CHAPTER 8

RESTORATIVE JUSTICE:

TOWARDS A RIGHTS-BASED APPROACH

Shannon Moore, Brock University

Introduction

Restorative Justice is sourced in ancient and contemporary indigenous epistemologies found the world over, contrasting the colonial foundations of mainstream systems of justice found in countries such as Canada. Restorative practice is built upon a communitarian value base, a standpoint of interconnectedness, a focus on full participation, a respect for human social and interpersonal relationships and an emphasis on the voice of victims of harm.¹ During restorative practice the process of healing harm is the central focus. Accordingly, the emphasis is on oral and emotive responses and interventions that are non-hierarchal and non-linear. The range of restorative justice practice is vast and may include dyads, groups or whole communities, fact sharing, acceptance of responsibility, mutual resolution, restitution, reduction in fear or a challenge to social inequity.

From the perspective of the UN Convention on the Rights of the Child (CRC), restorative justice and children’s rights may be understood as theoretically congruent as they are premised from similar principles. Moreover, through their interconnection in practice more ethical and democratic responses to young people in conflict with the law may be facilitated. Practices based on restorative justice and children’s rights also may be seen
to correspond with Canada’s domestic and international legal commitments, including those of the CRC and the UN Basic Principles of Restorative Justice. Both of these UN meta-narratives were adopted by Canada and drafted with significant Canadian input. Notwithstanding the potential for the theoretical and the practical application of these interconnected principles, only recently have they been linked in Canadian discourse. These principles have yet to become established in integrated practice in partnership with young people in Canada. However, movement towards such a practice and towards a fully-fledged system of rights-based restorative justice is both desirable and possible for Canada and may be informed by a limited number of international developments in this arena.

The merit of a Rights Based Restorative Justice may be understood in the context of recent legal developments in Canada and a practical focus on fair, proportionate and democratic interventions with young people in conflict with the law. With Canada’s ratification of the CRC in 1991, adoption of the UN Basic Principles of Restorative Justice (2002) and with the federal government’s enactment of the Youth Criminal Justice Act (YCJA) in 2003, Canada has become committed to a system of youth justice that integrates the principles both of restorative practice and children’s human rights. The YCJA has emerged as a major legislative development for rights-based initiatives, notwithstanding the substantial obstacles that have to be addressed if restorative justice and children’s are to be authentically joined in policy and practice.

This chapter presents a focused discussion on policy and practice related to restorative justice in a manner that is contextualized by the principles and provisions of the CRC. The aim of this chapter is to encourage a rights-based restorative practice.
dialogue by exploring and critically reflecting upon recent developments and obstacles influencing Canadian policy and practice. To achieve this aim, the chapter is organized as follows. It begins with an overview of definitions, major themes, and principles in restorative justice discourse. This is followed by an exploration of the Canadian context of restorative justice programs and then a critical analysis of recent developments. Then the practice of restorative justice is contextualized in terms of the relevant articles of the CRC. The chapter concludes with a reflection on the overall merits and challenges of promoting rights-based restorative practice.

**From Canada’s Retributive System of Justice Towards Restorative Justice**

Historically, Canada’s retributive justice system was inherited from Europeans during colonization in the 17th and 18th centuries. The indigenous justice systems that existed prior to colonization continued to prevail informally within First Peoples communities while Canada’s official system of justice began to increasingly reflect European legal and political customs. Canada’s criminal law and criminal justice policy, with its central focus on retribution and punishment, was “invented by Western culture within the process of colonization and the formation of Eurocentrism” ⁸ and essentially “overlooks millennia of First Peoples history.” ⁹

In contrast to Canada’s retributive system of justice, restorative justice is an approach associated with ancient indigenous-aboriginal pre-colonial teachings. Aboriginal communities in Canada were imbued with vibrancy, spirituality and social order prior to colonization.¹⁰ Restorative practice reflects the values of indigenous or aboriginal systems of justice in Canada (and elsewhere) and implies both a certain
process and outcome. The motive behind this approach is practical: it aims at restoring balance back to the lives of victims of crime as well as peace within the community, while allowing offenders the chance to redeem themselves and develop a sense of responsibility for being the perpetrators of harm. Consequently, the intent of these two conceptualizations of justice evidence strong contrasts. Restorative practice focuses on disharmonies in relationships, accountability, respect and capacity building while processes aim to decrease antagonism; whereas, retributive justice focuses on a single act of crime, are adversarial, punitive and can increase the isolation and alienation of an offender in relation to their community.

