appearance of the centrality of victims notwithstanding, the rhetoric of repairing harm, of supporting victims, of "repentance and forgiveness" is more legitimation than substance.

### **Formal Goals**

Given this philosophical basis, the Department of Justice defined the goals of Restorative Justice as follows (1998: 5):

#### Primary Goals:

1. Reduce recidivism

Recidivism rates are too high. It has been shown that face-to-face meetings with victims can have a profound effect on the future behaviour of offenders. The nature of the restorative justice provides an opportunity to focus on the underlying causes of the criminal behaviour and the constructive reintegration of the offender into the community.

2. Increase victim satisfaction.

The victim's voice is rarely heard in the formal justice system. By having a forum in which they can discuss the impact of the offence, and assist in the identification of the reparative measures to be taken, victims will derive greater satisfaction.

#### Secondary Goals:

3. Strengthen communities

4. Increase public confidence in the justice system

Moving from abstract philosophy to concrete goals places the RJ initiative squarely within the traditional concerns of the justice system. It is defined as an alternative deterrence strategy. The first goal, then, is well within the usual framework of the adversarial justice system.

The second primary goal is to increase victim satisfaction. This continues the emphasis on the role and importance of the victim apparent in the philosophical principles. In the words of the Department of Justice, "Greater participation by communities and victims, and evidence of a more effective justice process will enhance public confidence". (1998: 6)

Practically, this would mean obtaining a measure of the satisfaction of victims who go through the RJ process as opposed to those where the offender goes to court, controlling for seriousness and impact of the offence. A victim questionnaire immediately following a hearing may test the level of satisfaction at that point, but a comparable type of post-court data would be difficult to obtain. Sending victims a questionnaire after the passage of some time (both those who went through RJ and those who attended court) would obtain comparative data, but it would also risk "dredging up the past" that many victims would find troubling.

Two "secondary goals" were identified. Strengthening communities would be nebulous and essentially impossible to quantify. The question of the involvement of the community is raised again below. Testing public opinion about the justice system would ideally involve a public survey. But it is not clear that you would actually get a measurable difference in public confidence in the justice system comparing the trial and non-trial areas that could be attributed to the operation of the RJ programme. You could ask people whether they felt more confidence in the justice system as a result of RJ, but that may not be a very meaningful question.

## **Referrals: Entry Points and Levels of Offence**

In establishing the programme, the Department of Justice next had to define which offenders were eligible for restorative Justice and at what point in the justice system they would be eligible for the programme. In some cases it was defined as appropriate to initiate RJ alone, with no further involvement from the adversarial system. For other matters, RJ was appropriate only after the requirements of the formal justice system had been met.

Four different "levels" of offence were defined as well as four "entry points ". The entry points were (1998: 8):

1. Police Entry Point (pre-charge)
  - referral by police officers
  - referral of Level 1 and Level 2 offences (see below).
2. Crown Entry Point (post-charge/pre-conviction)
  - referral by Crown Attorneys
  - referral of Level 1 and Level 2 offences.
3. Court Entry Point (post-conviction/pre-sentence)
  - referral by judges
  - referral of Level 1, Level 2, and Level 3 offences.
4. Corrections Entry Point (post-sentence)
  - referral by Correctional Services/ Victims' Services staff
  - referral of Level 1, Level 2, level 3 and Level 4 offences.

### Police Entry Point

At the pre-charge stage, the police may give an informal warning, a formal Caution, initiate their own restorative justice process, refer a case directly to the

Community Agency for an assessment, or formally lay a charge. When laying a charge, the police may or may not recommend to the Crown Attorney that RJ be considered.

This raises the crucial concern about who gets in and who is excluded from the RJ programme. There are obvious variations in the penetration rate from department to department as well as officer to officer based on such factors as the policies of specific police forces and the individual proclivities of officers.

Evaluation would require a data base on exclusion/inclusion at the police level. It should contain information on specific offences and the decision to proceed via (1) informal warning (2) formal cautioning (3) in-house RJ forum (4) RJ referral (5) charge. The first of these, however, is very difficult to quantify, yet essential to an understanding of police practice. The use of formal cautioning would provide a base for comparison, but the caution must include information about the nature of the possible offence that is being handled in this manner. As presently envisioned, however, the form does not indicate the offence. The specific offence is listed on the RJ referral Form (logically), but it should be accompanied by date about those cases that were not referred (the checklist). It is important to know who is and isn't cautioned, but data on police use of discretion may be very difficult to obtain.

The other obvious variable here is that the police could decide to proceed to an in-house RJ forum, as they are already doing. In such a case, it is not clear that the checklist would be used. The NS programme notes that the RCMP is already involved with a family group conferencing model. The investigator may refer a case, pre-charge, to a trained facilitator in the detachment area (member or civilian or ether) who will "facilitate" and follow-up with the victim and with the offender's compliance with the agreement (p. 17).

#### Crown Entry Point

At the post-charge but pre-conviction stage, the Crown has three options: (1) to refer the case to the Community Agency for an assessment; (2) to refer the case to Adult Diversion; or (3) to prosecute. As we will see below, one of the issues raised by police respondents was what happens when there is disagreement between the police and the crown about proceeding to RJ.

#### Court Entry Point

At the post-conviction but pre-sentence stage, the judge may refer the case to the Community Agency for an assessment or proceed to a Sentencing Hearing.

#### Corrections Entry Point

Post-sentence, but pre-release, the correctional services can choose to send the case through the normal channels (for example, parole), or can refer the inmate to a Community Agency for an assessment prior to release (pp. 10-11).

