

# Doing Justice: New Directions in Restorative Justice

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## INTRODUCTION

When I was invited to contribute to the discussion of this year's theme "Doing Justice: Dispute Resolution in Courts and Beyond" by considering new directions in restorative justice, I began to take stock of where restorative justice has been and where it is going. My thoughts are occupied with the future directions of restorative justice often these days in my capacity as Director of the Nova Scotia Restorative Justice Community University Research Alliance (NSRJ-CURA).<sup>1</sup> The NSRJ-CURA is a five year research initiative that is concerned with issues of theory and practice that emerge as restorative justice moves from its nascent stages toward greater permanency as institutionalized models of justice. The Nova Scotia Restorative Justice Program is a focal point for this research.<sup>2</sup> As the most developed and comprehensive restorative justice program in Canada and a world leader, the Nova Scotia Program provides a unique opportunity to explore the new practical and theoretical questions that emerge with the institutionalization of restorative justice. This research will offer visions of, and support for, new directions in restorative justice both at the conceptual and practical levels. There are currently 17 research projects underway within the NSRJ-CURA addressing issues including: the reception and integration of restorative justice within the criminal justice system; equity and diversity issues in restorative justice; the appropriate means and mode of measuring success; the challenge of restorative justice to the compartmentalization of government funding and services; community empowerment/capacity

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<sup>1</sup> The Nova Scotia Restorative Justice Community University Research Alliance is funded through the Social Sciences and Humanities Research Council of Canada CURA grant program. For further information see online: <[www.nsrj-cura.ca](http://www.nsrj-cura.ca)>.

<sup>2</sup> For more information about this program see online: <[www.gov.ns.ca/just/Divisions/CourtServ/rj/index.asp](http://www.gov.ns.ca/just/Divisions/CourtServ/rj/index.asp)>; and Bruce Archibald & Jennifer Llewellyn, "The Challenges of Institutionalizing Comprehensive Restorative Justice: Theory and Practice in Nova Scotia" (2006) 29 Dal. L.J. 297-343.

building as a goal of restorative justice; rights protection in restorative justice; and the application of restorative justice to gender-based violence.

This research is taking place in the context of a rapid pace of development and growth in restorative justice practice worldwide. It is helpful to divide these developments into two categories: 1) development in restorative *justice* programs and processes and 2) development in the use of restorative *practices* in a variety of contexts. The distinction I make here is one often obscured in the restorative justice literature but an important one nevertheless. The first category refers to restorative *justice* processes and programs which are as the word “justice” suggests directed towards responding to incidents where a wrong demands response and redress. The second category sets apart developments in the scope of application and use of restorative principles and practices. The insights of restorative justice generate principles and practices that are useful and applicable in addressing generalized conflict, disputes and relational breakdown beyond the realm of justice concerns. Very often the language of restorative justice is used to describe any practice that reflects restorative elements or approaches. It is useful though to distinguish the use of restorative practices from restorative justice processes which are grounded in a distinct relational theory of justice.<sup>3</sup> Restorative practices however might be utilized where no justice concern is implicated.

There have been significant new developments and directions in both restorative justice and restorative practices. To attempt to capture and reflect all the new development and directions is not possible within the scope of this paper. There are now websites, news digests, blogs, conferences and newsgroups dedicated to this exercise.<sup>4</sup> Amid the exciting new directions in restorative justice there are some developments in perhaps the most familiar context for restorative justice—criminal justice. Thus far, restorative justice programs in the criminal realm have more often been aimed at youth and focused upon the lower end of criminal offences. There are, however, more and more examples emerging of restorative justice programs for adult offenders and for children who commit wrongs but who do not fall within the jurisdiction of

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<sup>3</sup> Jennifer Llewellyn & Robert Howse, *Restorative Justice – A Conceptual Framework* (Ottawa: Law Commission of Canada, 1998).

