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### The Challenges of Institutionalizing Comprehensive Restorative Justice: Theory and Practice in Nova Scotia

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The Challenges of Institutionalizing  
Comprehensive Restorative Justice:  
Theory and Practice in Nova Scotia†

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*The Nova Scotia Restorative Justice Program ("NSRJ") is one of the oldest and by all accounts the most comprehensive in Canada. The program centres on youth justice, and operates through referrals by police, prosecutors, judges and correctional officials to community organizations which facilitate restorative conferences and other restoratively oriented processes. More than five years of NSRJ experience with thousands of cases has led to a considerable rethinking of restorative justice theory and practice in relation to governing policies, standards for program implementation and responses to controversial issues. The purpose of this paper is to explore the significance of the Nova Scotia experience to date for sustaining restorative justice beyond the pilot project stage, where a vision of community-based justice is institutionalized with the support of considerable state resources. The first part of the paper explains the genesis, structure, theoretical goals and empirical evaluation of the program to date. The second part examines some of the challenges of institutionalizing comprehensive restorative justice. The paper concludes with general observations about the broader implications for restorative justice theory and practice of the Nova Scotia experience.*

*Le programme de justice restaurative (le « PJR ») de la Nouvelle-Écosse est l'un des plus anciens et, à tous égards, l'un des plus complets au Canada. Le programme s'intéresse particulièrement à la justice pour les jeunes, et il intervient à la suite de signalements par des policiers, des avocats de la poursuite, des juges et des agents des services correctionnels à des organisations communautaires qui organisent des conférences sur la justice restaurative et d'autres activités axées sur la réparation. L'expérience acquise au cours de plus de cinq années d'activités du PJR en Nouvelle-Écosse et grâce à des interventions dans des milliers de dossiers a mené à des rajustements profonds de la théorie et de la pratique en matière de justice restaurative par rapport aux politiques en vigueur, aux normes de mise en œuvre des programmes et des réponses à des questions qui prêtent à controverse. Cet article cherche à déterminer l'importance de l'expérience à ce jour, en Nouvelle-Écosse, de la poursuite du projet de justice restaurative au-delà de l'étape du projet pilote, alors que la vision de justice communautaire est institutionnalisée et bénéficie du soutien de ressources considérables de l'État. La première partie de l'article explique la genèse, la structure, les objectifs théoriques et l'évaluation empirique du programme jusqu'à maintenant. La seconde examine certains défis à relever pour institutionnaliser un système complet de justice restaurative. En conclusion, l'auteur formule des observations d'ordre général sur les incidences de grande portée de l'expérience néo-écossaise pour la théorie et la mise en pratique de la justice restaurative.*

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*Introduction*

The Nova Scotia Restorative Justice Program (“NSRJ”) is one of the oldest and by all accounts the most comprehensive in Canada.<sup>1</sup> The program got underway in 1999 as a pilot project in four Nova Scotia communities<sup>2</sup> and by November 2001 had been extended to the whole province. It is now an established program with over \$1.5 million in funding under the annual budget of the province’s Department of Justice. The currently funded program is oriented chiefly to twelve- to seventeen-year-old

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1. The program, which was conceived in 1997, developed in the subsequent two years, and first implemented in 1999, serves a province with a small population of slightly under a million people. See Nova Scotia, Department of Justice, *Restorative Justice: A Program for Nova Scotia*, (Halifax: Department of Justice, 1998) [June 1998 Program Document]. See also: Bruce P. Archibald, “A Comprehensive Canadian Approach to Restorative Justice: The Prospects for Structuring Fair Alternative Measures in Response to Crime” in Don Stuart, R.J. Delisle & Allan Manson, eds., *Toward a Clear and Just Criminal Law: A Criminal Reports Forum* (Toronto: Carswell, 1999) 520. For a description of Canadian restorative justice projects in place just prior to the development of the Nova Scotia Program, see *Satisfying Justice: A Compendium of Initiatives, Programs and Legislative Measures* (Ottawa: Church Council on Justice and Corrections, 1996).

2. The original four communities were the Cape Breton Regional Municipality, Halifax Regional Municipality, Cumberland County, and the Kings/Annapolis/West Hants Region of the province which comprised both urban and rural settings.

youth in conflict with the law and those they have harmed,<sup>3</sup> although the Royal Canadian Mounted Police (“RCMP”) employs restorative justice in adult matters.<sup>4</sup> The program has from the outset espoused the aim of becoming a comprehensive alternative to the mainstream punitive and/or rehabilitative criminal justice system for both youth and adult offenders.<sup>5</sup> This is consistent with NSRJ’s commitment in principle to goals which embody a broadly conceived restorative theory of justice<sup>6</sup> with potentially far reaching implications not only for offenders, victims and their families, but also for communities at large.

Over five years of NSRJ experience with thousands of cases, recently the subject of empirical evaluation,<sup>7</sup> has led to a considerable rethinking of restorative justice theory and practice in relation to governing policies, standards for program implementation and responses to controversial issues. Structuring quality restorative processes, ensuring equality in program service delivery, controlling tendencies toward bureaucratization, balancing offender and victim concerns, and encouraging restorative community development are the kinds of issues which have all been central to the program’s evolution. The purpose of

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3. The youth aspect of the program now falls under the *Youth Criminal Justice Act, S.C. 2002, c. 1* [YCJA], in force April 1, 2003, as a program of “extra-judicial measures” and “extra-judicial sanctions” pursuant to sections 4-12 of that Act.

4. Jharna Chatterjee, ed., *Proceedings of Achieving Justice with the Community in Canada: Restorative Justice – The Role of Police* (Ottawa: Research and Evaluation Branch, Community, Contract and Aboriginal Policing Services Directorate, Royal Canadian Mounted Police, 2000); and the Royal Canadian Mounted Police Website, “Restorative Justice” under the heading “Community, Contract and Aboriginal Policing” ([http://www.rcmp.ca/ccaps/restjust\\_e.htm](http://www.rcmp.ca/ccaps/restjust_e.htm)) accessed May 17, 2006. See also the Nova Scotia page on the same RCMP website.

5. See *June 1998 Program Document*, *supra* note 1. See also Bruce P. Archibald, “Citizen Participation in Canadian Criminal Justice: The Emergence of ‘Inclusionary Adversarial’ and ‘Restorative’ Models” in Stephen G. Coughlan & Dawn Russell, eds., *Citizenship and Citizen Participation in the Administration of Justice: Papers presented at a conference organized by the Canadian Institute for the Administration of Justice, held in Halifax, N.S., Oct. 10-13, 2001* (Montréal: Éditions Thémis, 2002) 147 [Archibald, “Citizen Participation”].

6. For a full presentation of restorative justice as a theory of justice, and not simply a collection of dispute resolution techniques, see Jennifer J. Llewellyn & Robert Howse, *Restorative Justice: A Conceptual Framework* (Ottawa: Law Commission of Canada, 1998) [Llewellyn & Howse].

7. See Don Clairmont, *The Nova Scotia Restorative Justice Initiative: Final Evaluation Report* (Bedford, N.S.: Pilot Research, 2005) [Clairmont, *Final Evaluation Report*] which compares the results of an initial set of 2440 exits interviews from the years 1999 to 2001 with a further sample of 3899 interviews collected in the period from 2002 to 2004. In the last year for which data is available (2003-2004), the program dealt with 1401 referrals: see Nova Scotia Department of Justice, *Nova Scotia Restorative Justice Program: Program Activity Report 2003/04* (Halifax: Department of Justice, 2005) [NSRJ Activity Report 03/04]. For further discussion of these results see generally Don Clairmont, “Penetrating the Walls: Implementing a System-Wide Restorative Justice Approach in the Justice System” in Elizabeth Elliott & Robert M. Gordon, *New Directions in Restorative Justice: Issues, Practice, Evaluation* (Cullompton: Willan, 2005) [Elliott & Gordon] 245 [Clairmont, “Penetrating the Walls”].

this paper is to explore the significance of the Nova Scotia experience to date for sustaining restorative justice beyond the pilot project stage, where a vision of community-based justice is institutionalized with the support of considerable state resources.

The paper is divided into two parts. Part One will explain the genesis, the theoretical goals of the program and their empirical evaluation to date, as well as the current structure of the Nova Scotia Restorative Justice Program.<sup>8</sup> Part Two will examine some of the challenges of institutionalizing comprehensive restorative justice in the province, including the politics of gender, the transformation of previously existing community agencies, the correlation between types of restorative process and the seriousness of harm, issues of equity, diversity and cultural difference within and among communities, and the balancing of community control with state superintendence. The paper concludes with some general observations concerning the broader implications of the Nova Scotia experience with restorative justice, as well as proposals for further research involving cooperative partnership among NSRJ stakeholders.

## I. *The genesis, goals and current structure of Nova Scotia restorative justice*

### 1. *The genesis of the Nova Scotia restorative justice program*

The movement toward restorative justice in Nova Scotia was born not of a “grassroots” initiative, but rather from frustration among a key cross-section of criminal justice system stakeholders concerning the inadequacy of the mainstream system’s response to the phenomenon of crime. It was clear that the traditional criminal justice system was not meeting the needs of offenders, victims or communities. Canada’s high levels of incarceration, burgeoning criminal justice system costs and public skepticism about the efficacy of the criminal justice system were all present in the minds of strategically placed policy makers, legal practitioners, correctional officials, victims’ services personnel and academics in Nova Scotia.<sup>9</sup> The *Young Offenders Act* was under attack,<sup>10</sup> and commissions of

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8. Readers unfamiliar with restorative justice in general or its various Canadian incarnations may wish to read Part I Section C immediately for an overview of the structure and operation of the Nova Scotia Restorative Justice Program.

9. See *June 1998 Program Document*, *supra* note 1 at 1.

10. The *Young Offenders Act*, R.S.C. 1985, c. Y-1, which had replaced the ancient *Juvenile Delinquents Act*, R.S.C. 1970, c. J-3 was publicly regarded as “soft on crime” although it had pushed up youth incarceration rates and thereby arguably had exacerbated recidivism. Thus, contrary to public expectations, *Renewing Youth Justice: Thirteenth Report of the Standing Committee on Justice and Legal Affairs* (Ottawa: House of Commons Standing Committee on Justice and Legal Affairs, 1997) at 55 advocated greater use of police cautioning, family group conferencing and circle sentencing.

inquiry had pilloried the criminal justice system for the disproportionate incarceration of Canada's Aboriginal peoples.<sup>11</sup> But Nova Scotia criminal justice professionals were aware of alternatives developing elsewhere. Circle sentencing was being explored by certain Canadian judges in Aboriginal communities,<sup>12</sup> and the word about restorative justice success in Australia and New Zealand had spread.<sup>13</sup> Moreover, a study conducted for the Nova Scotia Department of Justice had concluded that the youth diversion program based on "accountability sessions"<sup>14</sup> was not effective, and should be replaced by a model "based on community/victim-offender reconciliation and other restorative justice principles."<sup>15</sup>

Reliable anecdotal evidence reveals that a critical turning point for restorative justice in Nova Scotia was an airplane conversation in early 1997 between the then provincial Minister of Justice and a prominent criminal defence counsel who were both returning from Vancouver after attendance at one of the first large restorative justice congresses ever held in Canada.<sup>16</sup> Subsequent to that conversation, the Deputy Minister of Justice<sup>17</sup> and defence counsel Danny Graham brought together an ad hoc

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11. Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Supply and Services Canada, 1996); Public Inquiry into the Administration of Justice and Aboriginal People, *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People*, vol. 1 by A.C. Hamilton & C.M. Sinclair (Winnipeg: The Inquiry, 1991).

12. See Barry Stuart, "Circle Sentencing in Canada: A Partnership of the Community and the Criminal Justice System" (1996) 20 *Int. J. Comp. & App. Crim. Just.* 291 and Curt Taylor Griffiths, "Sanctioning and Healing: Restorative Justice in Canadian Aboriginal Communities" (1996) 20 *Int. J. Comp. & App. Crim. Just.* 37.

13. John Braithwaite gave a lecture at Dalhousie University in 1995 which vaunted the virtues of restorative justice and sparked the interest of certain Nova Scotia criminal justice policy makers in attendance. See John Braithwaite, "Restorative Justice and a Better Future" (1996) 76 *Dalhousie Review* 9.

14. Accountability sessions generally involved a young offender and his parents being read the riot act in a community justice setting, after he or she had acknowledged responsibility as a quid pro quo for being diverted from the formal youth court. This process was based, essentially, on 1970s labelling theory which held that stigmatization of offenders through criminal conviction leads to greater recidivism: see Law Reform Commission of Canada, *Diversion: Working Paper no. 7* (Ottawa: The Commission, 1975); Solicitor General Canada, *Diversion from the Juvenile Justice System and its Impact on Children: A Review of the Literature* by Sharon Moyer (Ottawa: Minister of Supply and Services, 1980); and Jacqueline Aubuchon, "Model for Community Diversion" (1978) 20 *Can. J. of Crim.* 296. We return, below, to the question of these accountability sessions as administered by "alternative measures societies" and their lingering consequences.

15. Nova Scotia, Department of Justice, *Alternative Measures in Nova Scotia: A Comprehensive Review* by Andrew Montgomery (Halifax: Department of Justice, 1997) [Montgomery].

16. As explained by one of the participants shortly afterwards to current author Bruce Archibald. The Minister of Justice was Jay Abbass and the defence counsel was Danny Graham, who later worked for the federal government on restorative justice issues and then became leader of the Nova Scotia Liberal Party during a period in opposition.

17. Gordon Gillis was Deputy Minister of Justice at the time.

committee which organized a conference on restorative justice to which were invited a number of experts who had experience with restorative justice in other parts of Canada,<sup>18</sup> plus a large number of local criminal justice stakeholders.<sup>19</sup> The Nova Scotia Department of Justice agreed to co-ordinate a process for setting up a restorative justice project. A “Restorative Justice Co-ordinator” was hired by the Department.<sup>20</sup> A Restorative Justice Steering Committee was established with representation from the major institutional players in the criminal justice system as well as justice-oriented community organizations.<sup>21</sup> This Steering Committee facilitated a year-long consultation process conducted by four sub-committees— one for each of the four proposed restorative justice entry points: police, prosecutors, judges and correctional officers. These were the criminal justice services which would make vital discretionary decisions in relation to offenders and victims in any restorative justice program. The steering group drafted the program authorization<sup>22</sup> and framework guidelines<sup>23</sup> for the Nova Scotia Restorative Justice Program over a number of months. The program was up and running in its four pilot areas by November, 1999.

