

**Gender, Power and Justice: A Feminist Perspective
on Restorative Justice and Intimate Violence**

BY

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Abstract

This thesis tests the appropriateness of the use of restorative justice in cases of intimate violence. It examines current definitions, understandings and practices of restorative justice from the perspective of victims of intimate violence, with particular attention to social location.

This thesis argues that, in order to achieve a just result, restorative justice models must take into account the needs, and interests of victims as much as those of offenders. This thesis demonstrates how theoretically, and practically the needs of victims of violence are often marginalized in restorative justice, and discusses the particular impacts on victims of intimate violence.

This thesis concludes that in some cases restorative justice is not meeting the needs of victims of intimate violence, and in some cases women are being revictimised. In many other cases, due to a serious lack of research, it is unclear whether victims are being helped or hurt. Because of this ambiguity, and the consequences of ignoring the potential dangers, this thesis proposes that there must be a moratorium on new projects dealing with intimate violence. Finally this thesis proposes mandatory national guidelines for current restorative justice initiatives that accept cases of intimate violence, and provides parameters for what cases, if any, should be diverted to these projects.

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INTRODUCTION

This thesis tests the appropriateness of the use of restorative justice in cases of intimate violence, primarily through the lens of the needs and experiences of victims of intimate violence. I conclude that in many cases the current manifestations of restorative justice should not be used in such cases, although I suggest a number of ways that this may be overcome. My approach is feminist, focussing on intimate violence as a gendered crime, paying particular attention to social location, and to the circumstances of Aboriginal women.

In this thesis understanding the needs and experiences of victims of intimate violence in the context of a criminal justice model is accomplished in a number of ways, but primarily through a feminist understanding of the social location of victims of intimate violence. The needs of victims of intimate violence, although similar at the most basic level, may be met in different ways according to their social location. I adopt the concept of social location described by Sherene Razack, a Canadian anti-racist scholar. According to Razack social location is "...the complex tracing of the social narratives that script how women experience their gender and how others respond to it."¹ In this thesis these narratives describing social location primarily include gender and culture, namely Aboriginal culture. When gender and Aboriginal culture intersect in the context of intimate violence, the resulting experience may at times be different than that of non-Aboriginal victims of intimate violence, and at times very similar. However, the more marginalised victims of intimate violence are, the greater the impact of the problems or

¹ Sherene Razack, *Looking White People in the Eye: Gender, Race and Culture in Courtrooms and Classrooms* (Toronto: University of Toronto Press, 1998) at 158.

shortcomings of restorative justice become in their lives. As will be discussed below, the legacy of colonialism for some Aboriginal women is not only experiences of intimate violence, but also experiences of being marginalised within Canadian society, and isolated from resources available to some non-Aboriginal women.

Emphasis on social location as a tool for understanding the sometimes diverse needs and experiences of victims of intimate violence does not, however, obviate the need for a focus on gender, the heart of this feminist analysis. No matter what the cultural context, women experience intimate violence in ways that are inextricably linked to their gender; gendered violence in any cultural context is a manifestation of sexism, and an unacceptable crime. Restorative justice theory pays lip service to the circumstances of the victims of crime, but does not in most cases² explore the unique implications and interactions of gender and/or culture for victims of intimate violence. Restorative justice practice, in many instances, pays close attention to the social location of the offender; namely how their experiences of culture, colonial oppression, abuse or poverty have shaped their lives. This is done in order to create a unique, healing way of holding them accountable for their crimes. In order for restorative justice practices to reach the stated goal of healing the offender, the victim and the community, those who are planning and implementing initiatives must also actively pay attention to the specific needs, experiences and social location of the victims of intimate violence.

In a practical context the needs of victims of intimate violence, informed by their social location, should be taken into account when planning specific measures within initiatives.

² The notable exceptions being feminist work in the area.

Systematic problems with restorative justice discussed in this thesis; such as a lack of accountability mechanisms, poor record keeping, a lack of sound evaluation and the revictimisation of women in some restorative justice projects will negatively effect victims of intimate violence in ways that do not effect other kinds of victims, or other participants in the initiative. For women who are more marginalised these impacts will be greater. This thesis will draw attention to the particular ways in which the needs of women are compromised when such systematic problems exist.