<sup>4</sup> See for example: Restorative Justice, online: <[www.restorativejustice.org](http://www.restorativejustice.org)>; International Institute for Restorative Practices, online: <[www.iirp.org](http://www.iirp.org)>; Conflict Resolution Network, Restorative Justice in Canada, online: <[www.crnetwork.ca/RJ/index.asp](http://www.crnetwork.ca/RJ/index.asp)>.

the criminal justice system.<sup>5</sup> There is also recent studies challenging conventional wisdom and suggesting the efficacy of restorative justice in response to serious interpersonal violent crimes.<sup>6</sup> But restorative justice is increasingly not limited to domestic criminal law contexts as it is contemplated and used to address historic, widespread or systemic rights abuses both in transitional contexts and in stable democracies.<sup>7</sup> Building upon the experience of the South African Truth and Reconciliation Commission restorative justice models are receiving serious attention both internationally and within Canada as a promising framework for understanding and responding to the justice demands in such circumstances.<sup>8</sup> The Truth and Reconciliation Commission for Indian Residential Schools which is currently getting underway in Canada may provide another profound example of the potential and promise of restorative justice.<sup>9</sup> Another realm in which restorative justice is showing some promise is with respect to government and corporate regulation.<sup>10</sup> The responsive and participatory character of restorative justice offers a promising and effective alternative to the dominant commend and control approach to regulation. The expansion of restorative practices to new contexts is developing almost exponentially as these practices are applied

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<sup>5</sup> To offer just two examples, see the Collaborative Justice Program in Ottawa that works with serious adult or youth crime for details, online: <[www.collaborativejustice.ca](http://www.collaborativejustice.ca)>; and the Children at the Critical Hour (CATCH) Program offered by the Island Community Justice Society in Cape Breton that deals with young people under the age of twelve.

<sup>6</sup> Lawrence Sherman & Heather Strang, *Restorative justice: The Evidence*. (London: The Smith Institute, 2007) at 24, 88.

<sup>7</sup> See the work of the Restorative Peacebuilding Project of the Working Party on Restorative Justice part of the Alliance of NGOs on Crime Prevention and Criminal Justice, online: <[www.cpcjalliance.org](http://www.cpcjalliance.org)>.

<sup>8</sup> Jennifer Llewellyn & Robert Howse, "Institutions for Restorative Justice: The South African Truth and Reconciliation Commission" (1999) 49 U.T.L.J. 355–388; Jennifer Llewellyn, "Restorative Justice in Transitions and Beyond: The Justice Potential of Truth Telling Mechanisms for Post-Peace Accord Societies" in T. Borer, ed., *Telling The Truths: Truth Telling and Peace Building in Post-Conflict Societies* (Notre Dame, IN: University of Notre Dame Press, 2006) at 83–114; Jennifer Llewellyn, "Truth and Reconciliation Commissions: Restorative Justice in Response to Abuse and Violence" in G. Johnstone & D. Van Ness, eds., *Handbook of Restorative Justice* (Devon, U.K.: Willan Publishing, 2007).

<sup>9</sup> See online: <[www.trc-cvr.ca](http://www.trc-cvr.ca)> and Jennifer Llewellyn, "Dealing with the Legacy of Native Residential School Abuse: Litigation, ADR, and Restorative Justice" (2002) 52 U.T.L.J. 253–300.

<sup>10</sup> John Braithwaite, *Restorative Justice and Responsive Regulation* (New York: Oxford University Press, 2002).

to educational settings, social and community services, workplaces, policing, community development, family conflict, among other applications.

As I considered these new directions of restorative justice I was struck by the fact that this journey to new places must be traveled along the same old roadways. On route to these new directions then we must navigate many familiar complexities to find our way. Thinking about new directions in restorative justice thus warrants careful attention to the road ahead. I am reminded in this exercise of a presentation given by Chief Justice Edward Bayda (as he then was) to the annual conference of the Canadian Institute for the Administration of Justice 10 years ago in 1997. The theme of that year's conference was sentencing and Chief Justice Bayda's contribution considered whether the theory and practice of sentencing were on the same wave length.<sup>11</sup> "The Theory and Practice of Sentencing: Are they on the Same Wavelength?" In his presentation the Chief Justice contemplated the same fundamental questions about the meaning and means of doing justice with which this CIAJ conference is concerned. Specifically, Chief Justice Bayda was concerned with the then recent changes to legislation regarding sentencing. He was particularly interested in the statement of the fundamental purpose of sentencing contained in the legislation which to this day remains unchanged. It says:

s.718. The fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions...<sup>12</sup>