The foregoing narrative on the genesis of the program provides the context for making several important interconnected points about the Nova Scotia restorative justice initiative. Firstly, the program from the outset was

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18. Prominent were: Cleve Cooper, Deputy Commissioner of the RCMP in Ottawa, who was spearheading that organization’s drive to train members of the force in facilitating police-led “restorative justice forums” on the Australian “Wagga Wagga” model with training from Transformative Justice Australia and Cooper’s own experience as an officer in Aboriginal communities of western Canada; Lorraine Berzins from the Church Council on Justice and Corrections, which had recently published its compendium *Satisfying Justice*, *supra* note 1; and a representative from the Saskatchewan Department of Justice who made a presentation on Saskatchewan’s restorative justice program cleverly entitled “Getting Smart about Getting Tough.”

19. At this conference, held in September 1997, there were representatives from community organizations (including “alternative measures” societies and Aboriginal community leaders), police departments, the public prosecution service, the provincial corrections service, victims’ services, Department of Justice policy makers, legal academics and social scientists, and a smattering of politicians.

20. This was Judy Fowler, a dynamic young lawyer with policy-making experience in government.

21. The steering committee’s initial membership included representation from the provincial Department of Justice, corrections services, policing services, victims’ services, the RCMP, Nova Scotia Legal Aid, Halifax Regional Municipality, the alternative measures societies, the Mi’kmaq Justice Institute and Dalhousie University.

22. The program authorization, signed on June 15, 1999, was simultaneously a program authorization under section 717 of the *Criminal Code* of Canada, a program authorization under section 4 of the federal *Young Offenders Act*, a guideline under section 6(a) of the *Public Prosecutions Act*, directions to police officers under section 717(1)(f) of the *Criminal Code* and section 4(1)(f) of the *Young Offenders Act*, and authorization to the police, prosecution service and correctional officials to establish guidelines and directives consistent with the program to carry out its objectives.

23. *June 1998 Program Document*, *supra* note 1.

conceived as a partnership between the state and various communities. Community justice organizations were present from the beginning, in the form of alternative measures societies and representatives from Aboriginal communities, but they were not initiators of the program. Criminal justice system actors, opinion leaders and administrators were at the forefront. Although there was a desire to enhance community empowerment, rhetoric about the state having “stolen the conflict” from the victim and the offender had little purchase.<sup>24</sup> Thus, the common conceptual triad at the basis of much restorative justice literature, which posits a relationship between offender, victim and community (which is typically narrowly conceived), is an inadequate conceptual schema for restorative justice in Nova Scotia insofar as it excludes a formal acknowledgement of the role the state.<sup>25</sup>

Secondly, NSRJ is not simply linked to private law notions of alternative dispute resolution, where the goal of the alternative process is “getting to yes” between two private parties.<sup>26</sup> In other words, it is more than victim-offender mediation.<sup>27</sup> Indeed, to the extent that the Nova Scotia program is about a response to criminal harms, it rests on the foundation of a public interest in the processes and outcomes of restorative justice. There is public participation in the resolution of a case referred to restorative justice in NSRJ in that the state has established a fair, equitable and publicly regulated set of standards for the process, and the details of particular process outcomes are in the hands of community representatives, as well as victim and offender families and supporters.

Thirdly, there may be a sense in which the historical genesis and conceptual foundations of the Nova Scotia Restorative Justice Program can be seen as quintessentially Canadian. From the National Policy of the first federal government of Canada in 1867, through the creation of a

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24. This rhetoric is often advanced by those who cite with favour this famous rallying cry from the article by Nils Christie, “Conflicts as Property” (1977) 17 *Brit. J. Criminology* 1.

25. An exception to this common approach is Dan Van Ness who puts restorative justice in a circle with four quadrants: victim, offender, community and state. See Daniel W. Van Ness & Karen Heetderks Strong, *Restoring Justice*, 2<sup>nd</sup> ed. (Cincinnati: Anderson, 2002). See also Llewellyn & Howse, *supra* note 6. Exploration of the role of the state in restorative justice requires further attention. Conceptually this role might be viewed either as a fourth institutional player or as part of a broader and more nuanced conception of community within restorative justice theory and practice.

26. This is the mantra of the alternative dispute resolution (ADR) movement in the civil justice context: see Roger Fisher & William Ury with Bruce Patton, ed., *Getting to Yes: Negotiating An Agreement without Giving In*, 2d. ed. (London: Random House, 1999).

27. See Jennifer J. Llewellyn, “Doing Justice to ADR,” on file with the author. Much of the restorative justice literature identifies victim-offender mediation as restorative justice, which is problematic not only for the fact that it commonly misses or obscures the role of the state but insofar as it often relies upon the facilitator to inject community views and interests into the process.



national unemployment insurance scheme in the immediate post-World War Two period and the setting of national standards for public medicare in the 1960s, the state has been viewed as a facilitator and ally, rather than an impediment or enemy, in the achievement of public and community goals. Thus, while some cynics may see restorative justice simply as a means of down-loading justice from the state to local communities, there is a loftier set of Canadian traditions and values through which restorative justice in Nova Scotia is refracted.<sup>28</sup> Indeed, these underlying values explain the ease with which the architects of NSRJ recognized and embraced balanced roles for the state and community in restorative justice.

## 2. *Nova Scotia restorative justice goals and their evaluation: taking stock*

The four formal goals of NSRJ are astoundingly broad in comparison to many criminal justice programs.<sup>29</sup> These goals clearly reflect the conceptual underpinnings of the program and the interests of the criminal justice players involved in its founding. They are: 1) to reduce recidivism; 2) to increase victim satisfaction; 3) to strengthen communities; and 4) to increase public confidence in the justice system. These goals are supplemented by four more precise “objectives.” These objectives are: 1) to provide a voice and an opportunity for victims and communities to participate; 2) to repair harms caused by offences; 3) to reintegrate offenders; and 4) to hold offenders accountable in meaningful ways.<sup>30</sup> In the brief discussion which follows, we will concentrate on the goals, with reference to the manner in which they relate to the underlying objectives,

28. The danger of government down-loading or off-loading programs and their associated expenses to the community is of course a constant worry and an issue that animates many of the discussions related to the operation of NSRJ: see discussion in Part II Section B below.

29. See Nova Scotia, Department of Justice, *Restorative Justice Program Protocol* (Halifax: Department of Justice, 2005) [*RJ Protocol*]. The original founding document, *June 1998 Program Document*, *supra* note 1, divided the four program goals by labelling the first two as “primary” and the second two as “secondary.” This distinction, perhaps fortuitously, has been dropped in the present protocol.

30. If restorative process outcome agreement compliance rates are any indication of the program’s success in meeting the objectives of “repairing the harm caused by the offence” and “holding the offender accountable in a meaningful way,” then NSRJ seems to be doing rather well. Successfully concluded agreements were achieved in 1188 of the 1343 cases processed to conclusion in 2003/2004, which constituted a compliance rate of eighty-eight per cent (down from ninety-two per cent in 2002/2003). In five per cent of closed cases in 2003/2004 no agreement was reached and the matter was sent back to the original referring agency for a decision on a formal court process. In the other seven per cent in 2003/2004 there was non-compliance with the actual agreement, and the case was returned to the referral source for formal enforcement: see *NSRJ Activity Report 03/04*, *supra* note 7 at 13. Anecdotal evidence would suggest that these compliance rates are far higher than for compliance with conditions in conditional sentence and probation orders resulting from court process. This is clearly an area where further empirical research is needed. See also Clairmont, “Penetrating the Walls,” *supra* note 7.

as well as explain the empirical data which assesses their implementation thus far and the extent to which the program is realizing these goals and objectives. The main purpose of the discussion, however, is to determine the nature of the theoretical and conceptual principles which are revealed by the particular articulations of these goals and objectives.

It is helpful to first identify the broad conception of restorative justice animating the development and operation of the Nova Scotia program. As will become clear throughout the more detailed discussion that follows, at its inception NSRJ was to be more than a simple process alternative within the existing criminal justice system. The attraction of restorative justice in the province was the promise of doing something different in response to criminal wrongdoing and not simply a new way of doing the same old thing. Although some restorative justice advocates and programs view it as the criminal law version of civil alternative dispute resolution, to do so can obscure the fundamentally new conception of justice that restorative justice offers. Restorative justice fully understood is a theory of justice—in its goals and what it requires in response to wrongdoing.<sup>31</sup> Conceived of in this fuller sense, restorative justice is grounded in a relational conception of justice. Justice viewed through this lens is concerned with the harm to relationships resulting from wrongdoing.<sup>32</sup> The task of justice in the face of wrongdoing is to restore those relationships harmed by wrongdoing to ones of social equality. Social equality here refers to equality in relationship and is marked by mutual concern, respect and dignity. Restorative justice thus takes as its aim the establishment of equality in relationships and not as it is often presented in its more romanticized version the reconciliation of personal relationships typified by the sentimental goal of “kiss and make up.” Nor is restorative justice committed to restoration in the sense of a return to the state of things before the wrongdoing. Indeed, the goal of social equality requires a return in the sense of realizing something inherently possible and desirable owing to the relational nature of our selves as human beings. Thus, the aim is restoration to our full potential as relational beings who flourish when accorded equal concern, respect

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31. See generally Llewellyn & Howse, *supra* note 6.

32. Understood in this way restorative justice is not, as some of the literature suggests, limited to a conception of criminal justice but is rather a more comprehensive conception of justice with purchase in response to wrongdoing beyond the criminal realm. For the purposes of this discussion, however, we will explore how restorative justice is understood and operationalized within the Nova Scotia program which is integrated as part of the criminal justice system.

and dignity.<sup>33</sup> The following brief examination of the goals and objectives underpinning the NSRJ program reveals the grounding and commitment of the program to this relational conception of justice.

The first program goal is the reduction of recidivism. The restorative justice program is founded on the belief in relation to recidivism that “face to face meetings between offenders and victims can have a profound effect” on future offender behaviour.<sup>34</sup> In addition, restorative justice processes provide opportunities “to focus on the underlying causes of criminal behaviour and the constructive reintegration of the offender into the community.”<sup>35</sup> The objectives of reintegration and offender accountability involve, among other things, a demonstration that the offender understands and can address the problems which may have contributed to the wrongdoing, participate in a process focused on responsibility and obligation, and take the opportunity to “make things right” and ask for help with problems which may have contributed to the wrongdoing.<sup>36</sup> All of this would appear to relate to the familiar concern over re-offending, but it is a far cry from the rhetoric of punishment and deterrence generally associated with the traditional criminal justice system.<sup>37</sup> Instead, implicit here is a conception of restorative justice as a relational theory of justice, which places the reduction of recidivism in the context of how the offender interacts with and responds to others.

Implementation of the foregoing goals and objectives might be thought to represent “making the offender accountable in a meaningful way,” as would compliance with outcome agreements. But the program’s high compliance rates, in the range of ninety per cent,<sup>38</sup> may not necessarily

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33. For a full discussion of restorative justice as a theory of justice see Llewellyn & Howse, *supra* note 6; Jennifer J. Llewellyn, “Dealing with the Legacy of Native Residential School Abuse: Litigation, ADR, and Restorative Justice” (2002) 52 U.T.L.J. 253 [Llewellyn, “Legacy”]; Jennifer Llewellyn, “Restorative Justice in Transitions and Beyond: The Justice Potential of Truth Telling Mechanisms for Post-Peace Accord Societies” in Tristan Anne Borer, ed., *Telling The Truths: Truth Telling and Peace Building in Post-Conflict Societies* (Notre Dame: University of Notre Dame Press, 2006) 83.

34. *June 1998 Program Document*, *supra* note 1 at 5.

35. *Ibid.*

36. *RJ Protocol*, *supra* note 29 at 2-3.

37. *Criminal Code* section 718, of course, states that the fundamental principle of sentencing is to contribute to the maintenance of a just, peaceful and safe society through denunciation of unlawful conduct, general and specific deterrence, separation of offenders from society where necessary, rehabilitation, reparation to victims and the community, and promotion of a sense of responsibility among offenders. Punishment is not a statutory purpose of the criminal law. This perception is largely absent from public debate in the media, and even the Supreme Court of Canada wrongly asserts that punishment is a legitimate purpose of sentencing: see *R. v. Gladue*, [1999] 1 S.C.R. 688. For a discussion of these issues, see Bruce P. Archibald, “Coordinating Canada’s Restorative and Inclusionary Models of Justice: The Legal Profession and the Exercise of Discretion under a Reflexive Rule of Law” (2005) 9 Can. Crim. L. Rev. 215 [Archibald, “Models of Justice”].

38. *Supra* note 30.

correlate with low recidivism rates. In fact, it turns out that the program's impact on recidivism is very difficult to measure and assess.<sup>39</sup> Don Clairmont's evaluation of the program concludes: "Clearly the recidivism associated with the RJ option is less than that associated with court processing..."<sup>40</sup> He cautions, however, that it is difficult to interpret this data, since there was no random assignment of cases between restorative and court processes, though he does point out that the restorative option is being used for increasing numbers of cases of great harm and seriousness. It is of interest to note, however, that Restorative Justice Information System data indicates a recidivism rate of twenty per cent among those being referred to restorative process.<sup>41</sup> As to patterns of recidivism, Clairmont's analysis reveals comparatively higher rates of recidivism among youth in metropolitan Halifax as opposed to other areas of the province, for males as compared to females, and in the Halifax region for Afro-Nova Scotians as opposed to Caucasian youth.<sup>42</sup> The implications of these latter observations will be developed further below.

The second stated goal of NSRJ is to increase victim satisfaction with the justice system. The inclusion of this goal was linked to the concern that "[t]he victim's voice is rarely heard in the formal justice system."<sup>43</sup> While this statement is less true now than was formerly the case,<sup>44</sup> it is surely correct that victim participation in a restorative process (whether mediation session, family group conference or sentencing circle) will doubtless be more likely than a criminal trial to bear out the program's subsequent claim: "By having a forum in which they can discuss the impact of the offence, and assist in the identification of the reparative

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39. There are two data collection systems operated by the Nova Scotia Department of Justice which must be analyzed and compared in order to get a handle on recidivism. The mainstream Justice Oriented Information System ("JOIS" – recently updated as the "Justice Enterprise Information Network" with a new acronym, "JEIN") has overall data for adults and youth offenders in Nova Scotia courts. The Restorative Justice Information System ("RJIS") has data relating to young offenders referred to restorative justice processes. Both must be examined, since depending on what decisions are made in terms of police or prosecutorial discretion, any individual recidivist can turn up in either system, and since RJIS deals with youths only, one may be interested to see what happens to individuals after they reach the age of majority in the JOIS/JEIN data base. There is also a relatively good data set maintained by the Halifax Regional Police Service on these issues. Finally, Don Clairmont has data on "self-reported re-offending" obtained by follow-up interviews conducted some considerable time after restorative justice sessions.

