



ENGAGEMENT • SUMMER 2017

Getting fair outcomes for victims in Canada's criminal justice system

Restorative Justice

What is restorative justice?

Restorative justice (RJ) is a way of looking at and thinking about crime and the criminal justice system – one that is meant to take a holistic, collaborative, and humanizing approach. In principle, it posits that crime is not only a violation of the law but also of people, relationships, and communities.¹ It can be understood as an approach that focuses on repairing the harm caused by crime by:

- > holding offenders accountable for their actions;
- > providing parties affected by the crime an opportunity to address their needs and seek a resolution that lends itself towards reparation; and
- > preventing further crime, harm, and victimization.

What is the federal government doing on this issue?

- > Recent commitments signal a desire by the Canadian federal government to re-orient the criminal justice system to more significantly reflect restorative principles and values.
- > The Minister of Justice and Attorney General of Canada's mandate letter² notes the increased use of RJ processes as an important priority for Canada's criminal justice system review and reform.
- > In May 2016, at the 25th Session of the UN Commission on Crime Prevention and Criminal Justice, a resolution tabled by Canada on the issue of RJ in criminal matters was adopted. It builds on a July 2002 resolution (RJ principles) and proposes to convene a meeting of RJ experts to review the use and application of the principles, along with innovative approaches in the area of RJ.

What rights to victims currently have with respect to restorative justice?

- > Under the *Canadian Victims Bill of Rights* (CVBR), every victim has the right – on request – to information about the services and programs available to them, including RJ programs.
 - One challenge is that the CVBR provides only that a victim has a right to information about RJ "on request". But if a victim doesn't know about RJ in the first place, how could they possibly know to inquire about it? The CVBR is also silent with respect to whose role or responsibility it is to provide such information to victims.
- > The ability for victims to access information about RJ is also included in the *Corrections and Conditional Release Act* (CCRA). The CCRA requires the Correctional Service of Canada to inform registered victims about its RJ programs and its victim-offender mediation services (though participation is voluntary).

Considerations

Usage

- > Governments in several jurisdictions have adopted RJ as an approach to criminal justice, for example, in England and Wales, the United States, France, Japan, and New Zealand.
- > In 2015, Manitoba became the first province to pass legislation specifically addressing RJ. Its *Restorative Justice Act* aims to increase the use of RJ and promote public safety by providing resolution that affords healing, reparation and re-integration. The Act provides that RJ programs may be used before or after a person is charged with an offence. It establishes an advisory council, made up of community and government representatives, to

provide advice and recommendations on the design and content of RJ programs, and the most effective means of implementing, delivering and monitoring them.

Impact of RJ

- > A multi-site study³ of victims of crime and criminal justice professionals across Canada found that criminal justice professionals surveyed believed that RJ would be most effective in cases involving youth in conflict with the law, first-time offenders, minor property offences, where the whole community is affected, where the victim consents to participate and where the offender is motivated to participate.
- > Several studies have concluded that both victims and offenders have high levels of satisfaction with RJ processes and outcomes. Analysis of several studies done by the Department of Justice Canada⁴ found that RJ was more successful than traditional justice approaches in improving satisfaction of both victims and offenders and getting offenders to comply with restitution. There was also a modest but statistically significant reduction in recidivism.
- > Amongst the potential benefits of RJ cited for victims are the opportunities it can provide to the victim to: communicate with the offender who harmed them, should they wish to do so; speak to their lived experience⁵; express the impact the crime has had; ask for answers to questions that matter to them⁶ and/or a sincere apology; and hold the offender accountable.
- > RJ may be a more flexible or procedurally-just approach – one that can be more readily adapted to meet the needs of participants, provide care and support, create dialogue and enable victims to take on a more active role in decisions and outcomes.⁷
- > Some of the central concerns for victims participating in RJ include risks of re-victimization or secondary victimization, pressure to participate, safety and confidentiality.⁸

Victims' needs and concerns

- > The available literature emphasizes that careful consideration is required to ensure that adequate information, resources, choices, options and safeguards are in place, and that the needs and concerns of victims and survivors are fully addressed.