He noted with concern that the "fine sounding words in the first part of the section appear to contain a presumption which may not mesh well with reality."<sup>13</sup> In particular, the assumption underlying the aspiration to *maintain* a just, peaceful and safe society ignores the reality of many members of minority or marginalized groups. Their experience of the world demands much more than preservation of the status quo which this section charges the sentencing judge. Instead, as Chief Justice Bayda rightly identifies, they seek "a contribution to the *establishment for*

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<sup>11</sup> Chief Justice Edward D. Bayda, "The Theory and Practice of Sentencing: Are they on the Same Wavelength? (Bill C-41 and Beyond)" in Patrick Healy & Helene Dumont, eds., *Dawn or Dusk in Sentencing* (Montreal: Canadian Institute for the Administration of Justice, 1997) at 3-19.

<sup>12</sup> *Criminal Code*, R.S.C. 1985, c. C-46, s. 718.

<sup>13</sup> *Supra* note 11 at 5.

*all* of a just, peaceful and safe society.”<sup>14</sup> So revised, the purpose of sentencing requires judges grapple with the question of how to do justice within the courts and outside. This inquiry led Chief Justice Bayda to turn to the objectives of sanctions as outlined in s.718 of the Criminal Code and to worry about the capacity of the first four of the six objectives listed (representing the more traditional objectives of sentencing: denounce, deter, separate, rehabilitate) to serve the fundamental purpose of sentencing as he had come to understand it. He then turned to the last two stated objectives:

- (e) to provide reparations for harm done to victims or to the community; and
- (f) to promote a sense of responsibility in offenders, and acknowledgement of harm done to victims and to the community.<sup>15</sup>

Bayda found these objectives more promising. They provided more scope for achieving the purpose of sentencing—doing justice for all—than had been possible within the confines of the traditional objectives of sentencing. Notably, Bayda identified these last two objectives of sentencing as reflecting “a restorative model of justice as opposed to the retributive model.”<sup>16</sup> He saw much potential and promise for the restorative model in achieving the purpose of sentencing. In considering this model though he identified a number of complexities and impediments to implementing or embracing a restorative model.

As we consider the theme of this conference, Chief Justice Bayda’s conclusion 10 years ago that restorative justice holds much promise and potential to the work of doing justice remains accurate. Indeed, restorative justice is worthy of significant study for what it has to say about both the meaning and means of doing justice. It is thus appropriate to pay close attention to the new directions in restorative justice. As we look to the future and new directions, however, the complexities that concerned Chief Justice Bayda still loom. We have come some considerable distance in 10 years in overcoming these impediments but there is still much work ahead if we are to travel in new directions and realize the full potential and promise of restorative justice as a mean of doing justice and resolving disputes.

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<sup>14</sup> *Ibid.*

<sup>15</sup> *Criminal Code, supra* note 12, ss.718(e), (f).

<sup>16</sup> *Supra* note 11 at 12.

## **I. NEW DIRECTIONS, FAMILIAR COMPLEXITIES**

Chief Justice Bayda identified five potential obstacles to restorative models of doing justice: (a) the public understanding of justice; (b) public mood about justice issues; (c) political complexities; (d) bureaucratic complexities and; (e) legal complexities. The extent to which these impediments still exist and the progress made towards surmounting them is key to a consideration of new directions in restorative justice and their likelihood of success. Furthermore, some of the new directions taken in restorative justice theory and practices have developed in direct response to these issues. It is thus worth revisiting the concerns identified by Chief Justice Bayda as a means of assessing where we are in restorative justice, where we might go, what might stand in the way and whose help might be needed in reaching these destinations.

### **A. PUBLIC UNDERSTANDING OF JUSTICE**

The first and perhaps most significant hurdle to restorative justice Chief Justice Bayda identified is no less an issue ten years later. The public understanding of justice is a formidable challenge to those seeking to develop existing restorative justice initiatives and to the prospects of moving in new directions with restorative justice in the future. Bayda C.J.'s concern was the public's (and within this term in this case we ought to include justice system actors and politicians) alignment of justice with punishment and, more particularly, with imprisonment as the only real form of punishment. This belief remains firmly entrenched. It is reflected in the current public demands for longer and stronger sentences in response to the perceived increase in youth crime and violence and gun crimes. Public sentiment reflects the conviction that punishment is essential to justice and a corresponding commitment to imprisonment as the principle and primary means of punishment. This view of imprisonment as the primary vehicle of punishment and thus justice, results in a perspective toward alternatives to imprisonment as at worst, justice compromised or denied, at best, treatment, and, in any case, soft on crime and criminals.