(a) Why Feminism? Why Restorative Justice?

Feminist perspectives on restorative justice are extremely important for two reasons. The first is that feminists, particularly those involved in the women's anti-violence movement, have been engaged with the criminal justice system for decades. Feminism has had an undeniable impact on criminal law. Feminists have systematically lobbied for, reformed, and strategized around successive criminal justice models dealing with intimate violence. The work in this paper is built on those decades of research, experience, and reform.

Second, unlike many critics of restorative justice the feminists whose ideas have inspired me do not support a right-wing law and order agenda.³ Many feminists, especially those engaged with the criminal justice system, have a deep understanding of the oppression

³ See for instance: Fay Honey Knopp, "Community Solutions to Sexual Violence: Feminist/Abolitionist Perspectives" in H. Pepinsky, "Peacemaking in Criminology and Criminal Justice" in Pepinsky and Quinney, eds., *Criminology as Peacemaking* (Indiana: Indiana University Press, 1991) at 181, and Lee Lakeman, "Why 'Law and Order' Cannot end Violence Against Women; and Why the Development of Women's (Social, Economic and Political and Civil) Rights Might" (2000) 20 *Canadian Woman Studies* at 24, and Kathleen Daly, "Sexual Assault and Restorative Justice" in Heather Strang and John Braithwaite *Restorative Justice and Family Violence* (Australia: Cambridge University Press, 2002) at 62.

faced by victims of intimate violence, and by marginalized and racialised accused within that system, particularly Aboriginal men. Those who advocate for restorative justice, and feminists who provide constructive critiques of restorative justice, are working towards the same elusive, difficult goal: to ensure that Canadian criminal justice systems provide safety and dignity for women victims of violence, while at the same time ensuring that accused from marginalised groups are treated fairly, without racism and without other types of oppression. This goal is what Kathleen Daly, feminist criminologist, calls the ‘unsolvable justice problem’: “(h)ow do we treat (gendered) harms as serious without engaging in harsh forms of punishment or hyper-criminalisation”?⁴ Feminist scholarship contributes to solving this problem by keeping gendered harms in focus in restorative justice theory and practice, and by inquiring into the values, needs, interests and experiences of the victims of intimate violence as much as those of the offenders.

(b) A Note on Terminology

I use the term ‘Aboriginal’ to refer to those of First Nations descent living in contemporary Canada. I use this term because, according to Paul Chartrand, a Law Professor and expert in Aboriginal issues, this term includes Metis, Inuit, and Indian peoples, as well as non-status Indian and Metis people.⁵ This term is an inclusive one, accounting for those who have been legally or physically cast out from their communities under the artificial categories of the *Indian Act*. Although Aboriginal cultures are not, and have never been, homogenous, they share a common experience of colonialism and oppression which shapes their experiences and responses to intimate violence.

⁴ Daly, *Supra* note 3 at 62.

⁵ Paul Chartrand, “Introduction” in Paul Chartrand ed., *Who Are Canada’s Aboriginal Peoples?* (Saskatoon, Purich Press, 2002) at 16.

In this thesis I use the term 'intimate violence' to include physical, sexual, emotional, financial, psychological or spiritual abuse by adult men of adult female partners in "...relationships of intimacy, trust, and dependence".⁶ I follow McGillivray and Comasky, Canadian feminist legal scholars, in using this term in lieu of wife battering, battered woman syndrome, wife abuse, spousal assault, family violence, domestic abuse, domestic assault and domestic violence. Intimate violence is used instead because it speaks to the close, personal relationship between abuser and victim, and "...the deep trust presumed to exist among family members, between intimate partners..."⁷ I also use this term to denote the gendered, systemic nature of abuse in intimate relationships that fosters in the abuser a sense of entitlement to abuse his partner. Terms such as "family violence" do not pinpoint the source of the violence in the cases I wish to discuss; namely the male partner.