- > A key concern that has been raised is that RJ too often takes as its starting point an offender-centred rather than a victim-centred (or evenly balanced) point of view.⁹
 - Where an offender-centred approach is taken, victims' needs for supports within the process, such as counselling and follow-up care, may be overlooked.
- > Some victims express concern about possibly forfeiting the opportunity to see the offender prosecuted in the criminal justice system should RJ be used.¹⁰
- > Concerns have been expressed where RJ appears to go hand-in-hand with expectations for reduced offender penalties.¹¹
- > There are a few international examples where a victim-centred approach to RJ has been specifically adopted. Such examples have shown promising results, with victims feeling more respected, heard and satisfied.¹²

Appropriateness

- > There is ongoing debate about the suitability of RJ in certain situations – for example, gender-based violence.
- > Most RJ programs are not equipped to deal with serious cases involving power inequalities, such as sexual assault or abuse, or domestic violence. Some programs have devoted extensive effort to training, consultation and partnership with appropriate supporting agencies to offer RJ in some of these cases, but that is not the norm.
- > A number of countries are exploring options for developing guides or standards to assist practitioners in assessing risk and applying RJ in cases of interpersonal violence and sexual assault.

Awareness

- > In a Canadian study, 102 victims in cases where a charge had been laid¹³ were asked if they had been given information about RJ processes after the crime. Just three of these victims said that they were given such information.
- > In public opinion research commissioned by the Department of Justice Canada in 2016¹⁴, fully 80

percent of those surveyed thought that criminal justice system officials should be required to inform victims/survivors and accused people of the availability of options focused on the acceptance of responsibility and reparation of harm, such as RJ.

- > A study on the RJ experiences amongst 34 victims of serious crime in Canada and Belgium¹⁵ identified two main approaches to providing information to victims about RJ options: a *protective approach* (i.e., victims were told about RJ only if they explicitly asked about it) and a *proactive approach* (victims were provided the information about RJ in a systematic way). The researchers found that victims preferred to be proactively informed about their RJ options, as long as certain conditions were respected (i.e., a guarantee of voluntary participation and use of RJ as a complement to criminal justice proceedings).

Indigenous RJ practices

- > While many of the concepts of RJ philosophy find their origins in the traditional practices of Indigenous cultures around the world¹⁶, it must be acknowledged from the outset that there are important differences between what have been called “western” approaches to RJ and Indigenous approaches to RJ¹⁷.
- > In *R v Gladue*¹⁸, the Supreme Court of Canada recognized that RJ principles apply to all offenders but went on to interpret section 718.2(e) of the *Criminal Code* to require particular emphasis on RJ for Indigenous peoples. The Court reviewed some already existing RJ initiatives, but was clear that RJ principles were not limited to existing sentencing processes, leaving the door open to alternative approaches to RJ.

Ideas for change

- > Research collectively points to the fact that all RJ processes should be carefully designed, and as part of its framework should:
 - ensure that only those who have specialized training and are highly experienced in RJ deliver the programs;
 - consider whether or not consent, even if fully informed, is in any way driven by perceived or real pressures from the person who caused the harm;

- manage expectations about the process (e.g., ensure that the victim is aware that the offender could withdraw from the process, or may not offer an apology);
- ensure that face-to-face preparatory meetings are available between mediators and the victim(s), along with their support persons;
- ensure that appropriate measures are in place to ensure a safe process and prevent secondary victimization (with an understanding that risk is dynamic and can be expected to change throughout the process); and
- provide support and information, including after-care support.

- > Development of principles and practice standards.