The common public understanding of justice poses a significant challenge to public support for, and engagement with, restorative justice. Viewed through a punishment-focused justice lens, restorative justice appears unjust or inadequate. Restorative justice does not equate

punishment with justice. Instead, it requires a contextual consideration of what is required to do justice for the parties affected by wrongdoing. Restorative justice requires the public to examine the very goals and aims of justice. What does it mean? What does it require? Restorative justice forces a reconsideration of the traditional resort to punishment by starting with the question: what is it we are trying to achieve through punishment? The answer, restorative justice suggests, is we are trying to create a meaningful response to the harm caused by wrongdoing. This harm includes harm to the individual, groups, communities and their relationships related to or resulting from wrongdoing.<sup>17</sup>

Restorative justice offers an understanding of justice that is grounded in the inescapable reality of our interconnectedness to one another through webs or networks of relationships.<sup>18</sup> Through this relational lens on the world the extent of harm flowing from wrongdoing comes into view. Harm from wrongdoing is not limited to the direct victim but can affect those connected with the victim, the wrongdoer, and the communities of which they are a part. From this relational starting point it becomes clear that justice requires a response when our social relationships are marked by inequality—that is when our equal moral worth as individuals is threatened or disregarded. Justice then requires response to wrongdoing that restores this ideal of human relationship—that restores relationships to ones of social equality marked by the features of equal concern, respect and dignity.<sup>19</sup>

In pursuit of this goal of restored relationships restorative justice processes seek to bring together all those with a stake in restoring relationships—including the victim(s), wrongdoer(s), their communities of support and members from the broader community. Through a restorative justice process these parties are invited to explore the nature of the harms resulting from the wrong and how to address these harms with a

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<sup>17</sup> For a fuller discussion, see Llewellyn & Howse, *supra* note 3.

<sup>18</sup> For a more detailed account of restorative justice as a relational theory of justice, see Jennifer Llewellyn & Robert Howse, *Restorative Justice—A Conceptual Framework* (Ottawa: Law Commission of Canada, 1998); Jennifer Llewellyn, “Justice for South Africa: Restorative Justice and the Truth and Reconciliation Commission” in C. M. Koggel, ed., *Moral Issues in Global Perspective* (Peterborough, Ont.: Broadview Press, 1999) at 96–111; Jennifer Llewellyn, “Doing Justice in South Africa: Restorative Justice and Reparations” in C. Villa-Vicencio & E. Doxtader, eds., *Repairing the Unforgivable: Reparations and Reconstruction in South Africa* (South Africa: David Philip Publishers/New Africa Books, 2004) at 166–183.

<sup>19</sup> *Ibid.*



view to establishing restored relationships in the future. This process thus requires a contextually based inquiry into what will be required to achieve justice in response to the particular wrong and for the parties harmed by it.

Restorative justice thus prompts a rethinking of our current mainstream assumptions about justice and how it is to be accomplished. It challenges the common public understanding of justice that props up the current criminal justice system. A major challenge for restorative justice then continues to be engaging the public in a discourse about the fundamental meaning of justice. Creating public space for this discussion is no easy task especially in the current public moral panic about violence (most recently youth violence) and in the face of the rhetorical power of traditional law and order politics.

Restorative justice scholars, advocates and others are, however, slowly finding spaces for this conversation. More attention is being paid within the restorative justice movement to the need for sound articulation of the theory of justice at the core of restorative justice. This is in contrast to the early stages of the restorative justice movement when restorative justice practice far outstripped its theory. The development of restorative justice practices without a solid theoretical framework has led to the view (and sometimes the reality) of restorative justice as little more than ADR for the criminal realm—as a new way of achieving the same goals as the criminal justice system. The theory of restorative justice helps make clear the aim and potential of restorative justice to offer new ways to achieve new goals. Restorative justice thus does not challenge the traditional resort to punishment and specifically imprisonment in order to be soft on criminals but, rather, because such punishment does not seem to work in addressing the actual harms to people and relationships caused by crime.