Restorative justice is defined by principles that focus on healthy human relationships and on healing the effects of wrongdoing through the promotion of dialogue among individuals within communities. In this way restorative justice is context-bound and co-constructed within the social worlds of those impacted by crime, harm and conflict. The principles of restorative justice may be summarized as follows. First, the perpetration of crime and the infliction of harm are fundamentally the violation of a human being or human relationships as they rupture the well-being of individuals, communities, and societies. Second, the goals of the restorative process involve repairing of harm done and restoring relationships between individuals and community with an aim of transformation of all parties towards greater equilibrium. Third, all restorative processes must be voluntary and respect the rights of individuals to choice with sensitive consideration of power relationships and individuals with less personal or positional resources within society. Fourth, victims of crime must always be of central concern and given free choice to participate in the process. Fifth, perpetrators of wrongdoing are given
opportunity to accept responsibility for the harm they have caused and a choice to participate in a restorative process. The above five principles emphasize the importance of human interpersonal and social relationships.\textsuperscript{15} Accordingly, restorative justice takes shape in a fluid way as it reflects the needs of particular individuals and communities while being connected within a single arena through values of empowerment, accountability, honesty, respect, engagement, volunteerism, restoration, inclusiveness, collaboration, and problem solving.\textsuperscript{16}

Further, restorative programs that authentically reflect the unique needs of diverse communities are more congruent with the basic principles of restorative justice than are prescribed formulations constrained by governmental regulation.\textsuperscript{17} This is a seminal concern as restorative processes become increasingly integrated into mainstream systems. Ideally, restorative processes with young people demonstrate an “emphasis upon the responsibility of the wider family group for their young relatives, rights of children and young people, affirmation of cultural diversity, and encouragement of community-state partnerships.”\textsuperscript{18} These process qualities are congruent with a rights-based restorative justice approach as they stress concern for ethical and democratic practice.

It is important to emphasize that many variations in contemporary restorative approaches exist such as family group conferencing, youth justice committees, community-based hosting processes, healing circles, reconciliation and conferencing, and victim-offender mediation. This range of programs and processes share the same guiding principles, as discussed above, creating a template to balance diversity and unity -- so essential in our increasingly pluralistic society.\textsuperscript{19} At the same time, major contrasts among processes emerge regarding the degree of autonomy communities retain to design
programs as opposed to choosing government endorsement. In Canada’s unique political landscape each province and territory independently decides how restorative justice is to be translated into practice, which leads to considerable variation in practice across the country.

**Canadian Context for Restorative Justice Programs**

Currently, restorative justice processes are being integrated into mainstream, correctional and grassroots programs throughout rural and urban Canada. In fact, restorative approaches have been used in a broad range of communities through informal justice processes for over thirty years. The roots of contemporary restorative practice can be traced back to the work of Mr. Mark Yantzi in the Kitchener-Waterloo region of Ontario and Community Justice Initiatives — an organization that continues to thrive today.\(^{20}\) Community Justice Initiatives is known worldwide as having started the first restorative justice program.\(^{21}\) Currently, restorative justice informs responses to wrong-doing in every Canadian province and territory through programs based in corrections, communities, and schools.

In 1998, a survey of restorative justice in Canada conducted by Correction Services Canada found that 200 programs were operational at that time.\(^{22}\) This was followed by a report commissioned by Justice Canada stating that by 2003, community and restorative programs featuring Youth Justice Committees numbered 262.\(^{23}\) Youth Justice Committees were established to work in partnership with the justice system and are founded on principles of restorative justice although they are regulated in a manner that leads to prescribed processes. This contrasts community-centered approaches to
restorative justice that respond uniquely to specific regional needs. Many restorative justice initiatives contrast Youth Justice Committees as they are grassroots and developed through community organizations or First Peoples communities. This choice to operate independently reflects a flexible approach to programming that was intended to be responsive to the unique needs of particular communities rather than directed by government regulation.

Although current and accurate information regarding the numbers of programs operating across Canada is difficult to obtain as many have an informal structure, it is clear that the numbers continue to grow—perhaps an indication of the effectiveness of restorative practices. This sense of expansion likely also reflects the call for community-based programming under the new *Youth Criminal Justice Act* (YCJA). After the YCJA came into effect in 2003, public and private sector support for programs grew while educational opportunities increased awareness.

Since the YCJA allows the provinces and territories a wide degree of autonomy in the development and delivery of community and restorative justice programs, there continues to be considerable variation across the country. As an illustration of developments in regions across Canada an overview of some developments in Canada by province and territory is provided next.

In British Columbia it is estimated that as many as 90 restorative justice programs are currently operational 18 of which are the focus of First Peoples communities. A majority of the programs are community-based and provide services to young people including to children under age 12. For instance, in Vancouver, both the John Howard Society of the Lower Mainland and Vancouver Aboriginal Transformational Justice
Service provide services for youth. In the region of greater Victoria, seven programs offer restorative justice services. These programs utilize a wide variety of models including community accountability panels, victim-offender programs, family group-community conferencing mediation, and mentorship, assessment and counseling programs.

In Alberta, there are an estimated 102 Youth Justice Committees responsible for community and restorative justice programming. For example, in Edmonton, the Community Conferencing Association focuses on serving youth through a conferencing model and Native Counselling Services of Alberta offers a variety of services to youth including to those under age 12. In Calgary, programs focus on a conferencing model such as used by the Alberta Seventh Step Society and the Calgary Community Conferencing Project. Other programs such as in Red Deer focus on family group conferencing or victim-offender mediation.28

In Saskatchewan, there are four government designated Community Justice Committees to provide programming and an additional 50 non-designated initiatives in Aboriginal communities.29 Most of the programs use the victim-offender mediation model and family group conferencing.