c) Intimate Violence and Restorative Justice in Canada

Intimate violence is a gendered crime. Christine Boyle, a feminist legal scholar, explains gendered crimes (or 'gendered assault') as "...offences against women as women rather than against people who simply happen to be women."⁸ Any analysis or evaluation of restorative justice dealing with intimate violence should explicitly recognize the specific,

⁶ Anne McGillivray and Brenda Comasky, *Black Eyes All of the Time: Intimate Violence, Aboriginal Women and the Justice System* (Toronto: University of Toronto Press, 1999) at xiv. I recognize that not all of these forms of abuse are illegal, however the cases that will be discussed include at least one act of criminal intimate violence. Criminal intimate violence often occurs within a constellation of non-criminal abusive behaviors. I also recognize feminist scholarship in the area of intimate violence in lesbian and gay relationships, however that is beyond the purview of this paper. For a discussion of intralesbian violence see: Mary Eaton, "Abuse by Any Other Name: Feminism, Difference and Intralesbian Violence" in Martha Albertson Fineman and Roxanne Mykitiuk eds., *The Public Nature of Private Violence: The Discovery of Domestic Abuse* (New York: Routledge, 1994) at 195, and Ellen Faulkner, "Lesbian Abuse; the Social and Legal Realities" (1991) 16 *QLJ* 261.

⁷ McGillivray and Comasky, *Supra* note 6 at xiv.

⁸ Christine Boyle, Marie-Andree Bertrand and Celine Lacerte-Lamontagne, *A Feminist Review of Criminal Law* (Ottawa: Minister of Supply and Services Canada, 1985) at 49.

gendered effects of these crimes, and construct specific, gendered responses to them. A gender-neutral response runs the risk of missing the fact that these crimes play a “...major role in the subordination of women...(and that)...they are in the forefront of the means of oppression.”⁹ Intimate violence creates and perpetuates gender inequality in Canadian society. Statistics on intimate abuse against women in Canada are sobering. A recent study by the Statistics Canada Centre for Justice Statistics indicates that 85% of victims of ‘family violence’ in Canada are women, and that for abuses such as kidnapping and sexual assault that rate climbs to 99% and 98% respectively.¹⁰ An earlier study by Holly Johnson, a senior statistician at Statistics Canada indicates that 29% of Canadian women surveyed had experienced at least one episode of violence at the hands of their male partners in the last year,¹¹ while almost half of Canadian women have been assaulted by a spouse or male partner in their lives.¹² Statistics on intimate abuse against Aboriginal women in Canada are shocking. Although intimate abuse rates are very high in the general Canadian population, estimates on rates against Aboriginal women are estimated to be three times as high.¹³ Estimates on both general and Aboriginal –specific rates may also be artificially low, as many researchers have noted the barriers to reporting intimate violence to police.¹⁴ These barriers include a sense that the violence in ‘normal’, shame, a close relationship with her abuser or a desire to avoid the criminal justice system. Only about half (52%) of BC women who have experienced violence in

⁹ *Ibid.*

¹⁰ Canada, Statistics Canada, Centre for Justice Statistics, “Family Violence: A Statistical Profile” (Ottawa: Stats Can, 2002) at 12.

¹¹ Holly Johnson, *Dangerous Domains: Violence Against Women in Canada* (Toronto: Nelson, 1996) at 136.

¹² *Ibid.*

¹³ McGillivray and Comaskey, *Supra* note 6 at 13.

¹⁴ Johnson, *Supra* note 11, and Statistics Canada, *Violence Against Women Survey* (Ottawa: Micro data File, 1994).

relationships contact social service agencies for assistance.¹⁵ Another significant concern is recidivism rates for male abusers. Estimates vary from 30 to 70%,¹⁶ with even the lowest estimate effecting one in three victims. There are particular safety risks for women who have been victimized by male partners when the offenders are given non-incarceral sentences, and criminal justice models must address these safety concerns as a priority.