## **B. PUBLIC MOOD ABOUT JUSTICE ISSUES**

The second challenge for restorative justice rightly identified by Chief Justice Bayda is the public mood about justice related issues. This factor is, of course, closely related to the public understanding of justice considered above. The public understanding of justice informs the content of public demands for justice. Thus, the perception or reality of increased crime is met with calls for more and greater punishments. We are witnessing this in recent public calls for mandatory minimums, longer

and tougher sentences, outrage at community sentences, etc. Public appetite for alternatives to the criminal justice system is weak even in the face of the failings of the current system and significant evidence that resort to more punishment is unlikely to work. The fact that ‘tough on crime’ politics garner such public support despite the preponderance of evidence about the weaknesses and failures of the traditional criminal resort to punishment (and imprisonment in particular) with respect to deterrence, denunciation and long term public safety, is telling of the public mood. The public wants something done and they are guided in what they want by their understanding of justice which tells them more punishment equals more justice.

This public mood is a formidable challenge for the development of restorative justice not only because of the influence it has over political will but because of the significant role the public and communities play in successful restorative justice programs and processes. Restorative justice explicitly recognizes the role of the public in both the creation and the resolution of conflict.<sup>20</sup> This centrality is reflected in the importance of community to the development and operation restorative justice programs (often in partnership with the State in order to ensure that the full breadth of public interest and concern is represented). Furthermore, members of the community(ies) are recognized as parties with a stake in the outcome of restorative processes by virtue of the fact that they are harmed or affected by a wrongdoing or that they have an interest in the just and peaceful resolution of a dispute that would otherwise weaken the fabric of community. Community involvement is thus essential to the best practice of restorative justice. The public mood could affect the willingness of folks to participate in restorative justice programs or processes.

In the context of the current public mood, restorative justice faces an uphill journey to prove its worth in terms of satisfying the public outcry for justice. Public education is surely one of the important responses to this challenge. One of the primary difficulties for restorative justice in addressing public impatience for alternatives that appear soft on crime, is its nuance and contextuality neither of which are easily amendable to explanation via short snappy sound bits. Restorative justice requires a revisioning of the public’s habitual thinking about justice. Habits are easy to acquire but hard to break. Altering this habit of mind and seeing justice anew will require sustained attention and thoughtful reflection. The lure of the current criminal justice system then is that it

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<sup>20</sup> Llewellyn & Howse, *supra* note 3.

does not require such hard work from the public. It offers a vision of what justice requires that is familiar and easy—justice requires punishment.<sup>21</sup> The criminal justice system is also seductive because it relieves the public of responsibility for justice by tasking criminal justice professionals with this job.

In contrast, restorative justice does not offer an easy answer to the question of what justice requires, it says: “It depends.” What will be required to do justice—to address all the harm resulting from wrongdoing with a view to restoring relationships—requires attention to the specific context and to the people and relationships involved in a particular case.<sup>22</sup> Restorative justice also does not provide a way of off-loading this messy and complicated work of justice to others. It requires that members of the public and communities participate in the work of justice.

There is some good news on this front for restorative justice. Studies conducted throughout the last decade have consistently shown that the public mood towards restorative justice can be changed through involvement and experience with restorative justice processes. The evidence is that those who participate in restorative processes have high levels of satisfaction with the process and positive views of restorative justice. However, this is a very slow and difficult way to surmount the challenge presented by public mood towards justice. If this challenge is to be met, new ways of educating and engaging the public in discussions about the meaning and mode of justice must be developed.

### C. POLITICAL COMPLEXITIES

Public understanding of and mood about justice are just two factors that generate the political complexities for restorative justice. Some of the political complexities restorative justice faces are no different than those faced by other new programs or policies. A reality of our system of democracy is that election politics dominate. In this climate, long term investments with limited short term results are hard to sell. It is

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<sup>21</sup> The only complexity of the criminal justice system’s traditional view of sentencing justice is ensuring a fit between the punishment and the crime. Admittedly, this is not an easy task itself but it is not one with which the public is typically troubled with the nuances of.

