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Justice as Healing

A Newsletter on Aboriginal Concepts of Justice

Developing a Restorative Justice Programme
Part One

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Editors Note: *The following is part one of two articles on "Developing a Restorative Justice Program" and is being published in consecutive newsletters for ease of reference. Mr. Peterson and the Law Courts Education Society of British Columbia developed the following guide material to introduce communities to Restorative Justice programs. The excerpts are reprinted with the author's permission.*

Part 1:

What is Restorative Justice?

The justice system is a contentious topic among Aboriginal peoples in British Columbia, Canada, and around the world. In Canada specifically, the current justice system has been imposed upon them, and in many respects it is conceptually removed from the notions of justice that Aboriginal peoples hold. The Canadian justice system, often referred to as "retributive justice," has a foundational philosophy that is antithetical to that of most Aboriginal groups and Nations in Canada. Research (both quantitative and qualitative) indicates that the current justice system does not work for Aboriginals in Canada. The process and philosophy of the system is foreign to them, and results in high incarceration rates, alienation, disintegration of self, family and community, and, does not achieve the system's goal of significant recidivism.

Due to widespread non-acceptance of the functioning, and poor success rate of, the current system, Aboriginal communities are starting to consider alternatives to the current system that will work for their people and operate according to their own values, needs and philosophies. This change is fundamental to addressing old and deeply rooted problems that lie at the very core of conflicts in Aboriginal societies: colonialism, repression, racism, and most specifically and most importantly, the fundamental difference in the way conflict resolution is approached in Aboriginal and non-Aboriginal societies.

Restorative justice is just that, a step toward the *restoration* of autonomy, control, and development of healthy Native societies. Taking control of justice issues in the community is one stage of the process. Transgressions by and against each other are deeply personal matters to a community. Communities may see acts between two people as personal matters, but matters that have effects beyond the victim and the victimizer. However, the current criminal justice system treats transgressions (when they are contrary to specified laws) primarily as against the State, and the victim as the 'witness' of that contravention. The settlement of a criminal matter is largely a closed matter between the victim, the State, and the offender. But that is not the only, nor the most effective, way to consider actions of one person against another. A community may decide that process simply does nothing to solve the problem. In fact, it may be seen to exacerbate the problem. Restorative Justice (RJ) has come to be seen as an important catch-phrase that differentiates a more inclusive and reparative method of dispute resolution from the retributive justice system (as used in Canada, for example.) It has been defined and described by a wide variety of writers, researchers, advocates and practitioners, both Aboriginal and non- Aboriginal. Still, it is essential that first a community identify what it is *it* seeks to address before commencing on an action plan to implement it. When the community speaks of RJ, what is it speaking about?

It is not enough to say that what is desired is a departure from the current justice system. A departure from what? To what? The first step in exploring a departure from the current system is to discuss three broad questions to help focus the journey's destination:

- What are our values regarding those who have acted in a disruptive manner?
- What are our philosophies regarding "justice"?
- What needs with respect to these aspects of our community are not being met by the current justice system? Can RJ meet those needs?

Themes

While there is no single definition that would adequately describe RJ for every community, most RJ definitions can be said to *share* certain common themes. A review of these themes should not necessarily influence any community's perception of RJ, however, it can help to see how others have described it. A community can learn from the views of other similarly situated communities.

RJ seeks to balance the rights and the roles of victim, offender and community. It is about restoring control; it is about healing, restoring harmony, relationships and balance. It is about taking responsibility and making reparation. The Euro-Canadian justice system is in many ways antithetical to this juridical approach to disputes. Aboriginal peoples commonly approach disputes from a mediation perspective—the dispute is seen as a disharmony, or a breakdown of relationships between the transgressor, the victim, and the transgressor's close and extended family and community. The current system sees an offender's action (when medical incapacity is not an issue) as a deliberate antisocial act against another; cruelty or malice. Or, a desire to gain at the expense of another. Aboriginal peoples see antisocial acts as a breakdown in the harmony of the collective group; a disintegration of the offender's social, physical and spiritual connection to others; an imbalance in these forces. While Aboriginal peoples seek to restore that harmony and balance, their focus being on the *effects* of the transgression[1] rather than the transgressor personally, the Euro-Canadian system seeks to denounce conduct, deter recurrence by coercion and threat of punishment, protect citizens through removal of the offender from among them, and promote a sense of responsibility for actions against others and/or the state. Rehabilitation and reintegration are part of the current system, but the approach is still far different from the 'restorative' views of these goals. The current system still has problems of individual rights conflicts (as the basis of the system, as opposed to communitarian foundations), stigma, long term effects from the punishment, and problems with acceptance at the reintegration stage.