40. Clairmont, *Final Evaluation Report*, *supra* note 7 at 171-179.

41. *Ibid.*

42. *Ibid.*

43. *June 1998 Program Document*, *supra* note 1 at 5.

44. Archibald has argued elsewhere that the formal justice system in Canada, which has opportunities for victim participation at virtually every stage, should now be labelled a "formal inclusionary model": see Archibald, "Citizen Participation," *supra* note 5; and Archibald, "Models of Justice," *supra* note 37.

measures to be taken, victims will derive greater satisfaction.”<sup>45</sup> Pursuant to the objective of providing a voice and an opportunity to participate for the victim, the *RJ Protocol* speaks of explaining why a restorative justice referral was made, ensuring a victim the chance to “talk about his/her feelings, concerns and experience in a safe and supportive environment,” and giving “updates of any outcomes or processes.”<sup>46</sup> Once again, it can be seen that NSRJ’s founding documents, and most recent operational precepts, make a commitment to a relational conception of justice, rather than to a simple concern with deterring or rehabilitating the offender or with mere compensation of the victim in some form of compensatory, corrective justice.<sup>47</sup>

In relation to the program’s second goal of victim satisfaction, the empirical data strongly supports the proposition that NSRJ is actually achieving considerable victim satisfaction.<sup>48</sup> In exit surveys, eighty-two per cent of 445 victims disagreed or strongly disagreed with the statement: “for me, this conference was disappointing.”<sup>49</sup> In response to the statement “I am satisfied with what the agreement requires the offender to do,” ninety-two per cent of victims agreed or strongly agreed.<sup>50</sup> Ninety-five per cent of the victims agreed or strongly agreed with the proposition that there were people at the conference who supported them, and ninety-nine per cent agreed with the statement that they were treated fairly in the process.<sup>51</sup> Eighty-six per cent of victims agreed or strongly agreed with the statement “I would recommend conferences like this to deal with offences like this one.”<sup>52</sup> Indeed, these glowing responses were similar to the views of other participants, that is, victims’ supporters, offenders, offenders’ supporters and various “neutrals.”<sup>53</sup> Clairmont notes that victims were less sure than offenders that “I think this conference will help

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45. *June 1998 Program Document*, *supra* note 1 at 5.

46. *RJ Protocol*, *supra* note 29 at 1-2.

47. For a discussion of the relationship between these goals and theories and restorative justice see Llewellyn & Howse, *supra* note 6. Also for a discussion of the relationship between restorative and corrective conceptions of justice see Llewellyn, “Legacy,” *supra* note 33.

48. The figures in this paragraph concerning victim surveys and follow-up interviews relate to individual persons as victims. It should be noted, however, that for the 2003/2004 statistical year, of the 1212 cases referred to restorative process which involved victims, the break-down of victim categories was as follows: Persons – sixty-five per cent; Corporate Retail – eighteen per cent; Other Corporate – eight per cent; Public Property – four per cent; Schools – four per cent: see *NSRJ Activity Report 03/04*, *supra* note 7 at 10.

49. Clairmont, *Final Evaluation Report*, *supra* note 7 at 65-131 and Table A-4 at 79.

50. *Ibid.* Table A-4.

51. *Ibid.*

52. *Ibid.*

53. Clairmont, *Final Evaluation Report*, *supra* note 7 at 65-71.

the offender to stay away from crime,<sup>54</sup> however, only thirty-two per cent of victims agreed or strongly agreed that “[t]his kind of conference helps the offender more than the victim,” while twenty-six per cent were unsure about this.<sup>55</sup> In the follow-up interviews given to a sample of “victim” survey respondents six months or so after the restorative process, there was “a modest drop-off in satisfaction” along a number of dimensions, but “[o]ver-all the victims generally indicated that the RJ option had many advantages vis-à-vis the court process”<sup>56</sup> and only fourteen per cent of the victims interviewed in follow-up held that “their case should have gone through the court process.”<sup>57</sup> This data is in line with the findings of almost all other empirical studies of victim attitudes toward their experiences with restorative justice—victim satisfaction is, in general, extraordinarily high.<sup>58</sup>

The third and fourth goals of the program, respectively, are “strengthening communities” and “increasing public confidence in the administration of justice.” The program’s original documentation linked these two goals in a concern for professionalization or bureaucratization of the mainstream justice system and a consequent public sense of alienation from it:

The existing formal justice agencies have assumed primary responsibility for crime prevention and crime control. As a result, communities have become increasingly alienated from the justice system. A restorative approach invites the participation of communities in achieving reconciliation between offenders and those harmed through the commission of an offence. Greater participation by communities and victims, and evidence of a more effective justice process will enhance public confidence.<sup>59</sup>

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54. Eighty-five per cent of offenders thought this although only sixty-two per cent of victims did. Clairmont, *Final Evaluation Report*, *supra* note 7, Table A-4 at 79.

55. *Ibid.*

56. Clairmont, *Final Evaluation Report*, *supra* note 7 at 107.

57. *Ibid.* at 108.

58. For a broad empirical assessment of satisfaction with restorative justice outcomes see: Department of Justice, *The Effectiveness of Restorative Justice Practices: A Meta-Analysis* by Jeff Latimer, Craig Dowden & Danielle Muise (Ottawa: Research and Statistics Division, Department of Justice Canada, 2001); also Paul McCold, “A Survey of Assessment Research on Mediation and Conferencing” in Lode Walgrave, ed., *Repositioning Restorative Justice* (Cullompton: Willan, 2003) 67; Leena Kurki, “Restorative and Community Justice in the United States” (2000) 27 *Crime and Justice: A Review of Research* 235; and Jharna Chatterjee, *A Report on the Evaluation of the RCMP Restorative Justice Initiative: Community Justice Forum as Seen by Participants* (Ottawa: Research and Evaluation Branch, Community, Contract and Aboriginal Policing Services, Royal Canadian Mounted Police, c. 2000).

59. *June 1998 Program Document*, *supra* note 1 at 6.

There are a number of possibly controversial premises articulated in this passage in support of the above two program goals. These require empirical assessment in a program evaluation. The first commitment to what might elsewhere be called “community development” through criminal justice would not only seem to be ambitious, but also difficult to evaluate. There are perhaps no incontrovertible proxies for “community development causally linked to restorative justice” which are easily measurable.<sup>60</sup> What can be said definitively on the community development score is that, from the outset, NSRJ was intended to be community-based, with state superintendence concerning basic procedures only.<sup>61</sup> Thus, facilitation of restorative processes, with the exception of circle sentencing run by judges and restorative justice forums run by RCMP officers, is in the hands of community agencies. These agencies are all independent organizations with community boards of directors which direct their full-time, as well as volunteer, staff.<sup>62</sup> The community agencies sign service contracts with the Department of Justice to facilitate restorative justice processes for their

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60. Community agencies and university researchers, along with criminal justice system stakeholders, are currently starting a research program which is intended to address evaluation of the goal of community development in concrete terms: see the discussion of this research plan in the concluding section of this paper.

61. A word may be in order concerning the concept of “superintendence.” Here it means regulatory oversight through promulgation of standards, reporting on performance in relation to such standards, and periodic performance review of community agencies, while leaving daily operational implementation to the independent operation of the community agencies. Nova Scotian lawyers are familiar with the concept of superintendence in relation to the roles of the attorney general and the statutorily independent director of public prosecutions: see *Report of the Royal Commission on the Donald Marshall, Jr., Prosecution: Walking the Tightrope of Justice*, vol. 5 by John L.I. J. Edwards (Halifax: The Commission, 1989) [*Marshall Inquiry Report*]. Others might prefer to substitute the idea of “responsive regulation” for “superintendence”: see John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford: Oxford University Press, 2002) [Braithwaite, *Responsive Regulation*].

62. The current agencies with head locations and county jurisdictions are: John Howard Restorative Justice in Truro (East Hants and Colchester), Community Justice Society in Halifax (Halifax Regional Municipality), South Shore Community Justice in Bridgewater (Queens and Lunenburg), Cumberland County Alternatives Society in Amherst (Cumberland), Island Community Justice Society in Sydney (Cape Breton Regional Municipality and Victoria), Island Community Justice Society in Port Hawkesbury (Inverness and Richmond), John Howard Society Restorative Justice in Westville (Pictou, Antigonish and Guysborough), Southwest Community Justice Society in Yarmouth (Digby, Yarmouth and Shelburne), Valley Restorative Justice in Kentville (Annapolis, West Hants and Kings) and the Mi’kmaq Customary Law Project in Eskasoni (dealing with Aboriginal referrals, province-wide). All together there are about forty full-time staff positions connected to restorative justice in the province and scores of trained volunteers.

areas in accordance with agreed-upon standards and requirements.<sup>63</sup> While a skeptic might think that these agencies are “dependent contractors” in their relationship with the Department of Justice,<sup>64</sup> they are clearly rooted in the communities which they serve. Moreover, many of them are involved with community service activities other than restorative justice. For example, those associated with the John Howard Society are institutionally aligned with other aspects of help to prisoners, and the Mi’kmaq Customary Law Project is part of the Aboriginal community development activities of the Mi’kmaq Legal Support Network.<sup>65</sup> Thus, these agencies have independent capacities and agendas driven by the needs of the communities in which they are located. If restorative justice can boost community development, these agencies are aptly situated to carry out the task. Whether this happens is a very important issue for a restorative justice program grounded in a relational theory of justice.

In the meantime, the Clairmont evaluation looks at the fourth goal—the issue of “public confidence” in the justice system as it relates to restorative justice. Clairmont established a base line of public awareness, or lack thereof, in relation to restorative justice through “elite interviewing” of a sample of community and justice system opinion leaders to whom he returns, and to whom he intends to return again, for follow-up at the conclusion of his evaluation. It will be interesting to see the results. Publicity for NSRJ has been intentionally low-key. It was not widely touted for political purposes by the government which established it, yet it

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63. The *NSRJ Activity Report 03/04*, *supra* note 7 at 6 provides a statistical breakdown of caseloads for each of the agencies. Identified by the location of their headquarters, the distribution of the 1401 referrals for 2003-2004 in absolute numbers and percentage terms is as follows: Halifax – 515 (36.8%), Sydney/Cape Breton – 227 (16.2%), Kentville – 182 (13.0%), Westville – 126 (9.0%), Bridgewater – 105 (7.5%), Amherst – 92 (6.6%), Yarmouth – 92 (6.6%), and Truro – 62 (4.4%). As we discuss further in the next section, the initial implementation of the NSRJ program did not provide specific and detailed practice standards to guide the agencies in their implementation. The absence of such standards also made government supervision and evaluation of the agencies’ services difficult. This issue prompted a collaborative consultation process resulting in the development of common practice standards, which are discussed below in Part II Section B.

64. The notion of a “dependent contractor” is borrowed from labour law, where it is generally understood to mean a person in a vulnerable work relationship which, while taking the form of a contractual relationship between equals, is in fact a relationship of subordination more akin to that between employer and employee to which trade union act protections may attach.

65. There exists a Tripartite Forum among the Nova Scotia government’s Office of Aboriginal Affairs, the Aboriginal Justice Directorate of the federal department of justice and the Union of Nova Scotia Indians, which has conducted successful discussions concerning various aboriginal issues, treaty rights and constitutional rights. A Tripartite Forum agreement was signed in 2003/2004 which recognizes the Mi’kmaq Customary Law Program’s unique status as an aboriginal organization and its special relationship to the Nova Scotia Restorative Justice Program. Thus, the status of this organization is different than that of the other community agencies having a simple contractual relationship with the Nova Scotia department of justice: *NSRJ Activity Report 03/04*, *supra* note 7 at 14. See the discussion in the text below starting at note 156.



survived a change of government unscathed—indeed, it was strengthened by the subsequent government as if it had been recognized for its inherent value in a non-partisan sense.<sup>66</sup> While community agencies have promoted their activities in their own locales, there has been an apparent desire to develop a positive track record on the ground and ensure solid community support based on experience with the program before flooding the media with information about restorative justice. At the outset, there was clearly a fear among program administrators that a public relations disaster could occur if a high profile restorative justice referral went sour.<sup>67</sup> This concern is particularly acute given the recent perceived resurgence of a need to be “tough on crime” and a specific concern regarding the youth criminal justice system as being soft on crime.<sup>68</sup> Given the volume of “successful” cases which have now been referred to restorative justice, this conservative communication strategy may well be vindicated. Program administrators and others involved have tended to participate in activities related to Canada’s “Restorative Justice Week,” largely sponsored by the federal correctional service. Thus, “the word is getting out” about restorative justice in Nova Scotia, but only gradually. The early research discussed earlier in relation to victim satisfaction (and indeed participant satisfaction more generally) suggests some significant potential for the program to enhance public confidence in the justice system. However, whether NSRJ has contributed or will contribute to increased public confidence remains an open question which will only be answered by further research.

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66. The government which established NSRJ was led by the Liberal Party, while the subsequent government which has enhanced its status is a Conservative one.

67. This nearly occurred in relation to what has probably been the program’s most high profile case. This was the use of restorative conferencing for a youth and victims of a passenger train derailment where the youth acknowledged that he had broken the lock off a railway switch and opened the mechanism. Cars of the train went off the track and crashed into a building in a rural community. No one was killed, but numerous passengers were injured, some seriously. Some victims were pleased with the restorative process, others were not. The offender, a troubled youth, was later charged with a subsequent unrelated offence involving cruelty to animals. All of this received sensationalist publicity in the Nova Scotia media. Whether this may have had a lasting impact, positive or negative, on public confidence in restorative justice or youth justice is unclear. There was also an early public controversy in relation to the possible use of restorative justice for sexual offences and family violence to which program administrators responded publicly – an issue which has yet to be fully resolved. See text below in Part Two Section A under the heading “The politics of gender and restorative justice.”

68. At the time of writing, there is currently a public inquiry commission in Nova Scotia, led by Supreme Court of Nova Scotia Justice Merlin Nunn, investigating the tragic circumstances of the death of a woman caused by a young person who was driving a stolen car after having been released from custody while awaiting trial on previous matters. The public outcry at the apparent failure of the justice system to prevent this tragedy is mirrored in proposals presently before the Canadian parliament to increase the number of crimes for which mandatory minimum jail sentences are imposed.