The Department of Justice recommended replacing some fixed guidelines with greater "discretion". Specifically, the provincial prohibition of including "multiple

offences, personal injury or indictable offences" in the range of offences eligible for Alternative Measures "should be eliminated". In addition, the "only once in two year" policy should be amended (1998: 12). In other words, RJ should be an option potentially open to more serious offences and for recidivists. Once fixed guidelines are removed, decisions would be made on a wider, more discretionary basis. Discretion is to be based on "*the specific circumstances of the offence and the characteristics of the offender*" (1998: 12; italicized in original).

How discretion is used is always and everywhere a major issue. Experience with correctional programmes suggests that whether programmes can claim a level of success depends, in the first instance, on the selection of cases. If those most likely to succeed are given entry while those least likely are excluded, the programme succeeds. Creating adequate experimental controls in this situation is very difficult if not impossible. The Department of Justice approaches this issue by declaring, first, the overriding importance of the protection of the public. Accordingly, the "selection of cases for referral must be carefully handled or the Initiative risks criticism that could irrevocably damage its reputation." The community must know that "the risk of failure in each case referred to restorative justice is not greater than it would have been in the conventional system" (1998: 13).

However, with conditional sentencing and home incarceration, similar issues have arisen. Judges, however, have not hesitated to use these dispositions although critics have argued that this involves "net-widening"; that is, that offenders receive more formal dispositions than otherwise (home incarceration rather than probation, instead of home incarceration rather than jail).

The response for the RJ initiative is to outline "Minimum Requirements" and "Discretionary Factors" (1998: 14). These same factors appear on the police Checklist which is used when determining the route to take a particular case. The Checklist, first, incorporates a presumption of RJ into the process in that the police are essentially justifying a decision not to refer. Second, by defining the factors to take into consideration, the Department of Justice hopes to limit, or at least make more visible, the workings of discretion.

Finally, the Included and Excluded offences for each entry point were also defined. As noted above, not all offences are eligible for inclusion in the programme at any of the four entry points. The most serious offences, for example, are only eligible for RJ following both conviction and a period of incarceration. In those cases, RJ becomes a step in the reintegration and reconciliation process, initiated by Corrections personnel or, in the idealized view, victim's representatives).

**INCLUDED AND EXCLUDED OFFENCES (1998: 16):**

<b>LEVEL 1 OFFENCES</b>	
These are the only offences for which a formal caution is an option.	<ul style="list-style-type: none"> <li>- Provincial statute offences</li> <li>- Minor property offences</li> <li>- Disorderly conduct offences (e.g. loitering, vagrancy)</li> <li>- Assaults not resulting in bodily harm</li> <li>- Mischief</li> </ul>
<b>LEVEL 2 OFFENCES</b>	
These offences can be referred at all four entry points.	<ul style="list-style-type: none"> <li>- This is the largest group of offences. They constitute all Criminal Code offences that are not Level 3 or Level 4.</li> </ul>
<b>LEVEL 3 OFFENCES</b>	
These offences can be referred only at the court (post-conviction/ pre-sentence) and corrections (post-sentence) entry points.	<ul style="list-style-type: none"> <li>- Fraud and theft-related offences over \$20,000</li> <li>- Robbery</li> <li>- Sexual Offences (Summary)</li> <li>- Aggravated Assault</li> <li>- Kidnapping, abduction and confinement</li> <li>- Criminal negligence/dangerous driving causing death</li> <li>- Manslaughter</li> <li>- Spousal/Partner violence offences</li> <li>- Impaired driving and other offences</li> </ul>
<b>LEVEL 4 OFFENCES</b>	
These offences can be referred only at the corrections (post-sentence) entry point.	<ul style="list-style-type: none"> <li>- Sexual offences (indictment)</li> <li>- Murder</li> </ul>

**Implementation**

With respect to an implementation timetable, the programme will be phased in over the next few years. In Phase One, beginning in November 1999, RJ will commence in four specific regions in Nova Scotia: Cape Breton, Halifax County, the Annapolis Valley, and Cumberland County. During Phase One, only Young Offenders will be eligible for RJ. These will include offenders under 18, charged with eligible offences, whether the offence is a first charge or not. In short, RJ is expected to include a wider number of offences as well as offenders. Subsequently, the

programme will be extended to the other three areas of the province, and then expanded to include adults as well as youthful offenders. It is expected to be comprehensive and province-wide.

Restorative Justice in Nova Scotia is being built on the foundation of a number of existing programmes that involve a variety of community-based corrections including Community Service Orders and the Fine-Option Programme. Of greatest significance, however, are two: Alternative Measures and Adult Diversion. Actual programming will be offered by Community RJ Agencies which are, essentially, enlarged versions of the existing Youth Alternative Measures Societies.

### **Alternative Measures and Adult Diversion**

For the last decade, approximately, Nova Scotian youth in conflict with the law have had, assuming certain criteria were met, the option of avoiding a court appearance and attending an Alternative Measures hearing. The province is divided into seven areas in each of which an independent, community board manages youth alternative societies (Valley Youth Alternatives and the Cumberland County Alternatives Society in the two areas canvassed for this Paper). Designed for first-time offenders and relatively minor property offences, these hearings provide the general model for restorative justice forums. By all accounts, the use of Alternative Measures for the designated subset of offenders has been successful. With very few exceptions, offenders complete the requirements of their disposition without defaulting and being sent back through the courts. Anecdotally, the recidivism rate for youth who were diverted from court through Alternative Measures is substantially better than the rate for youth sent through court, a conclusion that is consistent with the selection of first-time, minor offences for diversion. A substantial number of youth offenders who eventually serve a period of incarceration, however, have gone through diversion at one point, unsuccessfully in the longer run. More systematic data collection and analysis is necessary to actually assess the effectiveness of Alternative Measures as opposed to Court-ordered dispositions.