An RJ profile in summary

While it is true there are many definitions of RJ, and many descriptions of it, still, some common elements can be identified that lend some substance to the term, "restorative justice." Because one of the defining elements of RJ is the reference to traditional methods of conflict resolution in a community, the elements that are common to describing RJ refer to it's *goals*.

*RE*storative justice can be said to be a summary phrase, made up of the following constituent elements:

REparation — *repairing* the relationships that were affected by the transgressor's actions

REstitution — making *amends* for a loss, be it personal financial, or otherwise.

REhabilitation — the transgressor works, with the aid of many participants, toward *restoring the balances* in his or her life that have adversely affected relationships with the victim, families and community in which he or she lives.

REintigration — working toward *acceptance* of the transgressor back into the lives of all who he or she has affected.

What is important to note is that these elements of the whole (being a concept of RJ) are *flexible*, in that they will make up the whole in an endless variety of ways, because the emphasis on each of them will be case-specific.

When speaking of these broad goals and foci of RJ, the differences between the current Euro-Canadian justice system are illustrated. Many writers have tabled the differences in approach between the two systems. A compiled table would summarize such notable dissimilarities as:

Restorative Justice

Focus is on problem solving, and restoration of harmony

Crime is a violation of relationship between offender and victim

Action revolves around the victim, but includes as well others affected by those actions

The community may act as facilitator in the restorative process

The offender is impressed with the impact his actions had on the totality of the community

Restoration is achieved through

• reconciliation

• restitution

• reparation

Retributive Justice (Euro-Canadian System)

Leading purpose of system is to establish blame and assign guilt The action is a violation of the State

The action revolves around the offender, not the victim

The Community does not play a leading role

Actions are defined by "intent" and the process of the administration of justice.

Punishment is designed to:

• denounce

• deter

• protect society by separation

The individual Community

Before an RJ programme can be put into place, the community must answer the three questions mentioned earlier:

- What are our values regarding those who have acted in a disruptive manner?
- What are our philosophies regarding "justice"?
- What needs with respect to these aspects of our community are not being met by the current justice system? Can RJ meet those needs?

What are our values regarding those who have acted in a disruptive manner?

Establishing fundamental values is key to starting the process of exploration into how exactly the community differs in it's perception of dispute resolution from the Euro-Canadian model. The Community should discuss, "what are the traditional values regarding acts that affect the harmony of the community." When one offends against another, how did the community respond? Of the aspects of RJ that have been reviewed that refer specifically to the transgressor, which does it support? Which aspects do they identify with, either as stated or in some altered perception? Which do they reject?

The role of the transgressor is a key point where restorative and retributive justice philosophies diverge. How a community reacts to *the person* is an important trait of the community when trying to define it's sense of justice. As the treatment of a transgressor is discussed, the RJ values the community embrace will come out, and a 'picture' of their perspective on justice will begin to emerge. *What are our philosophies regarding "justice"?*

Consider the earlier Table: of the elements of RJ that were listed, which does the community agree with? Which would it revise? Which would it reject? The question posed here will oblige participants to puzzle out how the *personal* aspect of transgressor treatment fits with the larger theory of justice that the community supports. Both common and opposing or complicating features will begin to take shape, and the facilitator will see how the community addresses conflict in it's midst. As participants describe the fundamental structure of justice, a framework will be built, and from that framework the participant can move to the third question:

What needs with respect to these aspects of our community are not being met by the current justice system? Can RJ meet those needs?

Once participants have constructed a framework of justice beliefs, the framework can be applied to the problems the community has decided it needs to resolve. As stated earlier, a community may decide to construct an RJ programme for a number of reasons, most notably among them are either dissatisfaction with the success of the current model, or, a fundamental disbelief in the goals, motivations, and methods of conflict resolution the Euro-Canadian model employs. The community, then, has real problems they are determined to tackle on their own.