3. *The current institutional structure of Nova Scotia restorative justice*

Consistent with the principle of the rule of law, restorative justice in Canada is established by statutory authority. It may be authorized for federal offences pursuant to the *Criminal Code*<sup>69</sup> or the *Youth Criminal Justice Act*<sup>70</sup> by the attorney general of a province who deems such a program of “alternative measures” (under the *Criminal Code*) or “extra-judicial sanctions” (under the YCJA) to be “not inconsistent with the protection of society.”<sup>71</sup> In Nova Scotia it can also be authorized for provincial and municipal offences under the province’s *Youth Justice Act*.<sup>72</sup> Thus certain mandatory minimum statutory conditions must be met in the Nova Scotia restorative justice process: a referral must be appropriate having regard to the victim, the offender and society; the offender must “accept responsibility for the act or omission which forms the basis for a charge”; the offender must “freely and fully consent” to participation in the program; the offender must have been “informed of the right to counsel and given a reasonable opportunity to retain and instruct counsel”; there must be “sufficient evidence to proceed with the prosecution of the offence”; and the prosecution must not be “in any way barred at law.”<sup>73</sup> The statutes thus make clear that the restorative justice process is entirely voluntary from the perspective of the offender, and each authorizing statute states that such process is not to be used if the offender denies involvement in the offence or expresses the wish to have the matter dealt with in court.<sup>74</sup> The latter option becomes a “fail-safe” matter in that both authorizing statutes provide that any acceptance of responsibility, admission or confession made during a restorative process is inadmissible in any civil or criminal proceedings.<sup>75</sup> On the other hand, if there is only a partial fulfilment of a restorative justice agreement by reason of which formal charges are laid in court, the sentencing judge may take this into account, and the court must dismiss a charge if there has been full compliance with a restorative

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69. R.S.C. 1985, c. C-46, s. 717 [*Criminal Code*].

70. YCJA, s. 10. The attorney general of Nova Scotia’s *Restorative Justice Program Authorization* was re-issued on that date to comply with the new statutory regime.

71. This is the curious language of *Criminal Code*, s. 717(1).

72. Stats. N.S. 2001, c. 38, the long title of which is *An Act Providing for Summary Proceedings against Young Persons*. See especially section 10. This legislation was introduced to dovetail provincial procedures with the federal ones under the YCJA.

73. *Criminal Code* s. 717(1), YCJA s. 10(1) and the Nova Scotia *Youth Justice Act* s. 10(2) have only minor differences of language in setting out these requirements.

74. See *Criminal Code* s. 717(2) and YCJA s. 10(3).

75. See *Criminal Code* s. 717(3) and YCJA s. 10(4).

justice outcome agreement.<sup>76</sup> Once again, this is evidence that NSRJ is structured as a complement to the formal criminal justice system, and not in opposition to it.

In addition to the mandatory statutory conditions, the *RJ Protocol* sets out various discretionary factors to guide the exercise of the discretion of the person considering making a restorative justice referral, whether this be a police officer, Crown attorney or correctional official.<sup>77</sup> These include: the cooperation of the offender; the willingness of the victim to participate in the process; the community desire/need for restorative process; the motive behind the offence; the seriousness of the offence and the degree of the offender's involvement in it; any previous relationship between victim and offender; the offender's apparent ability to learn from the process and follow through on an agreement; the significance of a potential agreement to the victim; the nature of the harm done to the victim; whether the offender has previously been referred to a similar program; possible conflict with other government or prosecutorial policies; and other exceptional factors which the decision maker may deem appropriate.<sup>78</sup> A "Restorative Justice Checklist" for use by police and Crown attorneys is attached to the *RJ Protocol*. This checklist sets out the relevant factors governing referral of cases to restorative justice and includes the direction "[i]f not recommending a referral to the Restorative Justice Program, please state reasons."<sup>79</sup> In the minds of some, this was intended to operate as a programmatic presumption in favour of restorative justice; however, it has apparently not had this effect.<sup>80</sup> Nevertheless, it does serve as a reminder to criminal justice system operatives to use restorative justice wherever possible.

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76. See *Criminal Code* s. 717(4) and YCJA s. 10(5). These provisions, of course, are consistent with the procedural principle that an accused must not be subjected to double jeopardy, and they may also have the effect of preventing some forms of "net-widening". On the latter, see the text below in Part II Section C.

77. *RJ Protocol*, *supra* note 29 at 4-6. A mere protocol from the attorney general, as opposed to legislation, cannot direct a judge to exercise his or her sentencing discretion in favour of restorative justice. Thus, these discretionary factors do not apply to judges, although the protocol does make reference to the kinds of support and resources that a judge may receive from the program if he or she wishes to make a restorative justice referral or conduct a sentencing circle: *RJ Protocol*, *supra* note 29 Section III C: Post-Finding of Guilt Referral Process (Referral by Youth Court Judges).

78. *Ibid.* Section Two: Eligibility Criteria.

79. *Ibid.* Appendix A.

80. Don Clairmont reports in conversation with the authors that there is considerable variability among different police services in Nova Scotia as to how these checklists are used, and that many officers do not use or file them as requested. The Halifax Regional Police Force, however, is said to be particularly diligent in fulfilling its obligations with respect to the checklist.

A controlling variable in relation to the exercise of discretion in the NSRJ program is the “offence level” as set out in the *Program Authorization and RJ Protocol*.<sup>81</sup> Level 4 offences, the most serious, are only referable at the corrections (post-sentence) entry point. These are murder and sexual offences prosecuted by indictment.<sup>82</sup> Level 3 offences can only be referred at the court (post-conviction/pre-sentence) entry point or the corrections (post-sentence) entry point. These include fraud and theft relating to more than \$20,000, robbery, summary conviction sexual offences, aggravated assault, kidnapping and like offences, criminal negligence/dangerous driving causing death, manslaughter, spousal/partner violence cases, criminal harassment and impaired driving-related offences.<sup>83</sup> In other words, for Level 4 and 3 offences, restorative justice is not available as diversion from the formal trial, but rather as an adjunct to the sentencing process or to correctional administration. Level 2 offences are by far the largest category, comprising all offences not reserved for Levels 3 and 4.<sup>84</sup> They can be referred for restorative process at all four entry points. This means police and Crowns can refer the vast bulk of criminal and provincial offences to restorative justice as a matter of diversion from prosecution in appropriate cases. Level 1 offences, the most minor, are the ones for which a formal pre-charge caution may be issued by police: provincial liquor control and protection of property offences, minor property offences, disorderly conduct offences, minor assaults with no bodily injury and mischief. In its entirety the schema encourages restorative justice in relation to all offences (excepting sexual and domestic violence, because of a policy moratorium) at appropriate procedural points.

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81. See *RJ Protocol*, *supra* note 29, Appendix B.

82. Murder, of course, is no surprise in this category since it carries a mandatory life imprisonment sentence under *Criminal Code* s. 235. The inclusion of sexual assault in this and the subsequent level lists is somewhat misleading. There is currently a moratorium on the use of restorative justice in relation to all sexual offences and spousal/partner violence offences, which will be discussed below in Part II Section A under the heading “The politics of gender and restorative justice.”

83. The moratorium on sexual and spousal/partner violence will be discussed below.

84. The levels of offences were also modified in the *Motor Vehicle Act and Youth Justice Act (amended)*, S.N.S. 2005, c.32 which amended the *Motor Vehicle Act* to allow, among other things, for the seizure and impounding of motor vehicles involved in racing on highways, and the *Youth Justice Act* to exempt from the operation of the Act, and thus from the restorative justice program, sixteen- and seventeen-year-olds involved with any motor vehicle offence unless designated by regulation. To date there appear to have been no exceptions designated by regulation to allow for restorative justice concerning sixteen- and seventeen year-old youth committing motor vehicle offences. This is a draconian and perhaps dysfunctional response to the tragic death of a woman caused by a repeat offender, and in relation to which there is currently a commission of inquiry: see the reference to the Nunn commission, *supra* note 68.

In some measure the “table of offence levels” is the schematic administrative framework which renders NSRJ a comprehensive program. Moreover, this schema must be kept in mind at all times to prevent the observer from falling into the trap of perceiving restorative justice in Nova Scotia as “merely diversion” or “just soft on crime.” While the program is designed to be used at sentencing and correctional levels, the most recent statistics reveal a different picture as it operates on the ground.<sup>85</sup> Of the 1401 referrals to the program in 2003/2004, fully 57.5% (794) were made by the police. The public prosecution service made 36% (510) referrals. This means that the bulk of agency activity (93.5%) is, in fact, in the nature of diversion from the formal criminal trial. Referrals by the court, either for assistance in establishing a circle sentencing process or for the holding of a community restorative justice conference to provide input at sentencing, accounted for only 1.5%—that is, only twenty-one cases came from the judges. The correctional entry point referrals accounted for 5% (76). More restorative processes were thus requested by probation officers or prison officials than by judges, but the post-conviction and post-sentence cases accounted for only 6.5% of the restorative process in Nova Scotia.<sup>86</sup> In his early preliminary reports, Clairmont described the reluctance of Crown attorneys and judges to make use of restorative process as the program “hitting a wall,” like a marathon runner who must train to overcome inherent limitations.<sup>87</sup> There was some suggestion that adversarial legal training might be the source of the “limiting wall” for NSRJ, or simply a lack of familiarity with the process and awareness of its capabilities.<sup>88</sup> If, as many believe, restorative justice can make a useful contribution at sentencing and at the correctional level, these statistics would indicate that NSRJ is far from reaching its full potential. However, it is perhaps not at all inappropriate that restorative process in Nova Scotia receives its widest application as a diversion strategy intended to “nip harm in the bud.”

While the NSRJ program’s use of levels as a means of ensuring comprehensive access to restorative justice across the scope of criminal offences is admirable, there is some cause for concern with this structure. First, there are theoretical and practical reasons to prefer referrals to

85. The information in this paragraph is drawn from the *NSRJ Activity Report 03/04*, *supra* note 7.

86. It is possible that some judges may have held sentencing circles without the assistance of community agencies funded by the formal Nova Scotia department of justice program. These would not be included in NSRJ statistics; however, there is unlikely to have been more than a handful of such cases.

87. See Clairmont, “Penetrating the Walls,” *supra* note 7. It is to be noted that since Clairmont’s initial observations in this regard, Crown attorneys have been making considerably more use of restorative justice referrals than they were at the outset.

88. *Ibid.*

restorative justice at the early stages of the criminal justice process (at the pre-trial stages) before the adversarial nature of the process structures the relationships of the parties and their expectations.<sup>89</sup> The strict division of the NSRJ program according to these levels of offence also causes some concern with respect to the referral pattern that emerges as a result. It might encourage referral of the less serious cases to restorative conferencing, while reserving the more serious and complex cases for traditional, adversarial court process—thereby denying community agencies opportunities to develop the capacity to deal with more complex and serious cases. Furthermore, these levels do not serve as good markers for determining which cases will benefit most from or are most appropriate for a restorative justice approach. The level of the offence as determined by its seriousness within the hierarchy of the current criminal justice system does not necessarily map onto the factors most significant for deciding upon the appropriateness of restorative justice. For example, some lower level offences most likely to be referred to restorative justice may actually stand to benefit less from a restorative approach than more serious offences that are less likely to be referred or may be referred at a much later stage in the criminal justice process. Braithwaite notes, for example, that cases involving interpersonal violence that one might intuitively reserve for the traditional criminal justice system may be the most amenable to a restorative approach owing to the explicitly relational nature of the harms at stake.<sup>90</sup>

Thus far, we have been speaking rather generically about “restorative justice process.” However, the most recent *RJ Protocol* provides for a continuum of restorative justice process options. Mention has been made of

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89. There may be particular practical hurdles to overcome when restorative justice is reserved for the post-conviction or post-correctional stages. Two officers convicted of driving an Aboriginal man, Darrell Knight, to the outskirts of Saskatoon and abandoning him in freezing temperatures, requested restorative justice while at the same time expressing their intention to appeal their conviction. This request was rejected by the trial judge in *R. v. Munson*, 2001 SKQB 542, [2002] 3 W.W.R. 678 and upheld upon appeal *R. v. Munson*, 2003 SKCA 28, 172 C.C.C. (3d) 515. For more details, see Krista Foss, “Sentencing bid sparks anger among natives” *The Globe and Mail* (31 October 2001), online: <<http://www.theglobeandmail.com/series/apartheid/stories/globe20011031.html>>. See also “Convicted Saskatoon cops ask for sentencing circle” *CBC News* (31 October 2001), online: [http://www.cbc.ca/story/news/?/news/2001/10/30/sask\\_police\\_011030](http://www.cbc.ca/story/news/?/news/2001/10/30/sask_police_011030)>. Throughout the trial the officers had maintained their innocence and mounted a vigorous defence. Once convicted, however, the men requested that they be sentenced through a restorative justice process. The responses to this request from the victim’s family and Aboriginal community captured the dilemma posed by the integration of an adversarial system that encourages denial of responsibility in order to avail oneself of the right to be innocent until *proven* guilty and a restorative conception of justice premised on the acceptance of responsibility as a foundational requirement.

90. Braithwaite, *Responsive Regulation*, *supra* note 61; see also Heather Strang & Lawrence W. Sherman, “Repairing the Harm: Victims and Restorative Justice” (2003) *Utah L. Rev.* 15 at 29.

formal police cautions. These are classified as an option under the program even though it could be said that they are not in essence “restorative” in the sense of embodying a relational conception of justice. Their primary function is to divert an offender from the criminal justice system in trivial matters, by providing a warning, so as not to disproportionately stigmatize an offender, and so as to prevent clogging agencies with unnecessary cases which may “widen the net” cast by the criminal justice system. Aside from cautions, there are “restoratively-oriented options” and “restorative justice processes.”<sup>91</sup> Under the first heading are found accountability sessions (either individual or group) and adult diversion. The common characteristics of these restoratively-oriented options are that they usually do not involve victims, although they will usually involve family or supporters for a young offender, and they seek to achieve an outcome agreement for the benefit of the offender and the community.<sup>92</sup> Group accountability sessions have some of the characteristics of an educational workshop for a number of offenders.<sup>93</sup> There have also been efforts involving offender/victim communication “at a distance” through letters, email and the like, which have been called a “media exchange.” Finally, there are “pre-breach conferences” intended to get offenders back on track rather than taking formal steps to charge them with failure to fulfill outcome agreements or the terms of probation orders.