Among the victim-oriented respondents, there was considerable dissatisfaction with the use of the formal route. Before an offender goes to court, it was stated, he gets a lawyer who tells him he can beat the charge. The offender goes in having been coached with the attitude of getting away with it, escaping punishment, and not feeling remorseful. In general, however, RJ was not perceived to be the most desirable substitute among victim-oriented respondents. This is despite the assumption that, in Restorative justice, the offender must show remorse, confront his or her victim, accept responsibility (moral as opposed to only legal guilt), and agree to the disposition. On the other hand, several people pointed out that the formal system is not entirely negative (as the draft programme implied). Court was public and open whereas Restorative Justice would be held at a variety of times and locations and be more private.

The Restorative Justice programme is built on these Alternative Measures Societies, each being transformed into a Restorative Justice Community Agency with a

more explicit philosophical foundation, a wider mandate, and expanded resources. In this sense, the province is building on relative success. With respect to the formal differences between the new initiative and Alternative Measures, Restorative Justice Agencies will deal with referrals from four "entry points" rather than only one (pre-court); repeat offenders will no longer be excluded automatically from participating; a wider range of offences will be eligible for inclusion.

With respect to the inclusion of adults, Restorative Justice will also build on an already-existing programme of Adult Diversion. Like Alternative Measures, it is used in cases of minor, first offences. Introduced about two years ago, it appears to be seldom used. Respondents attributed this to a number of factors. It was apparently introduced with little publicity or preparation. There was assumed to be a reluctance to extend the same generosity about allowing a second chance to adults, who should know better, than that shown for youths who could be regarded as more amenable or less responsible for their misdeeds. Adult Diversion is handled by probation officers. Hearings are often one-on-one with the offender, in the absence of the victim, making this form of diversion, as currently practiced, further from a restorative justice process. We were told, however, that some probation officers make exceptional efforts to have victims attend and give them an opportunity to participate.

There does not appear to have been any systematic evaluation of the use of Adult Diversion in the province. The "penetration rate" -- the proportion of eligible offenders who actually go through youth or adult diversion -- varies from agency to agency, from police department to police department, and within police departments depending on the proclivities of individual officers. In some cases, judges took the initiative to recommend cases as being suitable for Adult Diversion. These variations, from county to county, among police departments/ detachments, and within individual police agencies, will likely persist throughout the implementation of Restorative Justice. Penetration rates may become more inconsistent as various interest groups and individuals define and judge the differences between existing programmes and Restorative Justice.

In almost all cases, people involved with restorative justice in the Valley or Cumberland County believed that there were two primary differences between Alternative Measures/Adult Diversion and Restorative Justice: a greater role for the victim (some arguing that the participation of the victim was essential for the actual "restoration" of restorative justice) and, second, a greater role for the community in the justice system. These and other issues that emerged from the pre-implementation interviews which form the basis of this report will be discussed below.

### **Pre-Charge Entry Point**

Much discussion centred around the first entry point, prior to a charge being laid. Upon investigation of a complaint and, once satisfied that they have reasonable and probable grounds that a charge would be warranted, the police have a number of options. As always, a matter may be handled informally in the classic exercise of police discretion. Beyond informality, the police may (1) issue a formal caution, a new option

being introduced as part of the initiative; (2) refer the case to the Restorative Justice Agency (or, in the case of the RCMP, to an internal RCMP-led Conference); (3) lay a charge and send the case to court.

There were a number of estimates about the numbers of cases that would be sent through restorative justice and also about the various conditions that would increase or reduce the numbers. Generally, almost all speculation centred around various forms of diversion to "lower" from "higher" dispositions. The issue of potential net widening was not spontaneously mentioned by any of the respondents. It is probable that many cases that are currently sent through Alternative Measures will be handled by a formal caution; first-time shoplifters, for example, or petty property damage cases. Some police officers calculated that cautions would substantially diminish restorative justice cases, diverting many offenders from Alternative Measures. There was a wide variation in the anticipated use of formal cautioning. Attitudes tended to vary with respect to the officer's judgement about the efficacy of Restorative Justice. For some, cautions would be used fairly extensively for minor Level One offences, diverting them from Alternative Measures. For others, the expectation was that few cautions would actually be given because they would either be unnecessary -- informal handling through Community-Based Policing in a small town is widespread and preferable and such incidents are recorded on PIRS -- or not suitable. The suggestion, for example, that minor, first-offence shoplifting may warrant a caution was resisted by some on the grounds that shoplifters need to confront their crime and be held accountable in a more meaningful way, such as through Alternative Measures.

Others speculated that there would be actual diversion of cases to Restorative Justice that ordinarily would have gone through court, meaning that there may be fewer cases overall referred to restorative justice than to Alternative Measures, but they would tend to be more serious and involve more agency time and work.

In the small towns, the majority of offences by far are level 1 or level 2 (perhaps 75%) -- theoretically, a relatively high percentage could be candidates for restorative justice at Levels One or Two. Police, however, at least at this point in time, would not consider most of these individuals candidates for restorative justice. They considered themselves the front-line workers with intimate knowledge of and experience with offenders. By the time they get to Alternative Measures, it was suggested, many had already been handled informally many times and been involved in criminal activities since they were young children. Consequently the police were best positioned to judge suitability for restorative justice and it was unlikely most offenders in their current case files would be deemed acceptable candidates.

Increased discretion always creates greater likelihood of systematic bias, although this point was not explicitly mentioned by the respondents. To take part in a forum, it is necessary that the offender "takes responsibility", co-operates with the police, and has developed some sense of understanding about the offence and the degree of harm done (cognitive), as well as having some empathy for the victim (emotive). In addition, however, anecdotal police discussion about the informal handling of previous cases, and existing restorative justice conferencing, emphasize that the youth handled in these ways tend to be those who come from "good homes"

who "would not benefit from going to court". The police may be accurate in their assessment of who would benefit from diversion and who would not, based on their experience, but it is difficult to avoid the appearance of class, or racial bias in discretionary handling of individual cases.