In Manitoba, there are about 58 designated Youth Justice Committees, although it is unclear how many are active. In places such as Brandon, services include family and community conferencing, victim offender mediation, circles of support, and circle sentencing. In Winnipeg, Onashowewin has a primary focus on young people using victim offender mediation, conferencing and circle sentencing.30 Moreover, Manitoba Keewatinook Okimakanak (MKO) First Nations Justice is focussed on the development and implementation of a system of aboriginal justice in Manitoba. It is operating in 10
First Nation communities. Its mandate is to empower First Nations to assume direction and control of the criminal justice process, creating a model that is restorative at its core, culturally relevant, and effective.\textsuperscript{31}

In Ontario, it is estimated that 56 programs founded on principles of restorative justice are currently operating. Twenty-seven programs identified are community-based restorative justice projects and 16 of these programs indicate services for youth.\textsuperscript{32} In addition, there are 23 government sponsored Youth Justice Committees designated in the province.\textsuperscript{33} The committees are expected to be expanded to more locations across the province although it is important to note that many of the established committees are currently inactive. An example of an emerging program is the Multi-faith “Hosting” pilot project which is communities across five regions in southern Ontario. Also, listings for six aboriginal community-based programs may be identified in the province.\textsuperscript{34}

In Quebec, eight restorative justice programs are identified and seven of these specifically serve young people. All of the programs for young people seem to focus on the victim offender mediation model in addition to the provision of some family group conferencing. In Montreal, two programs are based on restorative justice principles although the details on their types of processes are unclear.\textsuperscript{35}

In New Brunswick six restorative justice programs are operating and three of these provide services to young people. For instance, Moncton has three programs; two are focused on training and community education while the John Howard Society offers community justice forums for young people in addition to services for adults. In Fredericton, the Department of Criminology uses a circle of support format to serve
young people whereas alternative measures are the focus of Victim Services and Restorative Justice Department of Public Safety.\(^3\)

In Newfoundland and Labrador, an estimated 32 designated Youth Justice Committees are endorsed by Justice Canada.\(^4\) In addition, it is estimated that three non-designated restorative justice programs provide youth services. In St. Johns, the John Howard Society serves about 1000 young offenders annually. Also in St. Johns, Circles of Support are developing a program for young people.\(^5\)

The Nova Scotia Restorative Justice program, under the direction of Dr. Don Clairmont, is a national leader as it has aimed to implement restorative justice throughout the criminal justice system in that province. The understanding that restorative justice is some modality is applicable across contexts whether pre-charge, judicial or correction, premises the program. Launched in 1999 through federal government support after two years of pre-implementation planning, it is now fully funded provincially and programming is carried out by non-profit agencies. In fact, restorative justice is considered “institutionalized”, as it is established across the province in the Department of Justice and through community-based programming.\(^6\)

In Prince Edward Island, programs are operating in Charlottetown and Stratford. The Island’s Restorative Justice Network, for example, has a mandate to serve young people through victim offender mediation and conferencing.\(^7\)

In the Northwest Territories, there are 30 designated Community Justice Committees (similar to Youth Justice Committees) although only about 23 seem to be active.\(^8\) Currently, only two restorative justice programs are listed on the NWT justice website for example. These are in Fort Smith and Inuvik. They are supported by the
Community Justice Division of the Department of Justice in NWT and focus on developing safer and healthier communities through alternative justice programming. The Inuvik Justice Committee specifically offers youth programming for alternative measures and diversion. In Fort Smith, youth programming includes victim offender mediation, family group conferencing, circle sentencing and justice committees.

In Nunavut, the Community Justice Program (Department of Justice Nunavut) has a mandate to promote services for victims, crime prevention, and greater community involvement and control in responses to crime. This mission statement reflects principles of restorative justice. There are 25 government designated Community Justice Committees in the region, though it is unclear how many are currently active. It is noteworthy that a recent publication exploring the integration of principles of restorative practice, child rights, wisdom from Inuit Elders and cross-cultural counselling for school-based programming indicates possible future directions for rights-based restorative practice with young people in this northern context.

In the Yukon, nine restorative justice programs seem to be operating, many offering services in First Peoples communities. Processes focus on victim-offender mediation, conferencing, and circle sentencing.

In summary, there is considerable variation in program development, implementation and services that seems to reflect the vast diversity and difference across this country. Also, the ideological and philosophical differences among government regulated Youth Justice Committees and other grass-roots community centered or First Peoples agencies seem to impact the implementation, monitoring and activity of programs. For example, several Youth Justice Committees across the country that are
regulated and funded by Corrections Canada are inactive; however, programs that flexibly respond to unique needs of their communities seem to have greater longevity—perhaps as a result of greater local legitimacy. At the same time, many grass-roots programs retain a standpoint that moves away from certification, government regulation and endorsement in order to retain flexibility and community accountability.47

Unfortunately, this is reflected in a dearth of rigorous evaluations for many programs (Nova Scotia being a noteworthy exception) and effective standardization founded on the United Nations Basic Principles of Restorative Justice48. Furthermore, programs are currently being developed, piloted or are in a state of change which presents a challenge when reporting the current status of restorative justice. In the end, Canadians have an opportunity to begin a right-based restorative justice dialogue given past and current developments. In the final analysis, there remains an opportunity for the CRC to become integral to restorative practice in the future as the landscape of these processes evolves.