Under the heading “restorative justice processes” are victim-offender conferences, restorative conferences and sentencing circles. The first of these is victim-offender mediation under a different name. The community is not represented except through the community agencies’ role in planning and facilitating the process, but the process is deemed restorative because of the presence of the victim and the positive results which can flow from

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91. *RJ Protocol*, *supra* note 29 at 11. This distinction between restoratively oriented processes and restorative justice processes was not present in the initial stages of the program. It has developed as part of the evolution and refinement of the program and in an effort to clearly develop the program in a manner consistent with principles of restorative justice. This distinction expressed in this way was introduced by one of the authors in her capacity as one of the advisors to the program. See Jennifer J. Llewellyn, “Truth and Reconciliation Commissions: Restorative Justice in Response to Genocide and Mass Violence” (working title) forthcoming in Gerry Johnstone & Daniel Van Ness, eds., *Handbook of Restorative Justice* (Cullompton: Willan).

92. *RJ Protocol*, *ibid.*

93. *NSRJ Activity Report 03-04*, *supra* note 7 at 12.

this.<sup>94</sup> Restorative/family group conferences and sentencing circles both strive to involve not only the offender and victim but also family and/or supporters for each as well as members of the community who can bring helpful perspectives to the table.<sup>95</sup> Like accountability sessions, the restorative processes will ultimately focus on an outcome agreement, but the process is far more relational, holistic and comprehensive. There is a flexibility in relation to terminology and practice here. For example, responses to post-sentence referrals from correctional services or victims' services may be called "reintegration conferences" and may focus on offender/victim/community dialogue.<sup>96</sup>

The choice of process will result largely from a judgment by the facilitating agency after consultation with the offender, the victim, potential supporters and community members, where appropriate.<sup>97</sup> In general, restorative processes are more resource-intensive and this may be a consideration in relation to the agency's case load. Given scarce time and resources it is not inconsistent with a restorative conception of justice to target more resources to the more difficult, sensitive or important cases in order to ensure that those cases, where the most harm to relationships has occurred, receive the resources required. If such choices are not made, and instead the program attempts to spread resources equally across all potential cases, none may be served adequately or well. However, differences may arise among observers when it comes to assessing whether the program achieves the right balance in the use of options on the continuum. Of the 1014 restorative options completed in 2003-2004, 65 were group accountability sessions (6.2%), 326 were individual accountability sessions (31.3%), 104 were victim offender conferences or mediations (10%), 506 were family group conferences (48%), 12 were sentencing circles (1.1%), 23 were pre-breach conferences (2.2%), 3 were media exchanges (.29%) and there was one reintegration conference (.1%).

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94. Mark S. Umbreit, Robert B. Coates & Betty Vos, "Victim Impact of Meeting with Young Offenders: Two Decades of Victim Offender Mediation and Practice and Research" in A. Morris & G. Maxwell, *Restorative Justice for Juveniles: Conferencing, Mediation and Circles* (Oxford: Hart, 2001) 121; and, in the same collection, Heather Strang, "Justice for Victims of Young Offenders: The Centrality of Emotional Harm and Restoration" 183. There is some disagreement within the program as to whether, given the absence of community, this process option ought to be more properly characterized as restoratively oriented.

95. Early in the Nova Scotia program discussions it was decided that a victim would not have a veto on whether a restorative process would be held. Thus, surrogate victims, supporters and community representatives will suffice for a restorative conference.

96. *NSRJ Activity Report 03-04*, *supra* note 7 at 11.

97. Of course, the court will control this in a judicial referral.



The victim participation rate overall was 42%.<sup>98</sup> These statistics represent a significant increase in victim participation in restorative processes in the province by comparison to the early years. They also represent a dramatic increase in restorative processes as compared to accountability sessions.<sup>99</sup> This could be said to be evidence of an increasing appreciation of and commitment in practice to respect for the principles of restorative justice and their significance to the program.

Before leaving the nitty-gritty of a “process discussion,” it may be helpful to provide some information on “outcome agreements” in NSRJ. The *RJ Protocol* contains rather detailed rules on form and process for outcome agreements, as is entirely appropriate, since failure to adhere to the agreement may lead to formal charges being laid against the offender.<sup>100</sup> Fairness requires that all involved be able to determine with ease and accuracy what the offender is required to do and whether he or she is in breach. In the 2003-2004 year, 1277 agreements were reached.<sup>101</sup> As noted above, compliance over the last two years has been in the range of ninety per cent. Written or verbal apologies, essays, various home behaviour commitments, personal development commitments, community service work and restitution were among the most frequent provisions in agreements.<sup>102</sup> Other interesting requirements included: attending anger management workshops, referrals to professional counselling, donations to charities, drug and alcohol assessments, personal service to victims, thank-you letters to the referral source, ride-alongs with police, and participation in social programs such as “Life Lessons for Black Youth,” “Youth Repay” and “Working Together.” As one might expect, the program protocol lists a number of typical options for outcome agreements, but also allows for “any other outcome agreed upon by the participants of the restorative process.” Importantly, however, there is a provision for “no further action” where it is determined at the restorative justice process that no intervention is required because the offender has already satisfied the objectives of the program.<sup>103</sup> This range of outcomes indicates both a

98. *NSRJ Activity Report 03-04*, *supra* note 7 at 12, Chart 8. The victim participation rate requires some explanation. Over half of the “family group conferences” had no victim present, but on the other hand, victims were present at a significant number of accountability sessions as well as the circle sentencings and the reintegration conference. This shows there is a continuing need to refine the conceptual process distinctions within the program.

99. The significance of this development will be discussed below in Part II Section B under the heading “Agency cultures and the transition to restorative justice”.

100. *RJ Protocol*, *supra* note 29 at 14-19, Section V: Restorative Justice Agreements.

101. *NSRJ Activity Report 03-04*, *supra* note 7 at 12, Chart 9.

102. *Ibid.*

103. *RJ Protocol*, *supra* note 29 at 12.

considerable creativity in communities/agencies and a general commitment to relational notions of justice.

A word is in order about the current management structure of NSRJ. In the early days, policy direction and development, operations management and, to some extent, day-to-day management was in the hands of the original program steering committee. As described above, this body was “top heavy” in the sense that it included Department of Justice divisional directors at the highest levels as well as representatives of community groups and criminal justice stakeholders.<sup>104</sup> When the program became a permanent part of the Department of Justice programming, a new governance structure was put in place. NSRJ came under the aegis of the Court Services Division of the Department of Justice. The steering committee became a supervising policy body with formal decision-making authority for the program, and accordingly its composition was limited essentially to the Deputy Minister of Justice and the various divisional directors (police, corrections, court services, the DPP, victims’ services, etc.) whose programs are affected by restorative justice.<sup>105</sup> Guidance and operational advice to the restorative justice coordinator and decision-making in matters which do not need to go to the new steering committee are now in the hands of a multi-disciplinary restorative justice program management committee. This committee is composed of representatives of the community justice agencies (including the Mi’kmaq Customary Law Program), two police services, the public prosecution service, the judiciary, provincial victims’ services, Nova Scotia Legal Aid, and the academic community. The management committee is chaired by the restorative justice coordinator for the province.<sup>106</sup> This committee, or sub-committees of its membership, has (among other work) re-drafted the program authorization to accommodate the new *Youth Criminal Justice Act*, revised and consolidated the service delivery protocols,<sup>107</sup> managed a co-operative project to develop practice standards, monitored the empirical evaluation of the program, maintained a successful dialogue with the “Women’s Innovative Justice Initiative” concerning sexual assault and partner violence, and has supported the development of the

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104. See text accompanying notes 21-23.

105. This change occurred as of April 1, 2002.

106. The present incumbent, Ms. Pat Gorham, brings to the position a wealth of practical experience with the program as former director of one of the original community agencies, the Island Community Justice Society, in Sydney, Nova Scotia.

107. Originally there were four protocols, one governing the exercise of discretion at each entry point: police, prosecution, courts and corrections. These were streamlined and integrated into one document.

African Nova Scotian Youth Pilot Project.<sup>108</sup> This management committee meets only four times per year but, through the coordinator and its sub-committees, keeps regular and effective communication going with all the restorative justice stakeholders in the province. It has become a critical body for maintaining coherence and forward momentum in NSRJ. The inclusive structure of the management committee has also served to ensure that the program reflects community/agency interests and does not merely become a state-run bureaucratic case-processing system.

The final pieces of the puzzle which make up the current structure of NSRJ are the formal responsibilities of the community agencies and their relationships with their communities and the government. As mentioned earlier, the community agencies are independent community organizations which facilitate restorative processes as described above. However, their service delivery contracts require them to live up to the standards of the program protocol and newly developed restorative justice practice standards. Under the *RJ Protocol*, community agencies have the responsibility of monitoring the completion of the agreement through contact with the offender, victim and others. A violation can result in reconvening the process, establishing a new restorative process, or termination of the agreement and referral for court process by the agency.<sup>109</sup> The community agency must ensure that non-disclosure rules under the YCJA are respected,<sup>110</sup> retain and transfer records in accordance with provincial rules,<sup>111</sup> and provide appropriate statistical information as required.<sup>112</sup> These can be onerous requirements for small community organizations, but they are critical to the operation of the program and ultimately to assessing whether restorative justice is meeting its goals.

Of greater interest from the perspective of restorative justice theory is the recently instituted requirement for agencies to adhere to the *Nova Scotia Restorative Justice Best Practice Standards* in case management

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108. The latter two initiatives will be discussed in greater detail below starting at the text accompanying note 152.

109. *RJ Protocol*, *supra* note 29 at 19, Section VI: Supervision of Agreements.

110. Sections 119.2 and 119(2) as referred to in *RJ Protocol*, *ibid.* at 20, Section VII: Administrative Requirements. There are other complexities surrounding the issue of confidentiality in the program. While agencies typically include an assurance of confidentiality in their process, the legal status of this assurance is unclear at best. Further, more discussion is needed with respect to the desirability of confidentiality, given the principled commitment to inclusion of community in the processes and its role as part of a public justice system.

111. *Ibid.* at 21.

112. *Ibid.* at 21.

and service delivery.<sup>113</sup> The screening of volunteers who may become restorative justice facilitators, while important, follows fairly standard requirements of any social service agency.<sup>114</sup> The standards for the training and supervision of volunteers, however, are innovative and significant. Here is an area where restorative justice theory and practice meet. In conjunction with the agencies, the Department of Justice hired a coordinator to work with the community representatives to “workshop” best practice standards from agency experience, to review the global literature on the topic, and to come up with a provincial guide for practice standards and learning companion materials.<sup>115</sup> The community agencies do the training as adjusted to their particular needs, but must cover the core of the curriculum standards: orientation to the justice system; restorative justice principles and models; communications skills; conflict resolution skills; facilitation of restorative justice processes; working with victims of crime; understanding adolescence; supervision of young persons; agency case management processes; and training on cultural, social and economic diversity. The key elements of this curriculum standard then become the criteria by which community agencies are to supervise and evaluate volunteers, and by which the Department of Justice can, in some measure, evaluate the performance of the agency. Thus, while NSRJ relies heavily on volunteers, it is not a program which relies on untrained amateurs. The skills and training of volunteers is now receiving significant and serious attention within the program as part of its maturing process, and this is as it should be, in a program where the lives of victims, offenders and members of communities are at stake. Implementation of these standards may have a great deal to do with the aspiration of the program to inspire public confidence in the program and the justice system more broadly. How these practice standards relate to the most difficult challenges of the Nova Scotia program is an important aspect of the next part of this paper.

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113. *Ibid.* at 22-23, Section VIII: Agency Standards; see Nova Scotia, Department of Justice, *Nova Scotia Restorative Justice Best Practice Standards*, vol. I (Halifax: Department of Justice, 2005) [*RJ Best Practice Standards*].

114. This involves child abuse registry and criminal record checks, as well as getting references and interviewing potential appointees to see if they meet minimum qualifications.

115. This process took over a year and comprises eight volumes of materials. See *Nova Scotia Restorative Justice Program Draft Practice Standards 2005*, prepared under the direction of Gola Taraschi.

## II. *The challenges of institutionalizing comprehensive restorative Justice*

Restorative justice as an institutionalized process is in its infancy. While a significant number of restorative justice programs and processes now exist, many are still in nascent stages as pilot or exploratory programs. Others operate within a limited scope and sphere outside the formal systems of justice, often run by community organizations which are isolated from one another and from mainstream social institutions. The Nova Scotia program, given its comprehensive and integrated nature, provides a relatively unique opportunity to explore issues and challenges related to institutionalization of restorative justice. This part of the article contributes to an emerging literature dealing with this issue.<sup>116</sup> The issues of institutionalization upon which this section is focused are the most prominent which have arisen most in connection with the Nova Scotia experience, although they are of general significance.

### 1. *The politics of gender and restorative justice*

In the last two decades the Canadian criminal justice system has been a site of intense debate and conflict around gender politics. In these exchanges, the state has usually been seen by feminists as the enemy because of its failure to take male violence against women and children seriously.<sup>117</sup> In the struggle around the slogan “no means no,” the women’s movement demanded that prosecution of sexual assault cases be mandatory where the facts disclosed a likelihood of conviction, regardless of whether the victim may have been pressured by a partner to withdraw charges. Nova Scotia was no exception and promulgated prosecutorial guidelines accordingly.<sup>118</sup> In this context, use of restorative process to divert domestic violence or partner sexual assault away from a trial process can easily be perceived as being “soft on perpetrators of violence against women.” This is what occurred in Nova Scotia when the Nova Scotia Restorative Justice Program was initially announced. It did not help that there were allegations afoot at the time that an early Crown referral of a sexual assault case to a police experiment with restorative justice in the province had

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116. Howard Zehr & Barb Toews, eds., *Critical Issues in Restorative Justice* (Monsey: Criminal Justice Press, 2004); Ivo Aertsen, Tom Daems & Luc Robert, eds., *Institutionalizing Restorative Justice*, (Cullompton: Willan, 2006).

117. Christine Boyle, *Sexual Assault* (Toronto: Carswell, 1984); Christine Boyle *et al.*, *A Feminist Review of Criminal Law* (Ottawa: Minister of Supply and Services Canada, 1985).

118. Nova Scotia Public Prosecution Service, *Crown Attorney’s Manual*, “Spousal/Partner Violence,” online: <[http://www.gov.ns.ca/pps/ca\\_manual.htm](http://www.gov.ns.ca/pps/ca_manual.htm)>.

re-victimized a vulnerable adult female victim.<sup>119</sup> Nor did it help that at about the same time as the restorative justice program was announced by the Department of Justice, another department of government was announcing austerity measures which resulted in cut-backs of funding to transition houses for women victims of domestic violence. Women's organizations understandably drew a link between these occurrences and publicly pilloried the government. In the furor which followed during a pre-election period, the government decided to declare a moratorium on the use of the restorative justice program in relation to cases of sexual assault and partner violence.