Police forces least willing to be involved in restorative justice expect to put the onus on the Crown to refer -- they claim that they will lay the charges and leave it to the Crown to decide how to proceed. However, this may not be possible. At the protocol discussions, it was decided that, at the pre-charge entry point, police officers would be required to complete a "Restorative Justice Checklist" for all cases involving Level 1 or Level 2 offences (Protocol 1999: 3) where a charge could and/or would be laid. It was argued that this amounts to a presumption of referral unless indicated otherwise on the Checklist. The onus would be on the police to justify a decision to send the matter to court by indicating the absence of specific minimum requirements, or the existence of specific discretionary factors.

Given this presumption of referral, some police forces expressed concern that the Crown's action may amount to "second-guessing" them. In their view, the police are most likely to be in a position to know the offender through past dealings, to know her or his family background and close acquaintances. They can best judge cooperation (discretionary factor [a]) and "the offender's apparent ability to learn from a restorative experience" (factor [g]). The experience of Alternative Measures is that, in almost all cases, police discretion prevails, although there may be some informal discussion between the Crown and police about these decisions, especially in jurisdictions where the prosecutor formally reviews all diverted cases. The use of the Checklist will potentially increase police accountability and give the Crown the opportunity to review the factors that led to the decision to not refer. The Crown can exercise its discretion to over-rule the police -- in the view of the police, to "second-guess" them. Most cases that are referred post-charge, at entry point 2 (the Crown), however, will result from changed circumstances; for example, the offender, through consultation with her or his lawyer, agrees to "take responsibility" and participate in a forum.

As with Adult Diversion, it is possible that judges' opinions on individual cases may shape the determination of the characteristics of cases that are deemed to be or not be suitable for restorative justice forums. At this point, however, the Judicial Sub-Committee has not yet determined protocol.

One of the most commonly-cited difficulties with Restorative Justice was the onus on the police to complete additional forms and paper-work. Given their position at the base of the restorative justice pyramid, police departments and individual police officers will exert considerable influence over the success and failure of the programme administratively. Certainly cases not recommended by the police may be over-ruled by the Crown, but in practice police co-operation is essential. Even the most reluctant officer agreed that if referral became departmental (or RCMP) policy, then officers would comply. Even officers who were supportive in principle, however, had a number of reservations about the initiative. There was willingness to give the process a try; however there was also the recognition that much would depend on members'

experiences with Restorative Justice in general and the particular local Agency in particular. Initial scepticism about the initiative would harden into sustained opposition if a few officers participated in an Agency-sponsored forum and concluded that it was a "joke". Peer evaluations of that kind would be sufficient to undermine co-operation.

The RCMP has initiated its own, nation-wide, Restorative Justice Initiative (Community Justice Forums). None of the RCMP representatives thought these would cease to function altogether. That means that a parallel system would continue and that RCMP officers would have, as one option, diversion to an in-house Restorative Justice Forum. In some detachments, there appeared to be active resistance to referring files to the Community Agency. In some instances, this reluctance reflects a philosophical disagreement with the concept; in others a negative evaluation of the existing programme or personnel; in others a general belief that Restorative Justice works best at the detachment level, when it is not too far removed from the three parties most intimately involved: the victim, the offender, and the police. According to this third perspective, once an agency is created, it would develop into another bureaucracy, becoming a job-creation strategy that would defeat the purpose of Restorative Justice. However, in-house RCMP conferences are time-consuming for members who must appear at them.

Under the Nova Scotia programme, police involvement in the Agency-facilitated forum is optional. It appears that, in both rural areas, police attend 70% of Alternative Measures hearings. They are generally scheduled to accommodate police presence. Participating in Restorative Justice was seen as likely to be more time-consuming. Since the offender accepted responsibility, it could be argued that the police role was finished. Had the case gone to court, and the offender entered a plea of guilty, police presence would also be unnecessary. Only if it is necessary to enter evidence in a trial would police attend court.

In some cases, police were concerned about the time and, potentially, the cost involved if police were expected to attend the majority of restorative justice hearings, assuming that the number of cases diverted to that forum was large. In small towns, without the luxury of an officer dedicated to the initiative or assigned to youth offenders generally, attending a forum may mean expensive overtime (with a minimum number of hours pay per call-out) or result in "pulling a working officer off the street". Others felt the police presence at the forum was essential -- the police being one of the three parties most intimately involved in the offence. They would also provide security in a potentially volatile situation. Their presence could also prevent the forum from being diverted into disagreements about the facts of the case. In some cases, Alternative Measures hearings take place in police offices, apparently lending gravity to the occasion and putting the offender in a more vulnerable position.

Alternatively, many expected that police would not routinely attend. Instead they would provide the facilitator with the essential facts, equivalent to a Crown Sheet, and that would conclude their involvement. However, the protocol document (March 1999: 5) indicates that, while not required, "The strong preference is for the forum ... to include the participation of the investigating officer."

## **Offender's Rights and "Taking Responsibility"**

Some police officers expressed the view that the legal requirement to read a suspect's rights inhibited their ability to discuss restorative justice options with the offender. Presently, for example, in a case of a young offender, the police investigate an offence and have to decide how to proceed. If they have reasonable and probable grounds, they have to read the suspected person his or her rights. These include the right to remain silent, to consult a lawyer, and to be asked whether the offender wishes to consult a lawyer at that time. If they indicate they wish to speak to a lawyer, they will most likely be advised not to make a statement. At that point, the police may feel constrained in their ability to discuss diversion. The problem arises if the police are trying to trade-off information about the offence, including self-incrimination, in return for a referral to diversion. At the pre-charge level for restorative justice (and currently for Alternative Measures), the police have to determine whether the youth "accepts responsibility for his/her actions". Some police officers felt that this places them in a catch-22 position.