Common problems include, but are not limited to:

- high incarceration rates among members
- police intervention into matters felt to be purely private in nature
- no community involvement in either diversion discussions or sentencing
- a perception of harsh treatment for minor offences
- high incidence of police involvement in disputes
- unwillingness of Crown and police to use diversion solutions
- racist or inappropriate treatment of members of the community
- ineffective or even non-existent programmes during and post-incarceration

A community will relate the problems with which they want to deal with the extent or pervasiveness of those problems and the goals they are trying to achieve. It is important for a community to discuss how the answers to the three questions posed interact and interconnect with one another to form a cohesive juristic approach. This process is an *exploration*, and should highlight the strengths of traditional approaches to justice. This stage of the workshop may very well not result, at the end of the day, in complete agreement or a perfect picture of the community's approach. What it will do, however, is illustrate that there is determination to resolve a problem, and the insight, knowledge and will to do something about it.

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1 The retributive justice system (which in PART 3 I refer to as the *modified retributive justice system)* does take effect into account, however, it makes its most profound impact as an assessment of damage, thus affecting sentence, or in civil cases, the quantum of damages.

Part 2: Models of RJ Programmes

Introduction

As emphasised in Part 1, the origins of the design of any RJ programme should come from the traditional practices of the community. The community should be encouraged to reflect upon and record the values, principles and methods of conflict resolution historically practised by them. However, it is equally true that those traditional methods will likely have evolved under recent historical influences, primarily colonialism, and the imposition of the European system of civil and criminal justice. Any community will, with varying degrees of acceptance, incorporate the realities of these influences into the way members of the community have come to think about justice contemporarily. That is, the degree to which the community can return to traditional methods has been affected by the harsh reality of a Constitutional Canada.

When thinking about the introduction of an RJ programme, the community must accept, at least at present, that the Attorney General of each province has the ultimate authority with respect to the administration of justice[1] under the *Constitution of Canada*[2], and that the *Constitution*, which includes the *Charter of Rights and Freedoms*, is the supreme authority in the country.[3] In pragmatic terms[4] this means that RJ programmes in Canada, and in British Columbia specifically require the participation of both the

federal and provincial governments. While Part 3 will go into detail about *how* those governments participate, in this Part the effect of their inclusion with respect to models will be addressed.

Models

In British Columbia, the various models of RJ programmes can be grouped broadly into four categories, however, it is important to remember that the methods *within* these broad categories can still reflect the unique approach of each community. The four categories are:

1. Mediation
2. Diversion
3. Participation in sentencing
4. Post-incarceration & reintegration support

The names of these categories, not surprisingly, reflect their position in the cycle of an offence. As well, within each of these categories are practical programmes. The Table below sets out common programme descriptions and their 'place' within each category: (See table next page.)

It is important to note as well that offender participation in RJ programmes is a decision which is voluntary by the offender. 'Voluntary' in this context means without promises of benefit nor coercion by threat, and, the offender is competent and legally capable of making that decision.[5] The reality is that any of the offender, the RJ body responsible for the 'intake' of cases, or the court may ask for programme intervention. Where the offender makes the request, the only remaining issue is that he or she is legally capable of making the request; youth or those with mental challenges are examples. Where the directing body of the programme makes the request, the view of the offender is always considered before the proposal is put to the Crown (see Part 3 for a more expansive discussion of how the process works). Where an RJ proposal seeks to make sentencing recommendations regarding an offender, be it through a sentencing circle, or some model of a sentencing committee, two points must be kept in mind:

- the Crown or judge are unlikely to persist with such a proposal where the offender is against it[6] (preferring the usual process of PSR reports, and submissions by counsel); and
- sentencing recommendations are just that — recommendations. A judge is not bound to accept them, however, they are rarely rejected when the offender, Crown and judiciary are willing participants.[7]

Considering the distinctiveness of the categories and models of RJ, the best way to discuss the requirements, limits and possibilities of these programmes is to discuss them by category. It should be noted at this point that this is *not a comprehensive review of restorative justice programmes*. What this section discusses are *common elements* of typical or model programmes in each of the categories. The purpose of this review is to (1) acquaint participants with standard features of methods in each of the categories, and (2) to promote discussion and debate among the workshop participants about how the various methods fit with the traditional ideas of justice held by the community.