Critical Analysis: Towards Ethical and Democratic Restorative Practice

Restorative practices are not without controversy.49 While amplifying the strengths of restorative justice, it is equally essential to acknowledge critiques in order to safeguard the integrity of practice. For example, the effect of restorative programming may ‘widen the net’ of youth justice systems if the focus becomes increased intolerance and an accentuation of social control. Restorative justice processes are, by their nature, community centered and reliant of citizen volunteers to support programming. This in turn creates a dependence on a critical mass of investment, interest and knowledge of these alternative approaches in order for community-based programs to be sustained. In addition, the YCJA is likely to reflect a bifurcation of youth justice such that restorative justice will continue to be advocated for minor offences while
principles and processes of the traditional justice system will likely be engaged for more serious offences.\textsuperscript{50}

Further critiques have also emerged from social justice and feminist movements\textsuperscript{51} and are consistent with a critical social pedagogy and rights-based thinking:

The issue of power in relationships is very important when you consider alternative dispute resolution processes because ADR focuses on people who share a problem and share the resolution of the problem. When there is power imbalance between people who share the problem it may be difficult to engage in an equitable problem solving process and generate an equitable resolution to the problem.\textsuperscript{52}

Consequently, by recognizing the complexity of justice we will more likely take into account the challenges of equality, power relationships, and vulnerability when designing programs. Further, youth justice stakeholders have a responsibility to ensure ethical practice with everyone—perhaps most especially individuals who have been victimized or are vulnerable, including young people, by establishing a relational and systemic context of equality, mutuality and solidarity. One way to achieve this is to ensure supports are provided for individuals that compensate for power differentials as well as personal needs. Also, processes need to emphasize informed consent and voluntary participation. Victims’ needs must be a central focus, power relations need to be addressed and equalized, and all proceedings must be physically, emotionally and psychologically ‘safe’ to the maximum extent that is achievable.\textsuperscript{53}

Another pivotal critique of restorative justice argues that a return of individuals to a state that began with disequilibrium is the emphasis of “restoration.”\textsuperscript{54} In acknowledging this criticism, we can begin to address it by focusing on the impact of power relations, equality and vulnerability as highlighted in social justice and feminist
discourse. In this way the aim of healing justice must be transformation in a context of mutuality, equality and solidarity rather than restoration to imbalance.

Further, Canadian sociologist and justice activist Ruth Morris outlines several critiques of restorative justice that led her to emphasize transformative justice. She argued the following three points. First, it is unhealthy to speak of restoring victims as it indicates restoring a past without addressing the trauma of victimization. Second, structural-distributive injustice in society and the justice system are not adequately or consistently addressed in restorative processes. Third, the terminology “restorative justice” implies that there was justice originally and then was consequently lost — which is often not the case. In essence, according to Morris, transformative justice may be truer to the intentions of restorative justice and a focus on lasting change and healing. Moreover, in the author’s experience working with young people, a child rights approach has the potential to provide a framework for a more transformative restorative justice. Integrating the CRC in policy and practice would help safeguard the well-being of vulnerable participants and encourage their voice in a context of safety and full participation. By understanding the links between restorative justice and child rights an ethical, safe and transformative experience of justice may be realized.

**Contextualizing Restorative Justice and Children’s Rights**

In light of Canada’s international commitments to the CRC and the UN Basic Principles of Restorative Justice, the lens provided by Rights Based Restorative Justice could provide an effective standard of practice in systems of youth justice. Certainly, viewing restorative practice in the context of children and young people’s rights reveals several links between these constructs. Similar to human rights, restorative justice is not a new
concept: both have roots that may be traced through the millennia notwithstanding their recent appearance in discourse influencing how we relate and create space for children and young people in mainstream society. In Canada this is demonstrated through community-based initiatives, provincial restorative justice programs and the YCJA that reflects an openness to seriously engage restorative justice processes. Similarly, an interest in rights-based policy and practice has slowly evolved across service sectors in Canada over the past decade. In addition, one may find restorative justice principles in aboriginal, indigenous and ancient cultures the world over, including ones not only in North America but ancient Celtic traditions and practices in various regions of Africa and Asia for instance. Thus, it may not be surprising that in a contemporary sense “over 80 countries use some form of restorative justice in addressing crime, [and] the number could be closer to 100.”

Furthermore, Canada is understood as one of the pioneers of this alternative community-centered perspective as her first community-based justice program has roots dating back to 1974. This is a show of innovation and leadership regarding restorative justice in Canada yet the application of restorative processes remains inconsistent across the nation. Although the YCJA now legislates that alternatives to the criminal justice are to be the initial response for young people in conflict with the law for the first time, it is under the mandate of individual provinces and territories to decide how to translate this into policy. Further, it is then the responsibility of urban and rural communities to interpret how to engage restorative justice into practice locally. Funding is inconsistent or non-existent in many regions and local citizen volunteers must be mobilized to support the process. These factors lead to inconsistent engagement and knowledge about
restorative justice. At the same time, it is intended that this fluid interpretation of policy and practice provides an opportunity to shape responses to wrongdoing in a manner that reflects the specific needs and values of individuals and communities.