Defence lawyers, however, did not feel concerned that restorative justice would potentially diminish offenders' rights. There is considerable negotiation between legal aid and the Crown. If the offender does consent to talk to the police, usually it will be in the presence of a parent or guardian, or with a lawyer present. If the officer is satisfied that it is the type of case that can be referred to Alternative Measures, then she or he can proceed to explain the possible options, including diversion, provided that the youth tells the truth and takes responsibility. Defence lawyers would, similarly, lay out the options, and the costs and benefits of the alternative routes and then leave it to the offender's to decide a course of action. As one lawyer put it, though, some defendants are absolutely innocent if the Crown is asking for jail time but, as long as the Crown is offering probation (or, presumably, restorative justice), they are willing to be guilty of anything. There is potentially a considerable difference between guilty beyond a reasonable doubt and accepting responsibility. Some offenders may, in the past, have been persuaded to accept a guilty plea on the grounds that they may be convicted of higher level offences; similarly, some who may presumably be legally not guilty will be persuaded to take responsibility for the assumed benefits.

## **Role of the Offender**

Some respondents (although not defence lawyers) felt that the restorative justice initiative was offender-driven, a situation claimed to be the case where such programmes were developed elsewhere. It is clear that the offender's participation is a necessity. Once a referral is made to the Agency, "Where the offender agrees to participate in a restorative justice process", the Agency shall arrange a forum" (Protocol, 1999: 4). Obviously the offender must be present for a forum to proceed. In addition, the protocol envisages that "the parent/guardian or a responsible support person for the offender" would also be a necessary participant (p. 4). This would be

particularly true in Phase One, when only young offenders are candidates. Once the programme moves into Phase Two, and involves adults, the requirement for a support person is likely to become a recommendation only.

If offenders were a necessary ingredient for a successful forum, several Working Group members were concerned that offenders would need a motivation to take part in the process -- they had to be persuaded that they would benefit from their involvement. Since the offender's participation was essential while the actual victim's was merely optional, it was possible that the offender would be "catered to" to ensure involvement in the process. It was clear to most that, at least at the lower entry points, there were clear incentives for offenders to go through restorative justice: there would be no criminal record, no name in the paper, no public denunciation. An offender could keep knowledge of the matter from peers in school or relatives. Many respondents objected in principle to having any substantive benefit accrue to the offender's participation in restorative justice. For them, the only acceptable motivation must be the desire to make amends.

Anecdotally, every concrete example of Adult Diversion or RCMP conferencing that was raised in the discussions had concluded with the observation that the offender had reaped these more "genuine" benefits. Offenders achieved both cognitive understanding of the effects of their crime and were able to develop empathy for victims. Many felt that offenders did want to confess and make amends, that they had a core of goodness in them. More commonly, however, respondents estimated that between 25% and 50% of offenders were likely to benefit. The remainder were steeped in denial, or lacked the ability to empathize with others, or merely wanted to "do the time or pay the fine". Many offenses were committed for the purpose of obtaining money for drugs, for example. These offenders were heavily involved in criminal sub-cultures, it was suggested, and would not make good restorative justice candidates.

It was suggested that there is a contradiction in having, on the one hand, a requirement for participation that the offender express understanding of the offence and empathy for the victim and, on the other hand, having understanding and empathy as major goals for success of a forum -- the anticipated outcome is a prerequisite for participation. The difference is in degree. Offenders must have reached the point of some understanding of the damage they have caused, even if it is incomplete. It is necessary that they be confronted by the victim's perception -- most forcefully, by the victim her or himself.

Would Restorative Justice reduce recidivism? It was generally believed that, where participation resulted in the positive benefit for the offender of both increased cognitive knowledge and enhanced empathy, the experience was likely to have an impact on her or his subsequent criminal career. This expectation is explicit in the draft Nova Scotia programme and is used, in part, to justify the inclusion of higher-order offences on the presumption that these offenders would be more profoundly affected by having to confront their victims. It was unclear, however, how an hour forum could be expected to have a lasting effect on subsequent behaviour. Certainly it was argued that many offenders have deeply-rooted "personality problems" that do not

respond well even to community-based counselling or intensive therapy. They also inhabit a material world in which they face serious, objective disadvantages. Some respondents, however, argued, usually on the basis of anecdotal evidence, that participants -- both offenders and victims -- were at least able to deal with, "put a boundary around", one incident.

## **Victim Participation**

The role of the victim was usually regarded as the single most important component of Restorative Justice. Several people pointed out that one major weakness of the restorative justice initiative was that it was not victim-driven. However, ideologically, victim participation was seen as fundamental to restorative justice, one of the distinguishing hallmarks that made the new programme substantively different from Alternative Measures. The second primary goal of the initiative is to "increase victim satisfaction" (Dept. of Justice 1998: 9).

However, in Alternative Measures, most hearings proceed in the absence of victims or their representatives. In part this is because corporate victims routinely do not release employees to attend hearings because of the loss of work-time involved. Most of these cases, however, involve minor theft. Should these cases be diverted through Formal Cautioning, the remaining cases may have more identifiable and more readily "cultivated" victims. In addition, at least in Phase One, the offenders are youth and there may be greater willingness to meet with youth (who might be helped) and less intimidation than with adult offenders who, on the contrary, might be thought to "need" a dose of retaliation and be more intimidating.