Restorative justice is currently being used extensively across Canada,¹⁷ in many cases to deal with crimes of intimate violence. This thesis will examine the use of restorative justice in cases of intimate violence from the point of view of the safety and satisfaction of the victim of the crime. I will draw on theoretical analysis, research studies and evaluations by scholars and feminist activists who have considered restorative justice models in this context. The thesis examines the impact of restorative justice on female victims of intimate abuse in the Canadian context, with particular emphasis on Aboriginal women,¹⁸ and on the Province of British Columbia. This emphasis is dictated by a number of concerns: Aboriginal women are studied particularly because restorative justice is being used very extensively in Aboriginal communities to deal with domestic violence and sexual assault. Carol LaPrairie, a Canadian legal scholar notes that "...it

¹⁵ *Family Violence in Canada: A Statistical Profile 2001*, Statistics Canada, 2001.

¹⁶ D.G. Dutton, *The Domestic Assault of Women: Psychological and Criminal Justice Perspectives* (Vancouver, UBC Press, 1995), and see also L.K. Hamberger and J.E. Hastings, "Court Mandated Treatment of Men Who Assault their Partner: Issues, Controversies and Outcomes" in N.Z. Hilton ed, *Legal Responses to Wife Assault: Current Trends and Evaluations* (Newbury Park: Sage Publications, 1993) at 188.

¹⁷ A 2002 British Columbia inventory of restorative justice programs lists 60 programs in British Columbia alone. (British Columbia, "Restorative Justice Programs, Provincial Directory 2002" (Victoria: Minister of Public Safety and the Solicitor General British Columbia, 2002), while a national survey taken in 1998 shows over 400 programs nation-wide. (Canada, "Inventory of Canadian Events and Initiatives Related to Restorative Justice" (Ottawa: Correctional Services of Canada 1998).

¹⁸ I am not an Aboriginal woman, nor do I purport to speak for Aboriginal women. This thesis is informed by the activism, writing and scholarship of Aboriginal women who have written and spoken about this issue from their perspectives. Wherever possible in discussing restorative justice and Aboriginal women I will refer directly to the words of Aboriginal activists, writers and scholars.

appears that while restorative justice may not have become rooted in the mainstream ...this is not necessarily the situation for aboriginal offenders and aboriginal communities. (T)he aboriginal world has come to be seen as the most traditionally suitable and culturally appropriate place for the implementation of restorative justice practices.”¹⁹ Within the context of Canadian society Aboriginal women are a marginalised group, who frequently experience intimate violence, and may also be more likely to experience a restorative justice response to those crimes.

Also, restorative justice, in many cases, is considered to be drawn from a set of traditional Aboriginal practices. Many mainstream as well as Aboriginal-only models of restorative justice rely on foundations of Aboriginal tradition and spirituality. Critiques of these foundations offered by Aboriginal women provide insight into all restorative justice models, both mainstream and Aboriginal-only.

Although restorative justice is now a part of the federal *Criminal Code* (see Chapter Three) the provinces and territories have responsibility for the administration of initiatives in most cases. Policy and implementation varies from province to province, with safeguards for victims of intimate abuse also varying from province to province. My geographical location in Vancouver, and my local involvement with the women’s anti-violence movement have facilitated the acquisition and analysis of materials on British Columbia’s policies in this area. The focus on British Columbia’s policy and implementation allows the discussion of restorative justice practices to move from the general and theoretical to the specific.

¹⁹ Carol LaPrairie, “Understanding Restorative Justice”, (June 2002) [unpublished] at 23.

(d) Foundations

I begin from the assumption that First Nations in Canada labor under a long legacy of colonial, assimilationist policies that have robbed them of many of their resources, both human and economic; that this affects First Nations' responses to intimate violence, and that this must be taken into account in developing justice models. I begin also from the assumption that an important priority in any justice model that deals with intimate violence should be the safety, and dignity of the victims of these crimes, even at the expense of reconciliation of the parties, or in some cases of keeping the offender out of jail. I presume that the safety and healing of victims will warrant the same important consideration and resources as the rehabilitation of the offender. As the Royal Commission on Aboriginal Peoples states: "A (restorative justice) system that fails to protect women and children is a system that fails".²⁰