Likewise, as a social democratic industrial state we fall behind other OECD nations in the implementation of the CRC although Canada was an early supporter with its 1991 ratification of the convention. Some of the obstacles impeding the implementation of the CRC in practice have also plagued the wider adoption of restorative justice; and these may be traced, at least to some degree, to the political structure of Canada. For example, Canada co-hosted the 1990 United Nations World Summit for Children in New York promoting the CRC from it inception. In contrast to this early activity the CRC has not been integrated into federal legislation except for the presence of CRC principles in the recent YCJA. Furthermore, provincial and territorial governments make independent decisions as to whether the CRC enters this level of governmental policy. An outcome of these political realities is a lack of awareness of both the CRC and restorative justice among organizations and individual citizens despite national campaigns and federal endorsement. This political reality lends insight into the dearth of research and practice linking restorative justice and children’s rights in Canada.

Finally, restorative justice and child rights share congruent principles and assumptions as discussed in the introduction. Rights Based Restorative Justice was conceptualized as an approach to youthful offending that focuses upon fair, proportionate, ethical and democratic interventions in youth justice contexts. Moreover, a rights-based approach for working with young people in conflict with the law is
articulated by CRC Article 40 (1) which asserts that all young people are to be “treated in a manner consistent with the promotion of the child’s dignity and work, which reinforces the child’s respect for human rights and freedoms of others and which takes into account the child’s age and the desirability of promoting the child’s reintegration and the child’s assuming a constructive role in society”. Focusing upon full participation, the voice of victims, offenders and young people will be heard through non-discriminatory and safe volunteerism in matters that impact them. Thus, the principles of the CRC Articles 2,3,6, 12 are emphasized in harmony with the UN Basic Principles of Restorative Justice.

Establishing the links between restorative practice and the CRC begins with the fundamental premise that each young person has an innate citizenship indicative of their equality in relation to human rights. Human rights shared by all young citizens under principles of the CRC and restorative justice assert that each young person deserves respect, opportunities to fully participate in matters that concern them, to be heard and to express their concerns. To establish ethical practice, as emphasized earlier, across contexts it is also essential to consider power relations. This is re-enforced in situations of vulnerability or victimization and calls for compensatory measures for positional power differentials through effective supports related to such factors as development capacity. Given these links, it is clear that a more overt discussion of children’s rights within policy and practice of restorative justice could accentuate strengths of programs for young people in conflict with the law and protect the well-being.

A rights-based context for restorative justice could support the expansion of responses towards youthful offending beyond punitive and retributive responses. Such an approach would encourages the voice of victims, offenders and young people to be heard
through non-discriminatory, safe, authentic and full participation in matters that impact them. Through Rights Based Restorative Justice\textsuperscript{70} principles of the CRC Articles 2,3,6,12 are emphasized in harmony with the UN Basic Principles of Restorative Justice.\textsuperscript{71}

Specifically, such an approach would reinforce non discrimination (see CRC article 2) such that all young people have the same human rights regardless of social-cultural context or whether they are victims or perpetrators of harm. Also, the best interests (see CRC article 3) of all young participants would be a central motivation for processes and outcomes. Further, particular attention to survival and developmental (see CRC article 6) needs of all young participants would prompt appropriate consideration processes and outcomes in the context of vulnerabilities and power relations typical in circumstances of victimization. Finally, participation (CRC article 12) all people impacted by crime must have an opportunity to fully and voluntarily participate in restorative justice and experience having their views heard.\textsuperscript{72}

In Canada, this author is unaware of children’s rights under the CRC being established in an integrated practice with restorative approaches, in her years of practical and academic experience within this arena. Most Canadians simply are unaware that the Convention on the Rights of the Child exists and that Canada is accountable to the world community to ensure the rights of young people are protected.\textsuperscript{73} Only recently, discourse regarding children’s rights and restorative justice entered federal legislation as noted in the YCJA, yet the principles linking these frameworks remain essentially unexplored in the Canadian context.\textsuperscript{74} Given the general lack of mainstream knowledge about the CRC in Canada, the incorporation of principles of children’s rights into the YCJA becomes
ever more prescient. This important legislative development resulted from a series of consultations with advocates from across Canada along with other activists, scholars and promoters of child rights who raised the profile of the CRC to the attention of House of Commons Standing Committee on Justice and Human Rights. In turn this senate committee contributed to the reformation of youth justice in Canada. Still, the natural congruence between the principles of restorative justice and child rights—both being centered on respect, accountability and full participation—remain essentially unexplored.