- In Canada, a working group of British Columbia (B.C.) community-based RJ providers began a project in 2014 to develop victim-centred standards for RJ. The project came in response to growing interest in quality assurance from victim-serving agencies and other RJ referral sources, as well as RJ practitioners. The working group conducted stakeholder engagement (focus groups, interviews, and an online survey of crime victims, victim service representatives, RJ providers, and other key stakeholders in B.C.) and documentary research on existing standards in RJ both in Canada and internationally. This resulted in the development of a list of draft recommended principles and practice standards. After a pilot study whereby various RJ agencies implemented the recommended principles and standards, in 2016, the working group revised and finalized the recommendations outlining a series of principles and practice standards for RJ services across B.C.¹⁹

More about restorative justice

Referral to RJ in Canada can occur at various entry points within the criminal justice system – for example, pre-charge (referral by police), post-charge (Crown), pre-sentence (courts), post-sentence (corrections), or pre-revocation (parole).²⁰ As well, in Canada, as elsewhere, RJ can take many forms. For example, *victim-offender reconciliation or mediation programs* use trained mediators

to bring victims and accused persons together in order to discuss the crime, its impact, and any agreement to address it. More indirect variants also exist (e.g., where there is instead an exchange of letters between the victim and their offender). There is also *conferencing*, where the victim, the offender, their supporters (e.g., family members), and community members work toward reparation, facilitated by an independent third party. *Victim impact panels* bring together a group of victims who speak to an offender about the impact that a crime has had on their lives. *Victim-offender panels* bring together victims with offenders who have committed a similar crime to that which they have experienced (also sometimes referred to as “surrogate RJ”). As noted, Indigenous approaches to RJ are distinct from western approaches; they include, for example, *circles* (e.g., sentencing, healing, releasing). The specific approach taken will depend on the community and context but may include elements such as bringing together members of the community (e.g., accused persons, Elders, and often the victim(s)) to discuss the offence, its underlying causes and its impacts – not only on the victim but on the community and relationships – and identify a path forward.

The issue of RJ is also dealt with in the *Youth Criminal Justice Act* (the YCJA). The YCJA is the law that governs Canada's youth justice system and applies to youth who

are at least 12 but under 18 years old who are alleged to have committed criminal offences. It includes several provisions at the youth court level that are consistent with RJ principles and practices.

The YCJA encourages the recognition and reparation of harm done to victims and communities, invites participation by victims, and encourages the involvement of families and communities in the young person's rehabilitation and reintegration. These objectives are reflected, for example, in: the section 3 Declaration of Principle, which applies throughout the YCJA; sections 4 and 5, which set out the principles and objectives of extrajudicial measures (section 12 sets out the right for victims to information, on request, in cases where a young person is dealt with by an extrajudicial sanction); and section 38, which sets out the purpose and principles of sentencing. Section 42 of the YCJA provides the courts with many restorative sentencing options such as personal service to the victim, community service, and probation orders that include victim-offender mediation. Of particular relevance is section 19 of the YCJA, which provides for the convening of conferences²¹. Conferences may take on a restorative format, such as a restorative conference that involves the young person, the victim and other members of the community in a discussion about how the young person could be held accountable for an offence by making reparation to the victim.

ENDNOTES

¹ Tinneke Van Camp and Jo-Anne Wemmers, “Victims’ Reflections on the Protective and Proactive Approaches to the Offer of Restorative Justice: The Importance of Information”, *Canadian Journal of Criminology and Criminal Justice*, (Vol 58:3), 2016, consulted July 2017, <http://www.utpjournals.press/doi/pdf/10.3138/cjccj.2015.E03>.

² Minister of Justice and Attorney General of Canada Mandate Letter, consulted July 2017, <http://pm.gc.ca/eng/minister-justice-and-attorney-general-canada-mandate-letter>.

³ The study was conducted on behalf of the Department of Justice Canada and involved 16 sites within the 10 provinces; the territories were not included in the study.

⁴ Jeff Latimer, Craig Dowden, and Danielle Muise, *The Effectiveness of Restorative Justice Practices: A Meta-Analysis*, Department of Justice Canada, 2001, consulted July 2017, http://canada.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rp01_1-dr01_1/rp01_1.pdf.