Mediation

Mediation is an alternative process to either a civil or criminal trial. While it shares many characteristics with diversion initiatives, a significant difference lies in the juncture at which mediation takes place as opposed to diversion. Mediation occurs *before either the criminal or civil court proceedings are initiated*. Mediation is not a process that sees someone impose a solution upon parties; quite the opposite. It is a facilitator helping the parties reach an acceptable agreement among themselves. As noted earlier, mediation is more common in civil disputes, but, it may also be possible for some criminal offences. The community would have to decide whether they wish to pursue the possibility of mediating criminal offences, for example property offences, fraud, or perhaps some offences against the person.[8] The idea of mediation is that the parties directly involved (the victim and the transgressor) agree that a dispute exists, or a transgression has occurred, and they agree to settle the matter *without* reference to the courts.

One such programme in the BC Lower Mainland has recorded more than a 90% success rate of mediations ending in a settlement that has been honoured by the required party.[9]

Category	Stage in the Process	Programme Notes
Mediation	Prior to police intervention	• Most common in civil and family disputes. • The parties agree that a dispute exists, and agree to seek a local solution. • Not common in criminal, but, may be possible in property or other 'minor' offences where the victim voluntarily agrees to mediation to resolve the conflict.
Diversion	Police response or crown response	There are two stages that Diversion may occur: • Police have been called and arrive on scene either during or after the event. • Police and parties confer about whether the violation that has occurred is best resolved through an RJ programme, or through formal charges being laid. If charges are laid, diversion is still possible through the Crown • Crown reviews charge recommendation of police. • Crown may confer with the body responsible for RJ programme, victim, police and offender to consider whether to divert the case to the RJ programme.
Participatory Sentencing	Trial & finding or guilt	Where offender pleads guilty • RJ programme may speak to sentence through a variety of ways, including Circle Sentencing, Multi-party Sentence Recommendations, or Family Group Conferences Where offender pleads not guilty • If trial finds guilt, and no appeal is filed, RJ may choose to speak to sentence and make recommendations. • Where programs exist (or even if travel is involved), RJ participation may include requests to have the offender take part in rehabilitative programmes while serving the imposed sentence, either custodial or in the community.
Post-release Rehabilitation & Reintegration Support	Custodial sentence imposed	1. An RJ programme may consist of rehabilitative and reintegrative programmes for offenders coming out of their custodial sentences and are returning to the community.

An important element of mediation programmes is common to other restorative justice initiatives—the presence of trained facilitators. While the subject of resources is discussed later, one consideration bears mention now. In the provision of any RJ programme, the community needs to accept that resources are essential in setting up and successfully operating such programmes. One of the key components of this is capable participants. The province may insist that mediators, counsellors, therapists and other key participants undergo standardized training and certification programmes prior to practising in the field. However, to perhaps state the obvious, this should *not* be interpreted as a co-opting of the community's initiatives. Significant and authoritative knowledge of the community and traditional dispute resolution methods will always *inform the application* of the skills taught at these training courses. Realistically, key participants may not be able to perform their duties the best they can without both of these preparatory backgrounds.

Mediation Criteria Mediation programmes typically start with a vetting process to determine which disputes are appropriate for mediation. Examples of the characteristics that would need to be present could include: • An identifiable victim- someone who has suffered a wrong or a loss, • An identifiable wrongdoer- someone who accepts responsibility for the harm or the loss suffered, • Voluntary participation by victim and wrongdoer, • A wrongdoer who is willing to participate in a process that will result in an agreement to offer amends, and who is willing to meet that obligation in a timely manner.[10]

As has been emphasized throughout this workshop, a community RJ programme is not a community programme at all if it follows someone else's methods. A community must refer to its own ideas of justice when devising and developing an initiative of this kind. However, equally true is the ability of people to learn from each other. What follows is an example of how mediation could work in an individual case. *Please note*: the similarities between diversion and mediation will be obvious. That is because the two share very similar characteristics.