The process of bringing forward knowledge and awareness of restorative justice and the CRC continues to evolve in Canada. Hence, over many years this has proven to be a complex political and practical endeavor shaped by ideological changes in how we understand young people. These shifts in understanding have influences that date back to the early part of the 1900s. Over the past century social constructions of young people, justice and human rights in Canada have been strongly influenced by ideologies inherited from United Kingdom and Europe, the colonial foundation for our political, legal and social systems. In addition, policy and mainstream practice serving children paralleled changes in women rights over the last 100 years. Consequently, ontological views in Canada centered on perceptions of young people as objects of parental authority early in the last century. This perspective shifted to a view of young people as largely vulnerable and in need of protection during the Post World War period. In a more contemporary sense children are now beginning to be understood citizens and subjects of their lives rather than problems to be solved. It is important to note that worldviews regarding children and childhood from aboriginal and minority communities are not readily present
in historic literature as the focus in academic discourse followed mainstream colonial ideologies during the early part of the last century.

Today, our conceptualizations of young people continue to evolve and shape how we respond within policy and practice arenas. Accordingly, the meaning attributed to behaviours perpetrated by young people in conflict with the law are socially constructed and will continue to modify as Canadians begin to more fully understand and respect young people from the perspective of human rights. Indeed, the social construction of youthful offending is frequently described as deviance, and researchers within Canada and beyond the nation’s borders have begun to explore the links between this theoretical stance and retributive responses that focus on social control in the justice system. 78

Restorative Justice Contextualized by CRC Article 40

As a lens through which to view justice, a child rights approach is guided by Article 40 of the CRC first and foremost. Accordingly, article 40 (1) asserts that young people in conflict with the law are to be:

…treated in a manner consistent with the promotion of the child’s dignity and worth, which reinforces the child’s respect for human rights and freedoms of others and which takes into account the child’s age and the desirability of promoting the child’s reintegration and the child’s assuming a constructive role in society.

Many aspects of the above article reflect the principles of restorative justice. There is an emphasis on respecting young people as rights bearing citizens regardless of their behaviours or wrongdoing (see also CRC article 2 non-discrimination). At the same time, opportunities for young people to be accountable to those impacted by their actions assumes that young people are encouraged to respect and understand the rights and
freedoms of others and how these may have been impacted by wrongdoing (accountability is a central principle of restorative justice). These principles provide an opportunity for young people to be reintegrated into their communities as they strive to repair harm caused by their actions. At the same time the impact of wrongdoing is vocalized by all parties in restorative processes which, in turn, challenge young participants to bring their best selves forward, be socially accountable and contribute to society in more constructive ways (see also CRC article 12 participation and voice).

The YCJA also brings forth language that is equally consistent with article 40 of the CRC and principles of restorative justice. This is reflected in the following sections of the YCJA:

…Fair and proportionate accountability that is consistent with the greater dependency of young persons and their reduced level of maturity (s. 3 ii b).

This statute is also consistent with CRC Article 6 which refers to healthy development. Thus, an emphasis in Restorative justice on ensuring safety of vulnerable participants is emphasized. The YCJA continues these points:

…enhanced procedural protection to ensure that young persons are treated fairly and that their rights, including their right to privacy, are protected (s. 3 ii b).

Ontario’s Chief Advocate for children youth and families, Ms. Judy Finlay, addressed the above statute in relation to her experience consulting with young people about youth justice during an interview with the author in March 2005:

In some ways the YCJA is more restrictive in terms of rights than the Young Offenders Act—especially in terms of privacy, so there are some issues that don’t offer privacy. Other areas are more expansive and more inclusive in terms of young people—seeing them not as criminals but as young people and reflecting on that differently.79
Within the Finlay’s statement the challenge of actually transforming legislation to policy and then meaningful practice is highlighted. In order to facilitate ethical and democratic practice for young people whole systems need to be considered including the interaction of CRC principles and provisions and the values and practices imbedded in restorative processes. Central to a rights-based and restorative justice approach is respect—whether it in relation to privacy or another dimension of selfhood.

Recognition the challenge of transforming legislation such as the YCJA into meaningful policy and practice is seminal for understanding the social-political context impacting restorative justice and child rights. Finlay expands on this point:

> During the early phases of the development of the YCJA there was far more rights-based language and then with the whole debate a lot was pulled out. I was more hopeful in the early days. I think if people embrace the YCJA the rights will follow. It depends on how people choose and interpret the act provincially and territorially.\(^\text{60}\)

Similarly, it is sensible that if key principles of restorative processes are embraced respect for child rights would sensibly follow. As a whole the principles of restorative justice and child rights need to be acknowledged at all levels of systems for meaningful transformation of legislation. This is of particular challenge given Canada’s unique political landscape. Provincial and territorial interpretation of statutes is autonomous and dependent on the social-political will influencing specific regions. Ergo, a logical first step would be to educate policy makers and practitioners regarding the core principles of the CRC and restorative justice (This is echoed in CRC article 42). Nonetheless, a rights-based restorative justice has an opportunity to authentically manifest because of the solid foundation found within the new Youth Criminal Justice Act.
As discussed, the YCJA is innovative because it is the first example of federal legislation that clearly refers to the CRC and restorative processes; yet the challenge remains to authentically to move from this policy to practice. Although cautious optimism about this development is warranted as the new act holds promise “but only in its principles—it not really enacted throughout in its language, it is mentioned up in the front but not embedded clearly in the rest of the act.”