In retrospect, it might legitimately be thought that the proponents of the Nova Scotia Restorative Justice Program suffered from undue optimism and naiveté with regard to gender issues. There were voices in the ranks of the public prosecution service which saw restorative justice as a potentially positive alternative to the unfortunately frequent necessity of abandoning prosecutions because of the phenomenon of the victim as "recanting witness."<sup>120</sup> In this context, a restorative process was seen as better than nothing, and in that sense, not soft on crime at all. Moreover, the victims' services division of the Department of Justice was represented on the initial steering committee and vigorously championed the interests of victims, by pointing out that restorative process must not be without safeguards in place to ensure the safety and security of women participating in conferencing and to prevent any re-victimization of women and children in such circumstances. However, NSRJ was implemented without the elaboration of formal practice standards which would ensure that the concerns of victims' services representatives, echoed by women's groups, would be coherently and consistently addressed. True, the financing of NSRJ was oriented at the outset to young offender cases where the partner violence of concern to women's groups would less often be in issue. But the real political problem was that representative women's organizations had simply not been consulted, and they could legitimately point to the program's aspirations to include adult justice issues in the

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119. The story was that the police force in question had employed a restorative justice forum in a case where a clergyman had sexually assaulted a vulnerable female parishioner, and that a mere apology emanating from the former had been a result of "restorative justice." This was seen by many as an appalling slap on the wrist and an inappropriate response by the justice system in the circumstances. The details of this narrative are difficult to verify. The point, however, is that the story was circulated, believed, and had a political impact.

120. There was and is continuing debate in Canada about the rigours of the hearsay rule and the difficulty of finding other admissible evidence when the victim tells the prosecutor that, if put on the witness stand, she will deny that the accused ever did anything: Bruce P. Archibald, "The Canadian Hearsay Revolution: Is Half a Loaf Better than No Loaf at All?" (1999) 25 *Queen's L. J.* 1.

future as cause for legitimate concern for the protection of women victims. In this sense, the proponents were unduly optimistic about the capacity of restorative justice to do the job with the blunt policy and management tools then under discussion,<sup>121</sup> and they were politically naïve in thinking that the victims' services representatives on the steering committee were an adequate proxy for effective consultation with women's groups. This was a failure to implement in a thorough-going way the restorative theory of justice which underpins the Nova Scotia program. A restorative theory of justice mandates that processes be the product of inclusive and consultative design processes.<sup>122</sup>

What has happened since NSRJ's initial errors in this regard is quite instructive. The government was embarrassed into supporting research into restorative justice, to be conducted by a coalition of women's groups which were initially very hostile to the restorative justice program.<sup>123</sup> This group reported its findings, which, based on women's experience with the formal justice system and their sense of restorative justice process options, were not optimistic about the use of restorative justice in the context of sexual assault and domestic violence.<sup>124</sup> There was then a period of over two years of consultation between this women's coalition and representatives from the NSRJ Management Committee about this report. These consultations began with members of the management committee and some members of the steering committee attending a listening day at a conference held to release the results of the women's research project. This event brought together for the first time representatives of women's groups, restorative justice agencies, and management committee members as well as of the Minister of Justice and departmental policy

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121. That is, the agencies were given the program authorization and initial protocols mentioned above, but there were no detailed practice standards.

122. For general discussion see Llewellyn, "Legacy," *supra* note 33 at 294; Llewellyn & Howse, *supra* note 6 at 107.

123. This group came to be called "The Women's Innovative Justice Initiative." It was comprised of the Avalon Sexual Assault Centre, Elizabeth Fry Society of Cape Breton, Elizabeth Fry Society of Mainland Nova Scotia, the Nova Scotia Association of Women and the Law, The Transition House Association of Nova Scotia, and Women's Centres CONNECT.

124. Pamela Rubin, primary author, *Restorative Justice in Nova Scotia: Women's Experience and Recommendations for Positive Policy Development and Implementation: Report and Recommendations* (Halifax, 2003). This report, funded by Status of Women Canada's Women's Program, relied heavily on American critiques concerning problems with alternative dispute resolution/mediation in the context of sexual assault and restorative justice. It seems clear that distinctions were not being made in this literature between mediation on the one hand and full restorative conferencing with safety and security protocols in place on the other. See Trina Grillo, "The Mediation Alternative: Process Dangers for Women" (1991) 100 *Yale L. J.* 1545 and Lisa G. Lerman, "Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women" (1984) 7 *Harv. Women's L. J.* 57.

makers.<sup>125</sup> Input from this conference was then sifted in a year-long series of discussions between the women's equality-seeking groups and representatives of the restorative justice program management committee in a "joint working group."<sup>126</sup> The results of the process are essentially two-fold. Firstly, the moratorium on the use of restorative process will remain in place for the present in order to permit time for careful and full consideration of all the issues at stake before making a final decision as to the use of restorative justice in relation to such situations. Secondly, a community-collaborative process will go forward to explore issues related to the prospects of restorative justice in the context of intimate partner and sexual violence including the availability of validated risk assessment tools in relation to restorative justice practices, community resources to support conferencing, and a consultative process for the development of best practice standards and training materials for community agencies if they are to move in this direction.<sup>127</sup>

It is not clear what the outcome of the process will be, but some cautionary observations can be made. The Nova Scotia experience in some sense reflects patterns elsewhere. Women's organizations are divided over the extent to which restorative conferencing should be used in relation to partner sexual assault and domestic violence.<sup>128</sup> On the other hand, there is clearly some degree of openness to the use of restorative process in such cases among representatives of some Nova Scotia restorative justice agencies; this is significant given that the latter are staffed largely by women, many of whom have been actively involved in women's equality issues in their own communities. Indeed, this institutional feminization of

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125. This was held in the October of 2002.

126. The Joint Working Group made a formal report to the Restorative Justice Management Committee, April 29, 2005.

127. This is in line with discussions on spousal abuse policies and legislation in the Federal-Provincial-Territorial Restorative Justice Working Group, chaired by Pat Gorham, the restorative justice coordinator for Nova Scotia.

128. See Julie Stubbs, "Domestic Violence and Women's Safety: Feminist Challenges to Restorative Justice" in Heather Strang & John Braithwaite, eds., *Restorative Justice and Family Violence* (Cambridge: Cambridge University Press, 2002) 42 and, in the same collection, Ruth Busch, "Domestic Violence and Restorative Justice Initiatives: Who Pays if We Get it Wrong" 223 and Kathleen Daly, "Sexual Assault and Restorative Justice" 62. See also Alan Edwards & Jennifer Haslett, "Domestic Violence and Restorative Justice: Advancing the Dialogue," Victim Offender Mediation Association (VOMA), online: <<http://voma.org/articles.html>>. More recent research indicates the positive value of properly conducted restorative conferencing in the context of sexual assault and domestic violence: see Kathleen Daly, "Restorative Justice and Sexual Assault: An Archival Study of Court and Conference Cases" (2006) 46 *Brit. J. Crim.* 334; Heather Strang, et al., "Victim Evaluations of Face to Face Restorative Justice Conferences: A Quasi-Experimental Analysis," *Journal of Social Issues* [forthcoming]; and Caroline M. Angel, *Crime Victims Meet their Offenders: Testing the Impact of Restorative Justice Conferences on Victims' Post-Traumatic Stress Symptoms* (Ph.D. Dissertation, University of Pennsylvania, 2005).



restorative justice in Nova Scotia is surrounded by fascinating possibilities but also significant caveats.<sup>129</sup> In any event, the consultation processes which emerged from the errors of gender politics are likely to strengthen rather than weaken NSRJ in the end. They have had victims' interests in the reparation of harm in a safe and supportive environment at their core, while seeing the benefits for offenders and communities. They have been conducted with state institutions as a positive moderating, though obviously not disinterested, presence. They have opened a space for the kind of dialogue which ought to be associated with a program based on a restorative conception of justice.<sup>130</sup>

## 2. *Agency cultures and the transition from alternative measures to restorative justice*

The Nova Scotia Restorative Justice Program did not emerge out of a policy vacuum. As mentioned above, there had been previous attempts to avoid some of the most damaging aspects of the formal justice system through both adult diversion and the youth alternative measures options.<sup>131</sup> The success of these programs was limited in terms of their scope and the range of minor/low-end offences they processed.<sup>132</sup> They were also not focused on the needs of victims and the community. However, when the restorative justice program was proceeding to implementation, there was a need to identify community organizations which could provide restorative justice processes and various forms of support to victims, offenders and communities of harm. It was perhaps both practical and natural that the Department of Justice should turn to the organizations which were providing services under the rubric of alternative measures to see if they were willing to convert to the ethos and practice of restorative justice. Thus it was that arrangements were made for the previously operating "alternative measures societies" to contract with the Department of Justice

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129. One might think that properly trained staff in organizations largely run by women might go some distance toward easing the anxiety of those reluctant to use restorative process in this context. On the other hand, there are concerns that there may be a kind of female ghettoization at work here. Are women running restorative justice programs being paid less than other criminal justice system professionals? Is there a sense that the "tough guys" in the "real justice system" are only willing to refer "soft cases" to the "girls in restorative justice"? This is not so attractive a picture. These concerns have emerged in the authors' recent consultations with NSRJ practitioners. See the concluding section concerning the research potential here.

130. On the potential for capacity building associated with restorative justice which has characteristics of deliberative democracy, see Bruce P. Archibald, "Criminal Law and Restorative Justice in Canada: Capacity Building with Layered Models of Meta/Regulation and Deliberative Democracy," Presentation at the RegNet Seminar, Australian National University, Canberra, March 6, 2006 (text available from the author).

131. See *supra* notes 13 and 14.

132. Montgomery, *supra* note 15.

for the delivery of this new service. There were clearly benefits to this approach. The alternative measures societies had roots in communities around the province. They had personnel and volunteers concerned about youth in conflict with the law and the problems caused thereby. One suspects as well that there were certain bureaucratic and political considerations. The government had existing contractual agreements with these organizations and there were people whose livelihoods were bound up with their continued organizational existence. There was thus a certain moral and pragmatic logic to reliance on these tried and true shepherds of the youth criminal justice system in the new move to restorative justice.

In retrospect, it would appear that there were certain downsides to relying on these alternative measures organizations. These organizations were the product of simple diversion theory which held that first time and other non-serious offenders could best be served by keeping them out of the clutches of a criminal justice system that would not only stigmatize them as bad apples (and encourage discriminatory treatment toward them by others based on this label) but might also introduce them to a subculture of peers who could negatively influence their behaviour (youth institutions as “schools for crime”). There is nothing wrong with this analysis as far as it goes, but it does not take youth justice policy into the realm of restorative justice with its concern for restoring relationships harmed by wrongdoing, including requisite attention to the needs of victims, offenders and communities. Nor does it see restorative justice as a part of a larger community development strategy. To the extent that there was a justice theory beyond diversion at work, it was usually bound up with individualistic notions of offender rehabilitation. Once again there is certainly nothing wrong with using diversion as an opportunity to identify treatment possibilities to assist offender re-integration into society, but this is a partial rather than holistic response to the offender, the victim and the community. The procedural technique relied upon by the alternative measures organizations was the “accountability session” where youths and their families could be brought together with alternative measures staff and volunteers to educate the youth and encourage improved behaviour with family and professional support. The most advanced alternative measures societies were taking tentative experimental steps with victim offender mediation. But there was a clear sense that the alternative measures system was not performing as anticipated, was of marginal utility, and was starved for resources.<sup>133</sup> Another downside to transforming these organizations was the extent to which such a transformation would be understood and

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133. *Ibid.*

accepted by criminal justice system stakeholders such that they might take seriously the new role of such agencies in relation to restorative justice.

Given this state of affairs, it is perhaps not surprising that in the first year of the restorative justice program, the re-baptized alternative measures societies (now christened “restorative justice agencies”) tended to do what was familiar in response to youth offending. They conducted far more accountability sessions than full restorative conferences.<sup>134</sup> They tended to have low-end or minor offences referred to them.<sup>135</sup> Referrals tended to come from police forces rather than from other entry points in the justice system.<sup>136</sup> In an effort to move past an offender rehabilitation orientation and toward victim reparation, some agencies were inspired to engage in victim-offender mediation. However, full restorative conferencing with proper preparation of victims and offenders, as well as active participation of community representatives, was the exception rather than the rule. While agency directors attended early training in restorative justice theory and practice,<sup>137</sup> there was not sufficient ongoing support to enable them to translate this training into operational practice, particularly in locations such as Halifax where system volume and demand were significant and at times overwhelming. There were vast differences in the standards being applied in the four original pilot agencies. Some had embraced the theory and practice of restorative justice in a holistic fashion, while others were still operating from the paradigm of diversion, or at best, moving towards or including some victim-offender mediation.<sup>138</sup>

It was fortunate that the program was put on a permanent footing in April 2003 with funding from both provincial and federal levels of government providing the breathing room and resources needed to rectify some of the difficulties discussed above. The new program management committee, with a new program coordinator, channelled energy, effort and funds into

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134. See Don Clairmont, *Nova Scotia Restorative Justice Initiative: Year One Evaluation Report* (Bedford, N.S.: Pilot Research, 2001).

135. *Ibid.*

136. This is not surprising either. The RCMP, in its commitment to restorative justice (see note 18), had trained fifty officers from various municipal police forces in the province on the theory of restorative justice and exposed them to Wagga-Wagga/Community Justice Forum-style police-led conferencing in a one-day session. Crown prosecutors attending their annual educational workshop were also exposed to a half-day session on restorative justice. This did not lead to heavy use of the program by Crowns in the early days. Judges and correctional personnel, at that point, had received little or no training.

137. There had been a week-long educational session on restorative justice theory and practice led by Kay Pranis from Minnesota, among others, held in the summer of 1999 at Acadia University, Wolfville, Nova Scotia.