Another weakness often cited was that the victim can not veto the process, while the offender can. If victims think the case should go to court, they have no power; the forum may proceed against their wishes. The willingness of the victim to participate in a forum is a "discretionary factor", not a minimum requirement (Protocol, 19 March 1999: 3). Victims, then, will not have a veto over the process, although "the victim and/or a representative from the community of harm" must participate in order for a forum to proceed (p. 5). The general view was that the putative benefits of Restorative Justice derived precisely from the (controlled and mediated) confrontation between the offender and the victim. As pointed out above, the offender was to learn about the consequences of the crime. The victim would be able to express her or his rage, "speak bitterness", and get the matter out in the open. By hearing the offender's point of view, the victim would also potentially develop new insights and, perhaps, empathy. The victim would participate meaningfully in shaping the disposition. In the process, the victim would benefit materially through, for example, actual restitution, or direct service to a value equivalent to the damage caused. Negatively, however, it was also asserted that the victim had been harmed once by the offender. With Restorative Justice, this harm continued. The victim would feel morally compelled to participate in the process whether he or she wanted to or not. It would entail costs in time and anxiety. Many victims feared retaliation, that they would become potential targets for future crimes, that they may be subject to attack at the forum itself. It was bad

enough being victimized once; having to go through the Restorative Justice process actually doubly victimized them. These concerns were raised in particular by victim-oriented respondents and were particularly a concern in cases of sexual assault and spouse battery.

On a slightly wider area of concern, there was a view that victims might be more likely to be oriented to seeking a "pound of flesh" than closure or healing. Most agreed that the general public orientation was towards increased punitiveness, meaning that restorative justice runs contrary to public opinion. This may reflect highly publicized cases and victim's rights organizations rather than the orientation of the individual victim who is brought face-to-face with the flesh she or he wants a pound of (as one respondent put it). Defence lawyers were concerned that offenders may be at a great disadvantage in the forum faced with the victim, the police, and members from the harmed community. This was particularly likely because, in their experience, the parent/guardian, rather than acting as a support person, may side with the victim and be seeking assistance in exerting control and discipline over the youth.

What appeared to some to be also problematic was the discretionary factor of the willingness of the victim to participate in the process. At the pre-charge stage, it is up to the police to assess the victim's willingness. This is a delicate matter and the police may not be the best positioned to elicit participation. Most respondents were concerned with developing strategies that would help to "cultivate" victims and encourage their participation. If the police make few efforts at cultivation, then a negative assessment of the victim's attitude would become a discretionary factor on the Checklist that would justify an absence of a recommendation to refer.

Among the agencies, two models of intervention were planned. In some cases, one full-time agency employee would be assigned a case and work with both victims and offenders. The other model would divide this work, assigning to one agency worker the task of victim support, and another worker the task of offender co-ordination. In the latter model, each worker could focus on the best interests of their specific client. In the former model (a single case worker for both victim and offender), the worker would focus on the outcome and act as more of a mediator between interests.

## **The role of the community**

According to the June 1998 programme document, the State is expected to:

- Establish a legal framework for the RJ programs;
- Enable community-based programs;
- Initiate interest;
- Set standards;
- Monitor progress
- Provide financial support to "implement" programs and "oversee the Initiative"

However, "community ownership is essential to a successful ... program". The Department of Justice disclaims that this is a "downloading of Government responsibilities onto communities without resources", claiming instead to seek a "genuine partnership and collaboration". Communities are expected to identify the restorative justice model(s) that would work best in their locale (1998: 6).

What this means is that different programmes might be operating in different communities, although how different they actually were would be something to investigate. This does raise the fiscal issue, though -- RJ may be less expensive for the state. It begs the question, however, of the increase in the "expense" (in many ways, including time and money) of the volunteer community. That would be consistent with much government down-loading. The community-ownership rhetoric is likely to be merely verbiage.

If victim participation was the most commonly-cited fundamental characteristic of Restorative Justice, the second factor was the enhanced opportunity for involvement by the community. In the perspective of some of the police, however, if restorative justice meant that more serious and multiple offenders were going to receive community-based dispositions, the community would, in fact, become a less safe place and community satisfaction would decrease.

Restorative Justice in Nova Scotia, while emanating from the Province, is expected to be community-based. The concept of "community-ownership", which is explicit in the literature describing the initiative, means several things. One of the fundamental goals, and perhaps the most nebulous, is that the Restorative Justice programme will "strengthen communities". This would involve increased community participation and influence in the justice system. It is unclear how this would come about. One aspect would involve community education, or consciousness raising. In some cases, however, even some community service groups are apparently unaware of Alternative Measures, indicating a general absence of knowledge about the justice system in the community.

How would the "community" be identified? Some refer to the "criminal justice community", meaning only the key players in the system. A second sense of community is indicated by those who see the Restorative Justice agency itself as representing the community, indirectly in its role in the system and directly through the active participation of volunteers from the community. In either of these meanings, no further "community" participation is required beyond agency personnel (paid and unpaid). This is contrary to the wording of the Protocol document (19 March 1999), in which it is stated that there is a "preference for the community representative to be a person other than a representative of the Agency" (p. 5). Others speak of geographical communities. This definition incorporates a wider view of community participation, within which specific community representatives would be present, perhaps representing local groups affected by the offence. In one RCMP forum, for example, the participation of the Fire Chief illustrated the incorporation of a wider community interest. The participation of community representatives will be facilitated by the specification that the forum would be held in the "community of harm" (Restorative Justice Protocol, 19 June 1999, p. 5).