Furthermore, article 40 (4) of the CRC states that:

A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programs and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the office.

This statement clearly points to the necessity of alternative measures that address the underlying factors leading to incarceration and is congruent with a restorative approach. Furthering these points, the YCJA stipulates that custody “while may be imposed for a violent offence, section 39 (1)” restricts the use of custody for non-violent offences and requires a history of failing to comply with non-custodial sentences, a pattern of non-violent offending, for example. Thus, alternatives to sentencing have become legislated federally as the initial course of action for first time offenders.

It follows that within the declaration of principles of the YCJA, express reference to the CRC and the need for enhanced rights for young people facing the state’s criminal law power is made. This includes the requirement for all levels of the justice system to consider extra-judicial measures—such as restorative justice—before proceeding with judicial options. This is recognition of article 40 and the value of restorative justice.
Again the challenge remains to authentically develop an integrated rights-based restorative justice practice.

Furthermore, extrajudicial measures are evident in practice-based settings, to varying degrees across Canada. Notwithstanding this development Finlay asserts that individuals that first respond to youth in conflict with the law:

Are not associating [extrajudicial measures] with the YCJA. There is more of a liberal movement in terms of federal and provincial [policy and procedures than evident previously]. Also the introduction of the CRC in 1991 has elevated the issues of rights, voice and participation…a number of things going on simultaneously on a number of tracts that intersect in many places. We are seeing [CRC] in youth justice system yet movement beginning [prior to the change in legislation from the YOA to the YCJA] and this [ideological shift] facilitated these items being embedded in the YCJA…. The fact that in the last 10 years there has been the evolution of Child Advocates across the country has had great influence because the [CRC] is our language, the foundation of our work—it is our framework and we hold provinces accountable to that. We have a societal movement around voice and participation. We haven’t quite got to citizenship yet.\(^83\)

If we accept that an ideological shift regarding our social constructions youthful deviance is emerging in Canada then a complex analysis of factors influencing a rights-based restorative practice must be investigated for a full understanding of the Canadian context. Accordingly, the context of restorative justice within a rights-based framework is informed by micros and macro levels of social-political-historical processes just as the articles embedded in the CRC are interconnected and acquire depth of meaning when viewed holistically.

**Restorative Justice Contextualized by CRC Article 30**
Here, it seems important to emphasize that there is a fundamental difference between restorative justice and aboriginal justice.

Aboriginal Canadians (Inuit, Métis, and First Nations) are disproportionately represented in the criminal justice system as victims and offenders of crime and are described as the “most vulnerable group of children and youth in Canada today and in the future.” 84 Aboriginal Canadians are “likely borne into poverty, suffer health problems, be victims of maltreatment, be placed away from their families and communities in provincial and territorial child welfare systems or be incarcerated in youth correctional facilities.” 85 In fact this increased risk of Aboriginal young people becoming involved in the youth justice system is reflected in an incarceration rate eight times higher than non-aboriginal youth. Moreover, it is evident that young people in contact with the welfare system often cross-over into the justice systems. 86 These facts call attention to the need for social justice in relation to structural and distributive inequities in Canada.

Given the reality of increased risk factors for Aboriginal young people and the indigenous pre-colonial roots of community-based justice, contextualizing restorative justice with CRC Article 30 could support a vital response to be mobilized:

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language.

As discussed, restorative justice has ancient indigenous roots that are congruent with the traditional teachings represented in the diverse cultures of Aboriginal Canadians. 87
Hence, returning to the communitarian values of restorative processes in response to Aboriginal youth in conflict with law is arguably in accord with CRC Article 30.

Similarly, the Youth Criminal Justice Act makes reference to CRC article 30 and restorative practice in the following statues:

…. respect gender, ethnic, cultural and linguistic differences and respond to the needs of aboriginal young persons and of young persons with special requirements (s. 3 iv a).

…timely intervention that reinforces the link between the offending behaviour and its consequences (s. 3 iv b).

…within the limits of fair and proportionate accountability, the measures taken against young persons who commit offences should (s.3):

(i) reinforce respect for societal values,

(ii.) encourage the repair of harm done to victims and the community

(iii.) be meaningful for the individual young person given his or her needs and level of development and, where appropriate, involve the parents, the extended family, the community and social or other agencies in the young person’s rehabilitation and reintegration.

Taken together, the above statues affirm rights-based restorative practice as the emphasis is on timely, value-based, social-cultural conscious responses to offending behaviours.

Nevertheless, since the YCJA came into legislation significant advances have not been made in relation to Aboriginal young people. Finlay confirms this failure in the following:

…Because we have so many aboriginal young people in the child welfare system the rate is far higher than non-aboriginal—largely because of poverty and because of some of the conditions on reserve—and history and residential schools and alcoholism ….unless we assist communities in healing and assist communities in looking after and managing their own children then we going to have them gravitate to the justice system we know ….I think higher than 20%, a conservative estimate--come the youth justice systems from the child welfare system.
Hence, the challenges faced by Aboriginal young people in this country may take decades to meaningfully transform through social justice and radical action beyond legislation.