1. Someone (either one of the parties, or even a concerned individual) contacts the mediation office to refer a possible case for mediation.
2. If referred by a third-party, the wrongdoer is contacted to determine if he or she would be interested in participating in a mediated settlement. If not, that ends the process. If so, a contact number is given and a commitment to speak again is made by the office.
3. The victim is contacted, the process is introduced to them, questions are answered, and the victim is asked if she or he would like to participate in a mediated settlement.
4. If yes, both parties are reminded of some basic rules and principles of mediation, a. confidentiality, b. respect for each other and for the mediator and the process is essential, c. facts about the dispute are agreed upon by the parties, d. If the victim will be seeking some level of restitution, the mediator may wish to ask the victim to describe how that figure was arrived at.
5. A mediation is scheduled in a neutral place at a convenient time. The facilitator moves the parties through discussions to arrive at a settlement acceptable to both.
6. The mediation office makes the agreement official through whatever means has been accepted (a written contract is common, but not the only way of making a binding commitment) and is responsible to ensure enforcement of the agreement.[11]

Another process of mediation has been proposed in this way:

1. Once mediation is accepted by the parties, the party who initiated the mediation states the issue.
2. Elders or other guiding facilitator states the laws under which the community functions.
3. The other party speaks to the issues stated.
4. Others who feel affected by the dispute contribute to the discussion of it, and possible resolutions.
5. The parties are questioned by the Elders or guiding facilitator.
6. The Elders or other facilitator guides the parties to a resolution.[12]

As will be discussed more in Part 3, the mediation group should keep accurate records relating to the cases they have accepted and completed. If funding for mediation is provided by an outside agency, evaluations may be conducted into the volume of cases and the success rates, however, any number of statistical requests may be made.

Diversion

"Diversion" is a subset of alternative measures, occurs in criminal matters, and happens at a stage *after* the justice system has already been involved. Diversion takes a person who has accepted responsibility *out of the trial process*, and it has been agreed that the better way to address the transgression is through alternative measures. If accepted, because the offender has admitted responsibility, no court of law has made a finding of 'guilt,' therefore the offender will have no criminal record. While there are diversion possibilities at the police intervention stage, in British Columbia it is the policy of the government that the Crown attorney is responsible for alternative measures if the police do decide to file a 'charge report,' or, charge recommendation.[13] After a person has been accused of committing an offence, the police may make a 'charge recommendation' to the Crown attorney. The Crown then applies various legal tests to determine if the recommended charge, or some other charge, is to be pursued.[14] If a charge passes these tests, only at that point will diversion initiatives will be entertained.

The Attorney General of BC controls the diversion process, and the ministries of Corrections, and Children and Families (as appropriate) oversee accepted proposals for diversion. Later in Part 3, reference will be made again, and in more detail, about how government controls not only the acceptance of diversion proposals, but also the acceptance of RJ programmes into the catalogue of "Accepted Alternative Measures Programs."[15] However, as a final note, this control should not be viewed either too sceptically or without critical evaluation. Support for RJ programmes is a reality in BC from the Crown and the judiciary.[16]

Adult Diversion

The types of offences that will be commonly accepted for entry into diversion programmes range from the most accepted (theft under $5,000, disturbances, mischief, and the like) to the rarely accepted (serious assaults and sexual assaults, hate offences, breaches of court orders). However, with respect to the latter types of offences, the Crown may consider applying for acceptance to an RJ diversion programme when requested by a representative from an accepted Program, and with the approval of AG ministry officials. Commonly the supervising ministry would like programme participation complete in 3 months for minor offences, but longer periods are acceptable where more serious offences have been accepted.

With respect specifically to Aboriginal RJ programmes, the AG has set guidelines in the policy manual for the Crown to consider when an RJ committee has asked for diversion of an offender's case to their programme. In summary, they include: • Does the project enjoy substantial support of the community?[17]

- Has a plan been developed which has the necessary resources, and sets out goals and objectives to be achieved? • Is there a plan to monitor, review and report on the progress of the offender?[18]

While a diversion project can take as many forms as there are communities to develop one, nonetheless many take a form very similar to mediation initiatives. The process, then, could look like this in general:

1. Someone from the diversion project contacts the Crown to refer a possible case for diversion.
2. The wrongdoer is contacted (after having been advised of his right to counsel) to determine if he or she would be interested in participating in a diversion programme. If not, that ends the process. If yes, the office contacts them at a later stage. Again, voluntariness is critical.
3. The victim is consulted, the process is introduced to them, questions are answered.