Under the original terms of reference of the proposal, programmes are to be either developed locally or modified by local circumstances and decision-making. The Program uses the language of empowerment to describe how communities would "shape programs" and "deliver the service of restorative justice" (1998: 6). This means that programmes will vary considerably from region to region, as indicative of "community ownership", although being developed within the general framework of the initiative. There is a question how flexible the programme will be in allowing regional variations, for example, by including incentives for offender involvement in some locales when this is not a general policy.

As in the case of Alternative Measures, one of the possible outcomes of a forum is the requirement that the offender perform community service work. This is another way members of the community may be directly involved in restorative justice. Both CSO's, however, and community service work determined through Alternative Measures have sometimes been problematic in terms of completion and compliance. Control in the community was mentioned as a potentially serious problem having the potential to undermine the credibility of the programme.

## **Volunteers**

As a community-based programme, Restorative Justice would involve a large voluntary component, not only at the level of a Community Board to oversee the Agency but, as with Alternative Measures, at the level of mediators and facilitators. This has not proved to be problematic in the existing Alternative Measures hearings. Many respondents, whether oriented primarily towards victims or offenders, expressed strong reservations about the suitability of volunteers in general, or volunteers with the amount of training they are likely to receive, dealing with level 3 or level 4 cases. There was also the concern about the liability of volunteers in cases where offenders cause more harm following participation in the programme.

This component of the restorative justice initiative came in for considerable scrutiny and negative speculation. The people who facilitate the meetings must be able to deal with high-level offenders and offences, certainly higher and more complicated than AM. It was suggested that it would be inappropriate to have a young 22-year old volunteer getting her or his feet wet. The kids are manipulative, it was stated. Victims may be difficult to handle. The volunteers are going to need a great deal of experience to be able to know how to deal with this entry point. Most current volunteers with Alternative Measures would be unable to adequately facilitate a forum at the higher levels. But that raises a resource problem. There would have to be an extensive allocation of resources to provide the necessary in-depth training.

Among some respondents there was concern that higher-order offenders were steeped in denial, did not assume responsibility, and lacked victim empathy. You have to have a mediator who will take a tough, no-nonsense position vis-a-vis the offender. If you do not have enough safeguards in place, and have a mediator who does not understand offenders, then there is a danger that there will be too much empathy for the offender. This was not the issue raised by Defence lawyers. They also saw the

role of the facilitator as key. From their point of view, however, they perceived an imbalance in favour of the victim, against the offender. As noted, the offender's "support person" may be seeking tough sanctions in an effort to regain control. Anecdotal evidence was used to suggest that wider concerns of victims, beyond the immediate circumstances of the offence, may be brought in and result in a more onerous disposition than warranted. One lawyer said that the initiative would need some very talented people to run the programme. They will have to be insightful about the imbalance and try to bring the victim/parent around and not ask for too much. It is not an opportunity for the parent to regain lost control over their child.

For those most concerned with the adequacy of volunteer facilitators, the alternative suggested was the use of professionals for higher-level entry point forums or for more serious criminal cases -- volunteers would not be able to handle this work. Professionals, it was argued, have years of training and experience, they have developed their skills over years; this can not be duplicated in a few days of training. While some Diversion forums have been incredibly successful, it was stated, when they aren't, there is more victimization. If problems arise, again, professionals would know how to handle the follow-up.

Apparently, volunteers attending Working Committee meetings themselves have expressed reservations about dealing with level 3 and 4 offences. What accountability is there for them? What requirements can anyone put on a volunteer in these circumstances? There was concern that, overall, the social and political system was burning out volunteers, that we were actually coming to the end of the volunteer era.

#### **Level 4**

Conceptually, at least, the aim of programming at the post-sentence stage is to get the offender to the point where victim reconciliation would be a logical next step. The opportunity for this was not present, however, until restorative justice.

The issue of incentives raises its head at the fourth entry point. Several respondents were concerned that offenders would not agree to participate in a Restorative Justice forum unless they received a substantive benefit. If they were on probation, for example, they could be moved more quickly from an onerous reporting schedule to a minimal one, or to no reporting at all -- an expedited cascading of probation requirements. There could be minimization of restrictions. Incarcerated offenders might be eligible for an earlier release if they agreed to attend a forum. At least, a Parole Board might assess their application more favourably. Although under no illusions about offenders using the new programme to achieve their ends of more lenient treatment and agree to participate cynically, it was pointed out that they would have to appear to meet the requirements of sincerity and responsibility. During the forum the victim would have a chance to speak and perhaps achieve some "closure" regardless of the effects the forum had on the offender.

Other corrections personnel, as well as others in the Working Committee, expressed the concern that there is a perception that restorative justice represents a get-out-of-jail-free card. They countered with two main arguments. First, that no

incentive is intended. On the contrary, the fourth level would be the purest form of restorative justice, when all that was left would be healing and closure; reconciliation and reintegration. Second, they believed that the programme would not have a great impact because it would not affect many youth and that they would be very careful in their screening. In addition, since most youth at Waterville received sentences of six months or fewer, the preconditions for restorative justice would be unlikely to be generated. Restorative justice is limited, then, by the usual length of the sentence. Under the Young Offenders Act, the first priority for participation in diversion is that it is not inconsistent with the protection of society. That may inhibit the referral of youth cases to Restorative Justice.

Overall, restorative justice at level 4 will not make a substantial difference. What would be more likely to make a positive difference would be at the earliest stages of intervention. What might actually reduce recidivism, it was suggested, would be family-level intervention, involving the offender and the family in joint counselling. From several sources the point was made that programmes like restorative justice are after-the-fact and that the better way to reduce recidivism would be to identify the wider social and economic factors inducing much of the crime.