Ms. Finlay went on to describe the large number of young people in the child welfare system often cross over into the justice system—only to be brought off reserve because there are not resources for youth justice in rural Northern communities. Ironically, these same communities are home to the young people most likely to fill youth custody centers in this country. Indeed, the challenges faced by Aboriginal young people are indicative of “an element of racism—if the same circumstances existed for non-aboriginal people I am wondering if we would be as tolerant.” 89 Furthermore, there is also a “legislative requirement to pay ‘particular attention to the circumstances of aboriginal young persons.’” 90 The potential of a rights-based restorative justice approach to meaningfully impact the lives of young Aboriginal Canadians becomes evident when lived-experience, policies, practices, legislation and international commitments are all taken into consideration. As Canadians we need to broaden our vision of justice for lasting change. In brief, the aims of a rights-based restorative justice makes meaningful change as notions of right-doing and wronging are transcended in order to account for underlying causes of behaviours such as racism, distributive and structural injustices in our society.

**Accurate Knowledge: Article 42**

To effectively realize rights based restorative justice Canadians need accurate knowledge about the principles, provisions and processes that reflect the CRC and restorative responses to justice. 91 This assertion may appear simplistic but in practice ideological
and political barriers impede this initial and essential step.\textsuperscript{92} Notwithstanding the articulation of CRC and restorative justice principles in the YCJA, individuals responsible for facilitating the use of extra-judicial restorative approaches are generally unaware of the CRC or receive no training to actually understand the meaning of its principles. As discussed earlier, restorative justice practices are also inconsistently practiced across Canada essentially due to the variation in policies and resources supporting provincial and territorial programs -- irregardless of federal legislation. Of course, increased understanding is needed among all levels of community-based as well provincial and federal governmental systems. Thus, the first step to implementation and monitoring of a rights based restorative justice is widespread education.\textsuperscript{93}

\textbf{Accountability to the International Community: Article 44}

On the occasion of ratification of the Convention on the Rights of the Child, Canada made a commitment to its citizens and international community to up-hold a minimum standard of care for children and young people. Through ratification Canadians also made a commitment to report Canada’s progress in relation to CRC standards to the Committee on the Rights of the Child every five years.\textsuperscript{94}

In response, the Committee on the Rights of the Child expressed concern in 1995 and in 2003 regarding the complicated nature of Canadian federal government and the division of responsibilities among federal, provincial and territorial systems in matters impacting young people. First, the committee emphasized the importance of CRC Article 12 and the right for young people to be heard with an emphasis on judicial proceedings. Further, related to CRC article 12 are CRC articles 2 (non-discrimination) and 3 (best
interests) which need explicitly need integration into domestic law. Finally, the Committee reinforced the need to protect children from vulnerable and disadvantaged groups such as Aboriginal children and young people. A rights based restorative justice approach that promotes the principles outlined previously in this chapter could well addressed these critiques and contribute to full-filling Canada’s responsibility to CRC article 44.

Similarly, Canada has also endorsed the United Nations Economic and Social Council (ECOSOC) resolution on the basic principles and use of restorative justice programs in criminal matters. To summarize, ECOSOC recognizes calls for a significant growth of restorative justice worldwide and that initiatives draw on traditional and indigenous forms of justice. In addition the ECOSOC resolution suggests a revolving response to crime that respects the dignity and equality of each person, builds understanding and promotes social harmony through healing victims, offenders and communities. Thus, the Convention on the Rights of the Child and the ECOSOC resolution on the principles of restorative justice reinforce Canada’s international commitments and point to our responsibilities for leadership in relation to justice and the human rights of young people.

**Closing Reflections**

Over the last century our social constructions of justice and responses to young people in conflict with the law have evolved along with Canada’s collective social conscience. It is becoming increasingly irrelevant to view young people as objects of adult control, victims needing protection or problems to be solved. Young people are increasing being viewed as social actors having citizenship rights within society. In this author’s view, the
new YCJA reflects this growth in understanding with its integration of the principles from the United Nations Convention on the Rights of the Child along with principles of restorative justice. Hence, the social-political landscape of Canada seems ready for a rights-based restorative justice response.

On the whole, the *Youth Criminal Justice Act* presents a seminal opportunity across this country but not without caution. We now can move from legislative endorsement to the integration of child rights and restorative processes into provincial and territorial policy and grass-roots practice. The challenge remains to sustain the authenticity of restorative processes with flexible meaningful programs that respond to the unique diversity of each community within our pluralistic society. This is the heart of restorative justice and the factor that made Canada a world leader in these grass roots processes more than thirty years ago. Thus, it is essential that youth justice does not become so reliant on government regulations and designation that we neglect to address structural and distributive injustices within our society. We need to remain accountable to our young people, our local communities and our international commitments. In brief, a rights based restorative justice approach has the potential to protect the citizenship of everyone impacted by wrongdoing and promote healing; yet, this will not manifest without increased awareness of the basic principles of child rights and restorative justice.
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