4. If the diversion is to go forward, the parties are reminded of some basic rules and principles of mediation a. confidentiality, b. respect for each other and all parties is essential, c. facts about the dispute are agreed upon by the parties, d. The victim has been consulted *in advance* if a Victim Offender Reconciliation Programme (VORP) has been proposed, and if the victim would voluntarily participate in that portion of the disposition.
5. Through any combination of stages, members of the RJ programme meet with the offender and devise a plan to propose to Crown counsel. The plan sets out what the offender will commit to and undergo as part of the restorative justice initiative. *This is the very essence of restorative justice*. The plan is presented to the Crown for consideration.
6. The Crown either accepts (either on her or his own, or through approval from other AG officials) or rejects the plan. Revisions may be possible. If accepted, the appropriate supervising ministry is contacted. The approval of the presiding judge is sought.

Something that all categories of RJ initiatives share, be it mediation, diversion, or sentencing circles, is *creativity* and *reference to traditional justice principles*. Alternative measures put into action all the things discussed in Part 1 of the workshop- restoration of harmonies, restitution to the harmed, rehabilitation of the offender, and reintegration to the community. These are not diversions *away* from justice, but the community's way of dealing with transgressions outside an ineffective retributive justice system. Just *how* that is accomplished in a diversion programme is exactly what the community has to research, devise and develop.

Young Offender Diversion

Section 4 of the *Young Offenders Act*, and the re-introduced incarnation of that act, Bill C-3, the *Youth Criminal Justice Act* (ACJ), allows for diversion programmes in a similar fashion to s.717 of the *Criminal Code* for adult offenders. Programmes for diverting youth are popular for a number of important reasons, including: • youth are a high at-risk group, • it is important to establish community and traditional values in children as early as possible, and • keeping children out of the detention system is critically important for reducing the danger of recidivism.

Youth diversion programmes operate somewhat differently from those of adult diversion. Parents or guardians are included in the process through consultation about participation in a diversion proposal. The *Young Offenders Act* (YOA) contains a larger number of more specific guidelines about what cases are suitable for diversion and which are not.[20] In addition to statutory requirements, the BC Crown will follow policy guidelines similar to those in adult diversion. The process also has a number of additional steps early on:

1. Once a referral to Crown counsel has been made by the RJ programme representative, the Crown will contact either a Youth Probation Officer, or a representative of some local agency attached to the Ministry of Children and Families.
2. The probation officer or other representative will conduct a Screening Interview, to determine a long list of factors regarding the suitability of the youth to participate in a diversion programme. Again, voluntariness is mandatory.
3. After a plan has been developed and agreed upon by the offender and other participating individuals or groups, and if accepted, the Screening Interviewer must report to the Crown within a specified time. The Crown will make a final decision. If accepted, the Crown will notify the probation officer or other representative within a specified time.

Three final references to youth diversion programs: one, the Sparwood Youth Assistance Program[21]: this program is designed for diversion *prior to an information being laid*. That is, before the Crown has a charge recommendation before it. As stated earlier, diversion at this stage is practiced, and under police charging discretion it is possible, if not encouraged. However, the process in the Sparwood program is similar to those discussed in mediation and diversion. The important stage for the purposes of this

workshop is the Resolution Conference, where the youth explains why he acted the way he did, and the victim, offender and affected persons discuss the *effects of that action*, and how restitution can be achieved.