<sup>22</sup> Llewellyn & Howse, *supra* note 3; Llewellyn, “Restorative Justice in Transitions and Beyond: The Justice Potential of Truth Telling Mechanisms for Post-Peace Accord Societies,” *supra* note 8 at 83–114.

even harder when, as in the case of restorative justice, a fundamental shift in public understanding is required. Restorative justice programs require significant investments particularly in community capacity in order to be successful. Further, restorative justice is about the work of relationship building through which harm to victims, rehabilitation and reintegration of wrongdoers and empowerment, capacity building and strengthening of communities can be achieved. This work takes dedication, commitment and time. Success can only be appreciated in the fullness of time. But, time is often not a friend of political agendas.

It is possible, however, to navigate this political complexity. Nova Scotia's Restorative Justice Program stands as a testament to this possibility. About the time that Chief Justice Bayda was considering restorative justice as an aid to reconciling the theory and practice of sentencing, Nova Scotia was embarking on a process of establishing the most comprehensive and developed restorative justice program in Canada and among the most comprehensive in the world. In 1999 the Nova Scotia Restorative Justice Program came into being with the support of all of the major actors in the criminal justice system and in partnership with community agencies throughout the province. The Nova Scotia Program has survived a few elections and a change of government. The Nova Scotia government is remarkable for the level of investment and support it has provided to the program. The current challenges for the government are on a number of fronts: public safety, youth justice and crime prevention, to name a few, could easily have weakened its resolve to work through the political complexities of supporting and developing a restorative justice program. Instead, it appears that the government has seen the potential and promise of restorative justice. It has understood the role of restorative justice in youth justice, where restorative justice takes a holistic approach to justice that fits well with calls for an integrated child and youth strategy emerging out of a recent judicial inquiry.<sup>23</sup> The government has gone further to recognize the role of restorative justice in responding to the challenges of public safety and crime prevention

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<sup>23</sup> See the Nunn Commission of Inquiry, *Spiralling Out of Control, Lessons Learned From a Boy in Trouble*, (Nova Scotia: Nunn Commission of Inquiry, 2006), online: <[http://www.gov.ns.ca/just/nunn\\_commission.asp](http://www.gov.ns.ca/just/nunn_commission.asp)>]. Also see "The Strategy for Children and Youth, Our Kids Are Worth It," online: Nova Scotia Department of Community Services <[www.gov.ns.ca/coms](http://www.gov.ns.ca/coms)>.

through justice processes that engage and empower the community as partners.<sup>24</sup>

#### **D. BUREAUCRATIC COMPLEXITIES**

In addition to political complexities that might pose a challenge for restorative justice, Chief Justice Bayda noted the bureaucracy of government as a formidable challenge. Bayda C.J. warned “the monolithic bureaucratic behemoth is like a huge steamship, very hard to turn around.” Change, he noted “is not second nature to a bureaucracy.”<sup>25</sup> To this complexity we might add an extra layer for restorative justice. Restorative justice recognizes that restoring relationships requires attention to both the context and causes of wrongdoing as well as to the needs of the various parties. Restorative justice thus offers a more holistic approach to justice, one which broadens the set of issues typically in view of the justice system. It requires a holistic understanding of the context, causes of harms and their responses. This view of justice makes the connections between justice and education, social and community services, health, and government services clear. Restorative justice then requires a holistic and integrated approach to service and funding that is not emblematic of modern government. Thus one of the significant challenges for restorative justice is to break down the silos or compartmentalization of government in order to marshal the resources and skills required for a holistic approach to justice.<sup>26</sup>

#### **E. LEGAL COMPLEXITIES**

When he was speaking in 1997 Chief Justice Bayda recognized that the embrace and development of restorative justice would face significant legal complexities. The development of restorative justice programs in Nova Scotia and elsewhere in Canada and around the world allows us to identify and navigate the range of legal complexities that arise with the creation of new justice programs and processes. As

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<sup>24</sup> See Crime Prevention Strategy, “Time to Fight Crime Together,” online: Nova Scotia Department of Justice <[www.gov.ns.ca/coms](http://www.gov.ns.ca/coms)>.

<sup>25</sup> *Supra* note 11 at 10.