138. See Don Clairmont, *Nova Scotia Restorative Justice Initiative: Year Two Evaluation Report*, (Bedford, N.S.: Pilot Research, 2002) [Clairmont, *Year Two Evaluation*] where the statistics from the various agencies would appear to bear out this analysis.

the Best Practice Standards Project, which lasted from 2003 to 2005.<sup>139</sup> This project, described above, was a participatory one characterized by a reciprocal relationship between theory and practice. Through discussions among program administrators, agency representatives and program management committee members, conducted via workshops, email exchanges and circulation of draft documents, there emerged a consensus on best practice standards, educational training materials, and case management criteria which responded to some of the agency transition problems identified above. The best practice standards supplement the program goals and objectives with a “statement of principles and values” which embody relational justice ideas critical to orienting agencies along a more accurate restorative justice path.<sup>140</sup> The latest statistics regarding the use of process options, summarized earlier,<sup>141</sup> indicate that this strategy is bearing fruit. Restorative conferencing with proper victim and community involvement has come to the forefront of practice, at least where appropriate. However, it has been a long struggle. The transition from alternative measures societies to restorative justice agencies in the true sense is being accomplished, but was certainly not inevitable. That the program did not fall off the rails in the early days resulted from a collective effort to respond to problems, and to begin to ensure sound restorative justice theory was constantly tested against variations in practice and agency experimentation in the field.<sup>142</sup>

3. *Restorative process and serious criminal harms: upping the ante or just widening the net?*

The phenomenon of net-widening has been a constant concern for criminal justice professionals involved in alternative measures of various sorts in Canada and elsewhere.<sup>143</sup> This concern led to the adoption of police and Crown cautions as components of NSRJ from the very beginning, even though cautions are almost entirely “diversionary” rather than “restorative” in character. Until the inception of the program in 1999, there had been no

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139. See *RJ Best Practice Standards*, *supra* note 113. The chief researcher in this project, Gola Taraschi, has recently become the interim restorative justice program coordinator for the province. The effort from 2003 to 2005 was in the very capable hands of Pat Gorham.

140. A flavour of these principles and values can be gained from an enumeration of the headings by which they are organized: 1. Process Orientation; 2. Focus on Needs; 3. Respect; 4. Voluntary Nature of the Process; 5. Accountability; 6. Victim Voice; 7. Empowerment; 8. Community Participation and Connectedness; 9. Inclusiveness and Balance; and 10. Flexibility.

141. See text accompanying notes 84-98.

142. The significance of agency variability in the context of social diversity will be picked up below in Section D under the heading “Equity, diversity and social difference.”

143. See generally Julian V. Roberts & Thomas Gabor, “The Impact of Conditional Sentencing: Decarceration *and* Widening of the Net” (2003) 8 *Can. Crim. L. Rev.* 33.

Nova Scotia Department of Justice policy encouraging the use of police cautions in relation to minor offences.<sup>144</sup> Police departments and individual police officers had varying rules and different institutional cultures in this regard. Moreover, the informal cautions of the day were not recorded in formal police records, and thus did not “count” for purposes of police clearance rates.<sup>145</sup> The introduction of a formal system of police cautions (essentially letters to the offender warning of more serious consequences in the event of the reoccurrence of the offending behaviour) was thought to be an important component of NSRJ. The fear was that the restorative justice agencies would become the dumping ground for minor cases that the police would not otherwise handle, in order for them to get credit for the “clearance” by the referral. It was believed that the agencies, whose capacities would be limited, should have resources available to respond to the full range of harms suffered by victims and the community. Otherwise restorative justice would become a costly “add-on” to the criminal justice system rather than a cost-effective alternative.

It is difficult to determine from a rigorous empirical perspective just where the actual experience of NSRJ sits with respect to net-widening and the range of offences covered by the restorative justice program. As mentioned above, the program’s early years saw a preponderance of referrals from police agencies which were largely minor property offences. This was the same pattern as with the old alternative measures system. Moreover, it became evident that the Halifax Regional Police Department (the largest in the Province) was actively promoting both the use of cautions in minor cases and the referral of comparatively serious cases to restorative justice, while some other municipal police forces were less aggressive in the full use of the program’s options.<sup>146</sup> However, the referrals for 2003-2004 show a different pattern. Of the 2296 offences referred to restorative justice, sixty-three per cent were property offences, twenty per cent were offences of personal violence and the remaining seventeen per cent were breaches of provincial statutes, drug offences, breaches of court orders and miscellaneous other *Criminal Code* offences.<sup>147</sup> With the property offences, the police were still the predominant referral source (876), but Crown prosecutors referred a substantial number as well (497),

144. Alberta had a formal cautioning program in the mid 1990s, well in advance of Nova Scotia. The Alberta policy was advanced by Nova Scotia proponents of a formalized cautioning approach.

145. Clearance rates refer to the proportion of reported crimes for which police claim a successful response, traditionally measured by arrests and the laying of charges.

146. Clairmont, *Year Two Evaluation*, *supra* note 138.

147. *NSRJ Activity Report 03-04*, *supra* note 7, Chart 6: Offence Summary: Referrals 2003-2004. The main property offences were theft under \$5000 (s. 424), mischief – disturbances and property damage (s. 507), and break and enter (s. 240).

while the courts (35) and corrections (36) were beginning to refer their share. On the other hand, with respect to offences of personal violence, the pattern was reversed: Crowns referred more (236) than did police (177), while the courts (with 15) and corrections (with 30) were considerably farther behind.<sup>148</sup> However, this latest pattern would seem to be more in accordance with what should be expected under the program rules. Police and Crowns are both referring considerable numbers of offences to restorative justice, but the police are allowing the prosecutors to make the decisions in more serious cases where the police may be in doubt as to how to proceed (or where they may want the independent prosecution service to take responsibility for a potentially controversial decision).<sup>149</sup> While the statistics for courts and corrections are trending in the expected direction, they still seem to be under their potential.

But what does all this mean for “widening of the net” on the one hand and the potential for NSRJ to deal with “serious harms” on the other? It might be tempting to conclude that net-widening is not occurring. There is some reliable “before and after” empirical data to support such a claim. The volume of youth court cases seems to have gone down by about six per cent since the alternative measures era.<sup>150</sup> The latest offence referral patterns are consistent with the proposition that net-widening has not occurred. The number of referrals went down after the introduction of the *Youth Criminal Justice Act* in 2003, perhaps because of the statute’s emphasis on cautions and the training that police received as a result.<sup>151</sup> Meanwhile the proportion of violent offences of the total referrals to the agencies for which comparative data exists has consistently gone up in the period from 2001 to 2004.<sup>152</sup> This could mean that NSRJ is now dealing with the kind of serious cases that have been dealt with in pilot projects elsewhere,<sup>153</sup> as well as substantial numbers of “run of the mill” cases formerly dealt with by the courts. One cannot help but wonder if the practice standards exercise, described above, is not contributing to this trend as well. If this is true, then the comprehensive youth restorative justice program in Nova Scotia, after five years of struggle, may finally be starting to perform in

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148. *Ibid.*

149. Prosecutors may also make referrals where police cannot when offenders change their mind after charges are laid and agree to take responsibility for the offence.

150. Clairmont, “Penetrating the Walls,” *supra* note 7 at 253.

151. Clairmont, *Final Evaluation Report*, *supra* note 7.

152. *Ibid.* at 56, Table E-8. The percentages are: 2001 (174 = twelve per cent), 2002 (271 = eighteen per cent) and 2003 (267 = twenty per cent).

153. See Tanya Rugge & Robert Cormier, “Restorative Justice in Cases of Serious Crime: An Evaluation,” in Elliott & Gordon, *supra* note 7 at 266; and, in the same collection, Inge Vanfraechem, “Evaluating Conferencing for Serious Juvenile Offenders” 278.

accordance with theoretical expectations along the “offence seriousness” dimension. The program may be upping the ante by biting into the serious work of criminal justice in a helpful way, and not by simply widening the net to deal with minor matters which would previously have been ignored. There is, however, a tension that must be confronted in efforts to avoid the negative effect of net-widening. It is clear that the program must be wary of becoming simply a repository for minor offences that would not have otherwise warranted or received the attention of the criminal justice system. However, this concern might obscure one of the potential benefits the restorative justice program might offer. Restorative justice’s context-sensitive approach to understanding and responding to wrongdoing has the potential to identify and deal with those minor or low-end offences that might not have warranted the expenditure of resources in the formal system but represent the early manifestation of serious problems that, if not addressed, would likely develop into more serious criminal acts in future. The challenge is to ensure sufficient flexibility to deal with these cases without sliding down the slippery slope of net-widening.

#### 4. *Equity, diversity and cultural difference*

The Canadian criminal justice system has been grappling seriously with issues of equity, diversity and cultural difference since the advent of the equality guarantees of the *Charter*.<sup>154</sup> The prohibitions and sanctions of the criminal law are often thought to be applicable to all citizens equally in a formal sense, but it has been recognized that issues of substantive as opposed to formal equality lurk not far below the surface of many criminal justice matters.<sup>155</sup> Restorative justice is no exception to this phenomenon. Indeed, given the integration of the NSRJ program with the criminal justice system and the role the criminal justice system plays as the source of referrals for the program, it is very susceptible to inheriting these equity issues.<sup>156</sup> One of the original aspirations of the Nova Scotia

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154. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act (1982)* (U.K.), 1982, c. 11, proclaimed in force April 17, 1982. The equality rights provision, section 15, was deemed sufficiently problematic that proclamation was delayed until April 17, 1985. In subsection (1), it guarantees equality “before and under the law” and rights to “equal protection and equal benefit of the law” without discrimination based on “race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.” In subsection (2), however, it exempts affirmative action programs that have as their object “the amelioration of conditions of disadvantaged individuals or groups.”

155. Bruce P. Archibald, “Sentencing and Visible Minorities: Equality and Affirmative Action in the Criminal Justice System” (1989) 12 Dal. L. J. 377.

156. Bruce P. Archibald, “Fault, Penalty and Proportionality: Connecting Sentencing to Subjective and Objective Standards of Criminal Liability (with Ruminations on Restorative Justice)” (1998) 40 Crim L.Q. 263.

program was to respond to the needs of different communities with different characteristics.<sup>157</sup> But not long after the inception of the program, issues arose concerning the extent to which it was fulfilling its obligations in regard to specific ethnic and cultural communities. Two of these sets of concerns became particularly acute.

One was the program's relationship to the Mi'kmaq people of Nova Scotia.<sup>158</sup> The over-representation of Canada's First Nations' peoples in the Canadian justice system is a well documented fact.<sup>159</sup> In Nova Scotia, even following a commission of inquiry into the wrongful conviction and eleven-year imprisonment of a young Mi'kmaq man<sup>160</sup> and in the light of constitutionally recognized Aboriginal rights,<sup>161</sup> it was not until the 1990s that efforts to improve relations between Mi'kmaq communities and the justice system got underway. The Mi'kmaq Youth Options Program (MYOP), co-sponsored by a local community justice agency and the Union of Nova Scotia Indians and endorsed by the Tripartite Forum, had been formally engaged in the conduct of healing circles and other programs based on Mi'kmaq traditions since 1994,<sup>162</sup> five years before NSRJ got started. There is no doubt that sentencing circles elsewhere in Canada and the revival of Mi'kmaq justice in Nova Scotia were a positive example to the founders of the restorative justice program in Nova Scotia. However, relations between the Mi'kmaq organizations and those responsible for NSRJ were not simple. The Mi'kmaq spokespersons, while engaged in constant dialogue with program administrators and represented on program committees, were firm in their position that Aboriginal justice must be rooted in Aboriginal rights and Aboriginal traditions. It was not to be subjected to a set of provincial rules just because policy makers in

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157. See discussion above in text accompanying notes 58-66.

158. The Mi'kmaq (previously often known in popular English parlance as the "Micmac") are the Aboriginal or First Nations people who traditionally occupied the land of the Maritime or Atlantic Provinces of Canada, including the territory now known as Nova Scotia. For a succinct discussion of the relationship of the Mi'kmaq people to the legal system of Nova Scotia, see the essay by Marie Battiste, commissioned for and printed in the *Marshall Inquiry Report*, vol. 3, *supra* note 61 at 81.

159. See references *supra* note 10.

160. *Marshall Inquiry Report*, *supra* note 61. Donald Marshall, the teenage son of a traditional Mi'kmaq chief, was convicted of killing a black teenager in Sydney, Nova Scotia. Another man was later convicted of the deed, but not until a royal commission of inquiry had made a complete study of the ills of the Nova Scotia criminal justice system.

161. Section 25 of the *Charter* says: "The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired."

162. See Clairmont, *Final Evaluation Report*, *supra* note 7 and Clairmont's evaluations of Mi'kmaq justice programs conducted for the Tripartite Committee.



the Department of Justice had discovered something which they called restorative justice, but which in a culturally distinct form had been part of Mi'kmaq way of life for generations. In short, the Mi'kmaq community asserted its constitutional and treaty rights to run restorative justice in an independent fashion and in accordance with Mi'kmaq traditions.

It is a tribute to the patience and flexibility of all involved in the Tripartite Forum and what has emerged as the Mi'kmaq Legal Support Network that a new relationship between Mi'kmaq communities and the restorative justice program has now evolved. The Mi'kmaq Customary Law Program as part of the Mi'kmaq Legal Support Network has a unique status in that it is governed by the *RJ Protocol* but interprets and applies it in a manner consistent with Aboriginal tradition. In addition, the Mi'kmaq Customary Law Program differs from the other community agencies in that it facilitates all restorative justice process for all First Nations communities throughout the province. To date, the Mi'kmaq Customary Law Program's activities have not been integrated with the restorative justice data base, but its year-end report indicates that during 2003-2004 there were ninety-three Mi'kmaq youth in conflict with the law who were referred to Mi'kmaq justice circles.<sup>163</sup> Police pre-charge referrals from twelve different police forces in the province constituted ninety-four per cent of these cases, which is considerably higher than the fifty-eight per cent for referrals to non-Aboriginal community agencies.<sup>164</sup> It should be noted that in addition to this approach, some Nova Scotia judges have held sentencing circles in the province for members of First Nations communities.<sup>165</sup> The upshot of this history is that Mi'kmaq traditions and healing circles are having a continuing impact on restorative justice in Nova Scotia. Aboriginal cultural differences are not only being respected but are having a positive influence as a source of alternative ideas on restorative justice practice for the other community agencies.<sup>166</sup> They provide a constant reminder

163. The ninety-three Mi'kmaq justice circles were distributed among twelve Nova Scotia First Nations communities in the following manner: Acadia (1), Annapolis Valley (2), Glooscap (1), Chapel Island (12), Eskasoni (32), Halifax Regional Municipality etc (8), Indian Brook (13), Membertou (7), Millbrook (2), Pictou (7), Wagmacook (4) and Wekogmag (4). These cases bring the total number of referrals to restorative justice in Nova Scotia in 2003-2004 to almost 1500. See *NSRJ Activity Report 03-04*, *supra* note 7 at 14.