Legal scholarship and criminological writing generally engage with restorative justice in a comparative context, holding it up as either far superior or far inferior to the conventional criminal justice system.²¹ I will not use the conventional justice system as the main comparator, but will start with the needs of victims of intimate violence as expressed by these women and their advocates. This may mean that neither the current punitive models of law and order, nor restorative justice as it is currently practiced in Canada will provide a full response to the problems of intimate violence. Criminal justice

²⁰ Canada, *Report of the Royal Commission on Aboriginal Peoples*, "Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada" (Ottawa: Canada Communication Group, 1996) at 269. [hereinafter "Bridging the Cultural Divide"]

²¹ 'Conventional criminal justice system' refers to the court-based, adversarial criminal justice systems in place in most Western democracies.

reform should not place victims of intimate violence in a position where they must choose between two models that compromise their right to safety and dignity in different ways.

Chapter One provides a feminist theoretical and political context for my analysis of restorative justice. In part one of this chapter I outline the theory and ideas of the women's anti-violence movement, supporting my assertions that intimate violence is a gendered crime, and requires a gender analysis to effectively eliminate it. This segment also outlines some of the basic needs and concerns shared by all victims of intimate violence that must be addressed in restorative justice initiatives. The second part of this chapter provides an outline of the historical, political, economic and gender factors that inform the social location of Aboriginal women. This is necessary in order to outline some of the similar and unique needs that some Aboriginal women may have of restorative justice initiatives, and to place these within the larger socio-political context of Aboriginal cultures themselves.

Chapter Two provides some definition for the elusive concept of restorative justice. This chapter challenges some of the conventional wisdom about the genesis of restorative justice, and point out the theoretical, historical, political and cultural roots of two distinct schools of restorative justice in use in Canada.

Chapter Three contains a review of the legal foundations of restorative justice. I outline by what authority restorative justice is used in Canada, and discuss some of the legal and

administrative regimes that support its use. I also provide a feminist critique of some aspects of these regimes, by discussing ways in which administrative or legal problems may particularly affect victims of intimate violence who come in contact with the system.

Chapter Four provides a literature review of contemporary feminist thought on restorative justice and intimate violence. In this chapter I conclude that the emphasis on culture, in some writing by Aboriginal women, undermines the importance of gender, and potentially of protecting marginalized groups in Aboriginal communities.

Overall the literature on restorative justice discusses the problems and promise of these models in gender-neutral terms. In my opinion there is little or no recognition or discussion of the systemic discrimination and disadvantage faced by all women, and serious lack of analysis of the circumstances of more marginalized women. The gendered analysis in Chapter Five seeks to fill some of the gaps in the literature.

In Chapter Five I conclude that that in some cases restorative justice initiatives are not meeting the needs of victims of intimate violence, and in some cases women are being revictimised. I suggest ways in which restorative justice initiatives must address the needs of victims of intimate violence. In many other cases, due to a serious lack of research, there is no indication of whether victims of intimate violence are being helped or hurt. Because of this ambiguity I conclude that, until the implementation of national standards for restorative justice projects that protect victims of intimate violence, and a systematic evaluation of those projects that do deal with intimate violence, there must be

a moratorium on new projects dealing with intimate violence. Those that are currently dealing with cases of intimate violence should, as soon as possible, become subject to national guidelines designed to protect against revictimisation, and to meet the unique needs of victims of intimate violence. These should be drafted following consultations with women's anti-violence groups, Aboriginal women's groups and Aboriginal groups. New and renewed funding should attach to compliance to ensure uniform implementation. Finally I conclude that there are some serious cases of intimate violence that will never be appropriate for certain types of restorative justice, namely those models which require victims of intimate violence to advocate or negotiate for their interests in a mediation-type model.

CHAPTER ONE: WHAT DO VICTIMS OF INTIMATE VIOLENCE WANT? A NEEDS BASED ANALYSIS OF RESTORATIVE JUSTICE

This chapter will provide a feminist theoretical and political foundation for my analysis of restorative justice. In part one of this chapter I outline the theory and ideas of the women's anti-violence movement, supporting my assertions that intimate violence is a gendered crime, and requires a gender analysis to effectively eliminate or mitigate its effects. In my opinion the theories, tools and strategies used by the women's anti-violence movement have proven successful in mitigating gender inequality in other criminal justice models, and can provide guidance in examining all forms of restorative justice, regardless of cultural context. This segment also briefly discusses anti-racist feminist theory, within the context of mandatory arrest and charging policies. These policies are discussed as an example of a criminal justice intervention that has attracted feminist attention, and provides context and continuity for inquiries and conclusions feminists are making about restorative justice.