⁵ See, e.g., S. Jülich, J. Buttle, C. Cummins and E.V. Freeborn, *Project Restore: An Exploratory Study of Restorative Justice and Sexual Violence*, Auckland University of Technology, 2010; M. Keenan, *Sexual Trauma and Abuse: Restorative and Transformative Possibilities?*,

University College Dublin, 2014; C. McGlynn, N. Westmarland and N. Godden, “I Just Wanted Him to Hear Me: Sexual Violence and the Possibilities of Restorative Justice,” *Journal of Law and Society*, 2, 2012, 213-240.

⁶ See, e.g., M. Keenan, *Sexual Trauma and Abuse: Restorative and Transformative Possibilities?*, University College Dublin, 2014; Susan Herman, “Is Restorative Justice Possible Without a Parallel System for Victims?”, In Howard Zehr & Barb Toews (Eds.) *Critical Issues in Restorative Justice*, Monsey, NY: Criminal Justice Press, 2004, 75-83.

⁷ S. Curtis-Fawley and K. Daly, “Gendered Violence and Restorative Justice: The Views of Victim Advocates”, *Violence Against Women*, (Vol 11:5), 2005, 603-638.

⁸ United Nations, *Handbook on Restorative Justice Programs*, Criminal Justice Handbook Series, United Nations Office on Drugs and Crime, 2006.

⁹ See, e.g., Jo-Anne Wemmers, “Review of the First International Symposium on Restorative Justice for Juveniles”, *The Victimologist*, (Vol 1:1), 1997, p.5; and T. Marshall and S. Merry, *Crime and accountability: Victim/Offender mediation in practice*, London: Her Majesty's Stationary Office, 1990.

¹⁰ *Restorative Justice*, Government of British Columbia, Ministry of Public Safety and Solicitor General, p.7, consulted July 2017, <http://www2.gov.bc.ca/assets/gov/public-safety-and-emergency-services/crime-prevention/community-crime-prevention/publications/crime-prev-series3-restorative-justice.pdf>.

¹¹ H. Mika, M. Achilles, E. Halbert, L. Stutzman Amstutz, H Zehr, *Taking Victims and their Advocates Seriously: A Listening Project*, 2002, p.4, consulted July 2017, <http://restorativejustice.org/10fulltext/mika.pdf>.

¹² See, e.g., Ministry of Justice, New Zealand, *Restorative Justice Victim Satisfaction Survey: Research Report*, September 2016, consulted July 2017, <https://www.justice.govt.nz/assets/Documents/Publications/20170303-RJ-Victim-Report.pdf>.

¹³ Department of Justice Canada, *Multi-Site Survey of Victims of Crime and Criminal Justice Professionals across Canada*, 2004.

¹⁴ Ekos Research Associates, *National Justice Survey: Canada's Criminal Justice System: Synthesis Report*, submitted to the Department of Justice Canada, 2017.

¹⁵ *Ibid* at note 1.

¹⁶ M. Achtenberg, "Understanding restorative justice practice with the Aboriginal context", *Forum on Corrections Research*, (Vol 12:1), 2000, Correctional Service of Canada: Ottawa.

¹⁷ See, e.g., Michael Jackson. "In Search of the Pathways to Justice: Alternative Dispute Resolution in Aboriginal Communities", *UBC Law Review, Special Edition: Aboriginal Justice*, 1992.

¹⁸ 1999 CanLII 679 (SCC) [Gladue].

¹⁹ A. Lyons, C. Paras, A. Abramson, G. Lindquist, S. Grant-Warmald, J. Field, T. Kalaski, *Recommended Principles and Standards for Restorative Justice Providers in Criminal Matters*, August 2016, consulted July 2017,

http://www.cjibc.org/sites/cjibc.org/files/Standards_2016final.pdf.

²⁰ *The Effectiveness of Restorative Justice Practices: A Meta-Analysis*, Department of Justice Canada, 2001.

²¹ A conference is defined in the YCJA as a group of persons who are convened to give advice to certain decisions-makers, including judges, prosecutors, and police. Conferences may be convened to provide advice on a broad range of matters, including appropriate extrajudicial measures, bail conditions, sentences, and reintegration plans.