164. This is significant, given the Marshall Inquiry's findings that linguistic and cultural differences had consistently alienated Mi'kmaq offenders from formal trial processes in the province. See *Marshall Inquiry Report*, *supra* note 61.

165. D. Bruce Clarke, "Aboriginal Peacemaking Circles" (2001) 26:1 Nova Scotia Law News 1 at 33.

166. The Mi'kmaq Customary Law Program and Mi'kmaq traditions are prominently referred to in the *RJ Best Practice Standards*. See *supra* note 113 at iv, *inter alia*.

that Nova Scotia restorative justice must be community-based and should respond to differing community needs.

A second set of concerns for Nova Scotia restorative justice under the heading equity, diversity and cultural difference is the relationship of the program to the province's Afro-Canadian population. Overall, eighty-four per cent of cases referred to restorative justice in Nova Scotia were for Caucasian youth, nine per cent were African-Canadian, six per cent were Aboriginal and one per cent other.<sup>167</sup> The figure for Afro-Canadian youth is higher than their proportion in the general Nova Scotia population. Clairmont's data shows that court conviction rates and restorative justice recidivism rates for Afro-Canadian youth were disproportionately high in the Halifax Regional Municipality by comparison with other areas of the province.<sup>168</sup> This is part of the bald empirical context for a difficult series of experiences that the Halifax agency has traversed over the history of the program.

At the program's inception in 1999, it was anticipated that restorative justice would be welcomed by the Afro-Canadian communities in the Halifax Regional Municipality. Racist discrimination against the black population had been identified in the *Marshall Report* as a serious problem for the Nova Scotia justice system<sup>169</sup> and restorative justice was seen as a means of responding to black community needs. However, after the initial year or so of operation, tensions emerged in the Halifax agency. The Afro-Canadian community did not see themselves represented among agency staff or the agency board of directors. Representatives of the black community perceived restorative justice as just another effort by a government agency, characterized by systemic discrimination, to impose yet another social service program on their community without consultation. Meetings were held where tempers flared. Promises were made by the agency to consult and be more sensitive to Afro-Canadian needs. Afro-Canadian spokespersons were skeptical.<sup>170</sup>

A change in personnel at the Halifax agency seems to have been critical to an amelioration of the situation. A new agency executive director was hired who was supported by an able and visionary community-based board of directors.<sup>171</sup> Not only did she have considerable experience with

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167. *NSRJ Program Activity Report 03-04*, *supra* note 7 at 8.

168. See Clairmont, *Final Evaluation Report*, *supra* note 7 at 196, 200 and 201.

169. *Marshall Inquiry Report*, vol. 1, *supra* note 61 at 182-92 and vol. 4 *passim*. Volume 4 of the *Marshall Inquiry Report, Discrimination Against Blacks in Nova Scotia: The Criminal Justice System* by Wilson Head and Don Clairmont, is devoted to this issue.

170. One of the authors, Archibald, attended some of these uncomfortable meetings.

171. Jane Earle was the director of the Community Justice Society in Halifax from 2000 to 2005.

running community organizations, she had strong connections and great respect in the Afro-Canadian community. Black staff members were hired. Tensions eased and things improved, but the agency as a whole (the largest in the province, with a huge case load and geographical area to cover) did not believe it was adequately responding to the problem. The agency, with the encouragement of the restorative justice management committee, persuaded the Department of Justice to fund what was called the "African Nova Scotian Youth Pilot Project". This project involved opening agency sub-offices in two black communities in the Halifax area, supported by professional restorative justice workers and operating with Afro-Canadian volunteers trained in restorative process facilitation whose focus would be their local communities. Positive partnership among the police, the public prosecution service and Afro-Canadian communities was, and continues to be, the watch-word. With yet another change in leadership, the Halifax agency has embarked upon a community involvement and public education campaign based on an Africentric philosophy to guide its efforts.<sup>172</sup> The impact of these initiatives has yet to be evaluated, but the process which led to their creation was certainly instructive. There is no doubt that this experience was critical to the development of the practice standard provisions on "diversity and cultural competency" and a training curriculum module to go with it.<sup>173</sup> This practice standard, of course, applies to all agencies throughout the province, and is intended to encourage them to learn from the lessons of the Halifax agency when responding to the needs of Afro-Canadian victims, offenders and communities in their respective areas.

Just where NSRJ will go with what it has experienced in relation to equity, diversity and cultural difference is unclear. There are traditional Acadian communities in Nova Scotia which have thus far not been served comprehensively by restorative justice in the French language, although

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172. The new director of the Halifax Community Justice Society is Yvonne Atwell, an Afro-Canadian who has a wealth of experience as a community activist and as a member of the Nova Scotia Provincial Legislative Assembly. She has spearheaded the development of an Africentric approach to the Society's relations with Afro-Canadian communities in the Halifax Region.

173. *RJ Best Practice Standards*, *supra* note 113. See also Bonita Williams, "Accomplishing Cross Cultural Competency in Youth Development Programs" (2001) 39:6 *Journal of Extension*.

they are demanding French language legal services in other areas.<sup>174</sup> The Halifax agency has opened dialogue with organizations such as the Metropolitan Immigrant Settlement Association (MISA) and the Multi-Cultural Association of Nova Scotia (MANS) in order to identify potential community needs and volunteer facilitators for restorative justice in relation to the diverse contacts represented by these organizations. The extent to which one can conduct restorative justice in response to varying cultural norms may, of course, have its limits. One need only think of the recent controversy in Ontario where the government of that province backed down in the face of global political lobbying and decided not to adopt Sharia arbitration tribunals in family law matters for that province's Islamic community. But it is here that the *RJ Protocol* and *RJ Best Practice Standards* may take on a particular importance. Response to community needs will occur only within the democratically pre-established framework which is consistent with the rule of law. This point leads nicely into the question of the balance between state superintendence and community control in NSRJ.

##### 5. *Balancing community control with state superintendence*

Much of the groundwork for this discussion under the heading of balancing community control with state superintendence has been laid in the sections covering the current structure of the program, the conversion of the alternative measures societies to community restorative justice agencies, and the program's efforts to cope with equity, diversity and cultural difference. However, several points warrant brief, focused attention. There is an uneasy tension between community control and state superintendence in the Nova Scotia Restorative Justice Program. This may be healthy and it may be inevitable in a permanent and comprehensive program which is well integrated with the criminal justice system. The state has clearly taken the initiative in inaugurating the program, though with significant political and social support in communities around the province. The state has carefully elaborated a regulatory framework within which the community agencies must operate, and in accordance with which they will

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174. This pressure is spearheaded by an organization called L'Association des Juristes d'Expression Française de la Nouvelle Ecosse (AJEFNE) which has expressed a passive interest in "la justice réparatrice" or "la justice restaurative." On the basic problem of translating the words "restorative justice," see Bruce P. Archibald, "La justice restaurative: conditions et fondements d'une transformation démocratique en droit pénal" in Mylène Jaccoud (dir.), *Justice Réparatrice et Médiation Pénale* (Paris: L'Harmattan, 2003) 119. It is to be noted that there are two reported cases of restorative conferences held in French under the auspices of the South West Community Justice Society (Yarmouth) in the region of the province that Acadians would call "Clare." The authors have heard no similar reports from Acadian communities in other regions of the province, such as Cheticamp or Petit de Grat.

be evaluated. Administrators in the Department of Justice, particularly at contract negotiation time with the agencies, speak in terms of “service delivery.” But the traditional rhetoric of community-based restorative justice has been centred around repairing harm to victims,<sup>175</sup> re-integrating offenders into the community, community empowerment<sup>176</sup> and restoring relationships based on mutual respect, dignity and concern.<sup>177</sup> Reducing restorative justice to issues of “service delivery” has a bureaucratic connotation which sits uneasily with the transformative vision of the original proponents of the program.

The issue of state supervision and community control hits home at budget time. The program goals are broad and its aspirations ambitious. But the focus on youth justice through designated restorative justice agencies with its budgetary imperatives poses two significant challenges for the program. It may cause significant issues in terms of accessing the necessary resources to support and realize the terms included within restorative agreements reached by the parties (including for example access to social, education and health programs). It may also inhibit the kind of open and responsive attitude that will allow communities to successfully suggest new directions for the program. Where are the school-based restorative conferencing programs which have been so successful in other jurisdictions?<sup>178</sup> How will the kinds of communities mentioned under the heading equity, diversity and cultural difference be received if they propose an adult restorative justice scheme, for example?

A significant question for the future development of the program is whether there will be the governmental flexibility to allow for and encourage the sort of cooperation and integration required to support a holistic, relational conception of justice. Or rather, will there be continued compartmentalization and adherence to departmental and programmatic silos leading to turf wars over budget allocations? Can one break restorative justice out of the purely “justice” umbrella (and indeed out of the “court services” segment under which it currently resides in Nova Scotia) to find

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175. Howard Zehr, *Changing Lenses: A New Focus for Crime and Justice* (Scottsdale, PA: Herald Press, 1990).

176. See Kay Pranis, “Restorative Justice, Social Justice, and the Empowerment of Marginalized Populations” in Gordon Basemore & Mara Schiff, eds., *Restorative Community Justice: Repairing Harm and Transforming Communities* (Cincinnati: Anderson, 2001) 287.

177. Llewellyn & Howse, *supra* note 6.

178. Gordon Michael, Director of Community Collaboration and Partnerships for the Halifax Regional Municipality, was on the original steering committee and had an obvious interest in mediation of problems in schools. As events transpired, this insight seems to have dropped off the radar, although one RCMP detachment in the Municipality has done some school-based community justice forums outside the formal framework of the program.

support in the Department of Community Services, the Department of Education or the Department of Health? These are areas of governmental responsibility which have been the locus of creative restorative process in other jurisdictions, but which have not yet blossomed in Nova Scotia. Moreover, there are significant technical and budgetary resources in these social, educational and health domains which could be usefully deployed to the benefit of all concerned in partnership with community restorative justice agencies.<sup>179</sup> The African Nova Scotian Youth Pilot Project discussed above provides an encouraging precedent. However, as NSRJ becomes routinized it must continue to keep itself open to new directions and new partnerships among divisions of government, organizations in the private sector and a variety of community actors and programs if it is not to lose its forward momentum.

### *Conclusion*

The Nova Scotia restorative justice program has grown from its early pilot stages into a relatively mature and comprehensive program. Thus far, its implementation has maintained relatively steady progress in accordance with principles of restorative justice. Mechanisms are in place to allow community organizations to respond restoratively to victim, offender and community development needs while not sacrificing the stability of the rule of law or the force of the traditional criminal justice system, where the latter is required. The integration of complementary models of justice has proceeded relatively smoothly.<sup>180</sup> With this growth new challenges beyond those of conceptualization and implementation faced at the nascent stage of the program have emerged. This phase of the Nova Scotia program is of interest and significance in terms of the future development of the program and also for the insights it has to offer for the development of similar programs elsewhere in Canada and the world. While in each context one must face particular challenges related to institutionalization as they emerge from the experimentation and pilot stage, there is likely to be significant overlap with the challenges confronting the Nova Scotia program. The purpose of this paper has been to describe the genesis, development and challenges of the Nova Scotia program not with a view to resolving these challenges but rather in order to take advantage of the opportunity presented by the Nova Scotian experience to understand the

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179. If representatives of these departments are regularly brought to restorative conferences as resource people, it may be that the culture of government departmental silos can be broken down to enhance co-operative community problem-solving. The Nunn Commission, *supra* note 68, could have some useful things to say in this regard.

180. See Archibald, "Models of Justice," *supra* note 37.

issues of institutionalization and construct a future research agenda for restorative justice theory and practice.

Given the origins of the Nova Scotia restorative justice program and its commitment to be community based (something which is ideally true of restorative justice practice more generally), the approach to systemic problem-solving ought to happen in a co-operative framework. In Nova Scotia this kind of reciprocal reflection among the institutional partners in Nova Scotia restorative justice is currently underway under the auspices of a Community-University Research Alliance involving the major stakeholders in the Nova Scotia Restorative Justice Program working collaboratively with university researchers to examine the issues that emerge within such an institutionalized, comprehensive and complex restorative justice program.<sup>181</sup> This research will take up the issues and challenges presented in this paper among others. The research will focus on five themes related to the institutionalization of restorative justice: (i) translation of principles into practice; (ii) community; (iii) diversity & equity; (iv) gender; and (v) conceptualizing and measuring success. These themes cross-sect and intersect through a series of sixteen projects that take up particular issues related to the challenges of institutionalization in the Nova Scotian context. These projects include those exploring and examining the connection/relationship among the various restorative justice programs in Nova Scotia (NSRJ, the RCMP program and the Mi'kmaq Customary Law Program) including the role of adult restorative justice in the province; the reception and integration of restorative justice by the criminal justice system; restorative justice in diverse and multicultural contexts; the engagement of the African-Nova Scotian community with NSRJ; NSRJ engagement and services to the Francophone/Acadian community; challenges and effects of urban/rural context to restorative justice practice; the extent to which restorative justice principles are reflected in and provide guidance for NSRJ practice; tensions of professionalization in this community-based program; measures of success; differentials in access/process options and outcomes on the basis of gender, race/ethnicity, socioeconomic status and other minority or disadvantaged group status; decision-making processes related to referral to restorative justice; the

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181. The present authors, along with Professor Don Clairmont (Dalhousie) and Professor Diane Crocker (Saint Mary's), other researchers at Dalhousie University, Saint Mary's University, Acadia University, the University of Western Ontario and the University of Toronto, along with all of the institutional stakeholders in the Nova Scotia Restorative Justice Program (community agencies, police, public prosecution service, department of justice, etc.) in March 2005 received a substantial five year grant from the Social Sciences and Humanities Research Council of Canada under its Community/University Research Alliance (CURA) Program to support this research.

challenge of restorative justice to compartmentalization of funding and services in government; the definition and role of community at the process and system level of restorative justice; community empowerment/capacity as a goal of restorative justice; public perception/knowledge of NSRJ (and restorative justice generally); rights protection in restorative justice; and the application of restorative justice to gender-based violence.

The Nova Scotia Restorative Justice Program has a sufficiently complex developmental history, and a sufficiently sustained track record to render it of more than passing interest to those in many jurisdictions contemplating the value, development or expansion of restorative justice initiatives. The proposed research program of the Nova Scotia Restorative Justice Community-University Research Alliance (NSRJ-CURA) will take advantage of the opportunities presented by the Nova Scotia program to help elucidate for a global audience some of the challenges and their responses to institutionalizing comprehensive restorative justice in theory and in practice.