Two, the South Vancouver Island Tribal Council set up the Native Alternative Youth Program to deal with youth who are caught in the justice system. Briefly, the Crown will refer a youth (referred to as a "diversion candidate") to the Council (note the reversal here—it is the *Crown* who has done the referral). Two Tribal Elders and a Diversion Coordinator interview the candidate. Anyone who proves an interest in the case is heard at this interview. A report is submitted to the Tribal Court for consideration. If accepted, a "diversion contract" is drafted under terms and conditions which the youth agrees to carry out. The youth becomes responsible to a "sponsoring Elder."[22]

Finally, the Atawapiskat Project in Ontario is a diversion project for youth that shares a similar character with the South Vancouver Island project, in that it is the *court* who refers a candidate youth *to the project co-ordinator*. The crown stays the charges, and if the youth successfully completes the commitments made under the projects plan for healing, the crown goes to court and formally withdraws the charges.

Again, this is not a comprehensive summary of how youth diversion works; that is not the purpose of this workshop. This review of models is only to give a community exploring the possibility of an RJ programme some ideas of what initiatives are available, and a rough idea of how they work.[23] Communities are encouraged to always build from their *own* beliefs, then add whatever elements from other systems they feel might work for them, address their needs and accomplish their goals.

Sentence Participation & Recommendations

Predictably this section will focus on circle sentencing not just because it has become accepted by all the actors in the justice system- crown, defence, and the judiciary, but because its popularity demands it be addressed so other communities not yet involved can get a sense of their basic structure and operation. Due to the enormous wealth of written information available on circle sentencing from judgements, academics and practitioners, this summary of sentence participation will not be in-depth. The focus remains at an introductory level. The community involved in any given workshop session may not even had such practices in their traditional methodology.

A circle sentence is a process undergone *after* the offender has either plead guilty in a court of law, or is found guilty after trial.[24] At this point, after cooperation has already been established and permission for the circle has been granted by the presiding judge, the participants of the circle seek to achieve a just sentence for the offender that will put him or her on the path to healing and toward a reestablishment of harmonies disrupted by his behaviour. Incarceration may still be part of the whole sentence 'package', community detention may be suggested, or, no custody at all. 'Sentences' often include restitution, supervised community service, service to the victim, counselling, therapy or any of a host of options.[25] The proposal is made by all the participants in the circle, but the judge makes a final determination. While a judge is not bound by the recommendations of a sentencing circle, it is worth repeating that such recommendations receive very wide respect and support in the judicial community.[26]

Two alternative models have been identified which achieve the same objective as circle sentences.[27] One is an Elders Panel, consisting of either Elders, or community leaders, or both, or a mixture of citizens and influential individuals. The panel will interview the offender and the victim, and may hear from any other involved individuals. The panel discusses the transgression and formulates a proposal to the judge about the best way to approach the offender's sentence. The second model is similar- it is called a Sentence Advisory Panel that hears applicants for sentence recommendations. The panel conducts research into the particular case, decides if the candidate is suitable for sentence recommendations, and then formulates a proposal to the Crown and the judge.[28]

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1 See for example the NS or BC governments' outlines of how offences are broken down into "levels," and the RJ programme possibilities for each level of intervention from police contact to completion of sentence.

2 *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, at s.92(14). Under s.91(27) the federal government makes the criminal law and the law on criminal procedure. Also relevant is s.91(24), which gives the federal government authority over "Indians and lands reserved for Indians."

3 *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11. Section 52 states that the *Constitution* is the "supreme law of Canada."

4 The focus of this workshop does not require that I go into continuing progress in the definition of s.35 rights under the *Constitution*, although progress with respect to the *Constitution* is reflected in treaty negotiations, self-government agreements and other initiatives relating to the self-determination of Aboriginal peoples.

5 Various courts have set voluntary participation as a mandatory prerequisite to the involvement of any offender in RJ programmes. See, for example, *R.* v. *Morin* (1995), 101 C.C.C. (3d) 124 (Sask. C.A.), *R.* v. *Joseyounen*, [1995] 6 W.W.R. 438 (Sask. Prov. Ct.). See as well such model procedures as the Winnipeg Alternative Sentencing Program (as discussed in M. Jackson, *In Search of the Pathways to Justice,* in (1992) 26 UBC Law Rev. 147, at 183.

6 A case involving an offender who was opposed to the advice made by an elders panel to Judge Lilles in Quebec is recited in *Bridging the Cultural Divide*, a publication of the RCAP (1996, Minister of Supply & Services)., at p.113. See also *R.* v. *Morin*, *ibid*., at 130. Of some 100 circle sentences, only 2 were appealed.