It was considered unlikely that any restorative justice initiative at the pre-incarceration stage would have much impact on correctional institutions such as the Waterville Youth Centre because, by the time offenders get to incarceration at that level, they have gone through all other available options, a situation that would continue to be true. Some anticipated that the initiative might reduce the number of youth sent to the Shelburne provincial institution (for girls and for boys under 16). Clearly, however, the expectation of restorative justice advocates is that offenders will be diverted from incarceration and this should have an impact on the numbers of people jailed in both institutions.

## **Domestic and Sexual Violence**

Domestic assaults (spousal/partner violence) are Level 3 offences and can only be handled post-conviction and post-sentencing according to the Programme (1998: 16). Even level 1 sexual assaults are also re-defined as Level 3 and can only be referred post-sentence. There was sharp disagreement, however, about whether such cases should be included at Level 2 (and hence be eligible at all four entry points). Some respondents believed that most of these cases are often good candidates for RJ. Most victims of domestic abuse, in a couple of weeks, are trying to have the charges dropped, it was claimed. The level of intimacy involved should provide a foundation for successful Restorative Justice.

Among victim-oriented respondents, however, it was argued that the programme was too offender-oriented. Victimized women would be unable to speak in the forum, unable to tell the truth. They would still be silenced by the presence of the offender and, quite realistically, fear retaliation. Their participation in the forum would be compelled by the abuser who would be seeking some substantive advantage. It would not, then be genuinely voluntary. Particularly considering younger victims, it

was suggested that there ought to be a minimum age of consent to take part in a Restorative Justice forum. Victims' representatives raised concerns about the absence of a victim veto on the process. They anticipated that RJ would, in many cases, result in further victimization of the most vulnerable.

One response to these concerns was that the abused victim, such as a spouse could still remain silent at a forum while other participants actively shamed the offender.

In sum, the programme, then, excludes sexual and family violence until the later entry points. There was considerable disagreement about whether this should be a blanket policy, decided on a case by case basis, or whether RJ as conceived is appropriate in any cases involving intimate violence.

## **Down-loading**

Among those who were more cautious about restorative justice, there was a tendency to complain that the initiative is being put into place in the absence of sufficient resources to actually implement it. The initiative was compared to Conditional Sentencing, regarded as a scheme devised by the federal Government and then imposed on provinces without the necessary enrichment of resources to make it work. Conditional sentencing involves extensive community supervision and control, and is much more intensive than routine probation orders, but it was implemented in the absence of additional hiring (although additions are being made after the fact). Restorative justice, similarly, may amount to down-loading onto agencies that are already overworked and onto volunteers who are being asked to do more and more. So while RJ will save money in court time and incarceration, it is not likely that the resources to adequately do RJ will be allotted to the agencies (like probation) or to counselling programmes. Town police added that the potential savings would accrue to the province while potential additional costs (officer time and overtime) would be borne by the municipalities without additional financial assistance from the province.

## **Resources**

One of the motivations for restorative justice is to reduce costs. Putting them in jail is much more expensive than having them on probation, or having volunteers monitor community service. However, should the programme expand to multiple and more serious offenders, volunteers will be unprepared to deal with them. If done properly, restorative justice would not save money because every dollar that was not spent on court or jail would be diverted to resources such as counselling, sexual offender treatment, anger management, or alcohol dependency. It was suggested that, in the frequently cited example of New Zealand, while the prison population was substantially reduced, there was no equivalent increase in resource allocation for community services. Elsewhere, mechanisms have been established, such as mental health services attached to the courts, educational resources, or programmes that offenders have access to through court orders. In the smaller towns in Nova Scotia,

however, resources are scarce, programmes are unavailable or have lengthy delays. If institutional confinement is successful, offenders are brought to the point where their behaviour is under control, but they are then dropped back into the community, their schools, with no follow-up, no community programming, and no real supervision. For provincially incarcerated youth, there are no CRCs they can be sent where they can exercise some degree of responsibility while still being supervised and guided.

### **Role of Community-Working Group**

The final point that I wish to discuss at this stage is the role of the Working Group in the future. While essential at the initial stages, it was unclear what role the regional Working Committees would have in the future. Some expected them to continue throughout the two-year implementation stage (Phase One and Phase Two). They could also continue beyond this period as a forum for communication among the diverse interest-groups in the justice system. However, in rural areas there may already be considerable informal sharing of information that would not be much enhanced by a formal structure. Members of the Working Committee may also not perceive their role as acting as liaison with their working constituency (a representative from Probation Services with other probation officers, for example).

### **Conclusion**

At this pre-implementation stage, it is only possible to raise potential problems and issues. This is a very large-scale programme, soon to be province-wide and to involve all components of the justice system. In this respect, despite the inappropriateness of the "theoretical elephant" under which the programme was developed, it is a major undertaking.

More likely, however, is that what will emerge from the implementation of the programme is an expanded version of alternative measures, to include some adults as well as youths, and to include recidivists. This is the "programmatic mouse" that results from the "theoretical elephant". In itself, this is a useful reform. In most cases, diversion from the formal court/corrections system is a positive occurrence. The most supportive respondents were those Crown Attorneys who anticipated a lighter workload if diversion were expanded, and the workers in the Alternative Measures Societies who recognized an opportunity to expand their agencies, their resources, and their material status in the justice system.

There will be relatively few Restorative Justice hearings emanating from Corrections (post-sentence). Judges may use the Restorative Justice Committee to conduct pre-sentence hearings (like a pre-sentence Report prepared by a Probation Officer). The philosophical core of the RJ programme – victim satisfaction – will likely be more elusive. Most victims are not oriented towards reconciliation, forgiveness, and reintegration. Offenders and victims are often not part of an identifiable community; they often do not possess shared cultural values. The conditions within which Restorative Justice putatively emerged – relatively small, homogeneous communities –

are not easily reproduced in urban society, even in its small town Nova Scotian approximation.

## **SOURCES**

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