<sup>26</sup> This issue, among others related to the challenges of institutionalizing restorative justice, is being explored through the Nova Scotia Restorative Justice Community University Research Alliance (NSRJ-CURA), *supra* note 1.

restorative justice moves from the stage of pilot projects and becomes a more institutionalized part of the justice system further legal complexities arise including, to name only a few: issues of confidentiality, prejudice, and rights protection for offenders and victims. These issues require careful and thoughtful attention. They are not unknown complexities however. They are similar to the difficult legal questions triggered in other new legal processes. This is not to say the answers will be the same but that there is some reason to be optimistic that a resolution to these issues can be found. Surmounting these legal complexities however will require the right kind of attention from those with the capacity and skills to overcome them. It will require particular consideration by participants from the legal community—from lawyers and judges. The failure to garner this attention (or attracting the wrong kind of attention) could become a significant hurdle for restorative justice.

I want to offer just one example of the potential problem a misapprehension of restorative justice by the legal community could pose. We have traveled some distance in terms of legal developments in restorative justice in the past ten years. One major development heralded by restorative justice advocates is the Supreme Court of Canada's decision in *R. v. Gladue*,<sup>27</sup> (and subsequent case law). This decision opened the door for serious engagement with restorative justice in our legal system. As such it is rightly viewed by advocates of restorative justice as an important milestone in overcoming hurdles to finding a place for restorative justice within the existing legal system. However, while this decision opened a door, it did not do so sufficiently enough to enable restorative justice to pass through it. In *Gladue* the Supreme Court was presented with many of the same concerns about sentencing that worried Chief Justice Bayda ten years ago. *Gladue* was the first time the Supreme Court of Canada recognized and considered the role of restorative justice as one of the purposes and principles of sentencing under the new codification of sentencing principles contained in section 718 to 718.2 of the *Criminal Code*. However, in doing so the Court explicitly refused to articulate the concept and principles of restorative justice, believing this best left to be developed in the jurisprudence over time. Implicit in the judgement, however, is an understanding of restorative justice that simply equates it with community sentences. Much of the application of *Gladue* by lower court cases adopts or replicates this limited interpretation of

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<sup>27</sup> [1999] 1 S.C.R. 688.

restorative justice.<sup>28</sup> As a result the door opened by the Supreme Court for restorative justice may be more illusory than real since it is too narrow to admit the full insights and implications of restorative justice as a truly different approach to sentencing and justice.

This failure to appreciate or explore restorative justice fully is not one that can rest with the justices of the Supreme Court alone. Indeed, their hesitance to articulate the concept and principles of restorative justice and their view of it as little more than a label for alternative sentencing practice reflects the state of much of the legal profession's understanding of restorative justice. Chief Justice Bayda recognized that the development of restorative justice would require a change in the jurisprudential area. This will need the participation of judges, prosecutors and defense counsel, law professors and students, and public servants. As Chief Justice Bayda rightly argues, unless and until counsel understands and can explain and advocate for restorative justice in court, judges will be limited in their capacity to consider its implications for justice. If restorative justice is to go in new directions public and professional education is key. Only when we enable new ways of thinking about justice will we be able to travel in new restorative directions.

## CONCLUSION

Realizing the promise and possibility of restorative justice to move in new directions will require vigilance in navigating the complexities of this journey. It will also require good traveling companions for it is not a journey that can be made alone. The trip will require the expertise and leadership of community, government and academia. There are those who argue this journey is the purview of the community alone as a means of claiming back power over conflict resolution that has been "stolen by the state." Others have tried to forge ahead without inviting or waiting for the community to join. Governments have tried instituting restorative justice as a part of the existing system. For most of its development restorative justice practitioners have pushed ahead without the company of theorists and scholars that might help map the route or ask questions when they get lost. Experience has made clear the importance of strong

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<sup>28</sup> For a further discussion of this, see Jennifer Llewellyn, "Restorative Justice in *Borde* and *Hamilton* – A Systemic Problem?" (2003) 8 C.R. (6<sup>th</sup>) 308.

partnerships in moving forward with restorative justice in a way that is meaningful, legitimate and successful. The Nova Scotia Restorative Justice CURA is focused on mapping a route towards the new directions in restorative justice not only as reflected in the substance of its research findings, but also in the way in which this research is conducted. It is a partnership involving communities, government and universities. It is this partnership that enables us to bring the full expertise, knowledge and skills of community, government and academic to bear on moving restorative justice theory and practice in new directions. This model builds upon the partnership between community and government at the core of the Nova Scotia program, and it is an important example for the way ahead in restorative justice.