7 Judge Fafard of Saskatchewan has noted that in 60–70 sentencing circles, he has never rejected a recommendation (See R. Green, *Aboriginal Community Sentencing: Within and Without the Circle*, in (1997) 25 Man. L. J. 77, at 89).

8 Refer to Parts 2 and 3 regarding government views on the use of mediation in criminal matters.

9 See the Fraser Region Community Justice Initiatives Association, as reviewed in *Promising Models in Restorative Justice: A report for the Ministry of Attorney General of B.C.*, by Dave Gustafson and Sandi Bergen, from the Fraser Region Community Justice Initiatives Association, 1998, at pp.25-31.

10 This list has been influenced by the Gustafson and Bergen report, *ibid*., p.28, and *R.* v. *Moses*.

11 This example has been influenced by the Gustafson and Bergen report, *supra*, note 9, p.28-31.

12 This model has been suggested by Larissa Behrendt, and appeared as an excerpt from her book, in *Justice as Healing*, Vol 3, No. 3 (Fall 1998).

13 The *Crown Counsel Policy Manual* has numerous chapters setting out the government's policy regarding alternative measures. See, for example, ALT 1 (Adult offenders) , ALT 1.1 (Youth offenders), and NAT 1.1 (Aboriginal restorative justice programmes).

14 Those tests include the "charge approval standard," which in BC is a "substantial likelihood of conviction." Other tests refer to community safety, *Criminal Code* provisions, and the interests of society generally.

15 This term comes from the *Crown Counsel Policy Manual*, ALT 1.

16 See *Restorative Justice Needs Assessment*, Law Courts Education Society, November 1999, at pp 23-8.

17 This requirement is discussed again in Part 3, under the discussion of the Aboriginal Justice Strategy Working Group (AJS).

18 *Crown Counsel Policy Manual*, NAT 1.1

19 *Crown Counsel Policy Manual*, ALT 1, at p.4; Also, see the MOU between BC Corrections and the AG, at p.4.

20 Sections 3 and 4 of the *YOA*.

21 Sparwood has set out the process in a publication. Contact the Sparwood RCMP for a copy.

22 For a summary of this programme, see M. Jackson, *In Search of the Pathways to Justice: Alternative Dispute Resolution in Aboriginal Communities*, (1992) 26 U.B.C. Law Rev. 147 (Special Edition) at p.201-3.

23 Detailed practices of the AG, Ministry of Corrections, Aboriginal Affairs, and, Children and Families as they relate to RJ projects should be researched once the community decides what kind of programmes it will offer under RJ. Additionally, as is discussed in Part 3, the Aboriginal Justice Strategy Working Group (AJS) will be quite specific to the community about the kinds of programmes it will support.

24 Section 717 of the *Code*, and s.4 of the *YOA* require that alternative measures (diversion) only be offered to those who have accepted responsibility for their role in the incident. Understandably, for many reasons, accused who do not take responsibility for their behaviour may *not* be offered restorative justice programme support.

25 Section 742 of the *Criminal Code* allows for "conditional sentences," where offences that carry a term of less than 2 years, and have no mandatory minimum sentence, can be carried out in the community, with some fairly flexible and creative conditions attached to the 'sentence.'

26 See note 5 regarding the success of circle sentence recommendations in SK. Also, as stated in note 15, crown, defence and the judiciary support circle sentences. See also *R.* v. *Morin*, *supra*, note 5- Saskatchewan had had over 100 sentencing circles, with only 2 appeals. Their acceptance is further noted in the research in general. For a comprehensive bibliography, refer to the Native Law Centre at the University of Saskatchewan, *Circle Sentencing Bibliography*, accessible through their webpage.

27 See R. Green, *Aboriginal Community Sentencing: Within and Without the Circle*, in (1997) 25 Man. L. J. 77, at 83, and the RCAP, *Bridging the Cultural Divide*, *supra,* note 6, at 110.

28 Informing the Crown of sentence recommendations is largely a courtesy in the justice system. The judge would likely ask any panel to provide the Crown with a copy of the proposal, so that the judge may hear the crown's submissions on it.