The second part of this chapter provides an outline of some of the historical, political, economic and gender factors that inform the social location of Aboriginal women. This reflects the focus on Aboriginal women throughout this thesis, and provides specific examples of how social location can reflect particular needs that must be answered in restorative justice models.

As stated in the introduction, gender is the heart of my feminist analysis, yet I also wish to pay attention to the particular social location of victims of intimate violence, and how

these factors effect their experiences and needs. I adopt the approach described by Susan Boyd, a feminist legal scholar, in her recent book on child custody, women's work and gender:

Many of the above (child custody) issues arise for mothers regardless of differences of race, class, sexuality and ability, but such differences may affect the way in which the issues takes shape in a particular woman's life.¹

This thesis will discuss generally the issues that arise for victims of intimate violence in restorative justice contexts, regardless of their culture. I will also discuss Aboriginal women, and the ways in which their gender and culture intersect to inform the particular ways these issues take shape in their lives. Victims of intimate violence are not a homogenous group. They do, however, have two very important, basic needs in common. The first is to be protected from further violence, and the second is to have a post-abuse level of autonomy and control that permits them to make choices about their own (and often their children's') lives.² These needs can be met in a wide variety of ways, and may be met differently for different women, depending on their experiences and social location.

This thesis provides a feminist critique of restorative justice, primarily through the lens of the needs and experiences of victims of intimate violence.³ Because, in my opinion,

¹ Susan Boyd, *Child Custody, Law and Women's Work* (Toronto: Oxford Press, 2003) at 12.

² Two recent feminist studies on the needs of victims of intimate violence indicate that these two primary needs are common amongst women, regardless of social location. Other needs, such as police intervention, having the abuser incarcerated, culturally appropriate services and even being taken seriously in the conventional criminal justice system were variable between respondents depending on their social location. (Joanne Minaker, "Evaluating Criminal Justice Responses to Intimate Abuse Through the Lens of Women's Needs" (2001) 13 *C.J.W.L.* at 81, and Anne McGillivray and Brenda Comasky, *Black Eyes All of the Time: Intimate Violence, Aboriginal Women and the Justice System* (Toronto: University of Toronto Press, 1999) at 93 to 112, and 188 to 130).

³ Basing feminist theory and practice in the lived experiences of women and girls is a well-established feminist epistemology. See for instance: Minaker, *Ibid.* at 75, Christine Overall, "A Case for Using

current restorative justice rhetoric and practice are skewed in favor of considering the offenders needs first, this is partly a strategic point of view. Making the needs of the victims of intimate violence the primary lens through which we view restorative justice forces the focus of readers to move from thinking almost exclusively about the offender to thinking also about the victim. This exercise will reveal ways to improve restorative justice initiatives that I think would otherwise be lost, and to begin the discussion about cases in which restorative justice should not be used. This is not intended to indicate that the interests of the offender are unimportant; ending violence against women can only be accomplished by ensuring that those who commit these crimes become whole, non-violent human beings. What this strategic emphasis is intended to do is to force the reader to look at restorative justice from the particular perspective of victims of intimate violence, and to interrogate whether restorative justice is an equally helpful response for them. I believe that, in some cases, given the right circumstances, a good restorative justice model can do both.

Looking at restorative justice through the lens of the needs of victims of intimate violence also has a secondary function. In many cases the needs of the victim are not antithetical to the needs of the offender. In fact in some cases they coincide in a number of important ways. By considering the needs of victims of intimate violence, and by changing

Personal Histories and Social Identities”, Chapter Eight in *A Feminist I: Reflections from Academia* (Ontario: Broadview Press, 1998) at 173, Sharlene Frank, “A Needs Assessment for an Aboriginal Women’s Transition House” (Vancouver: Feminist Research, Education, Development and Action Centre, 1996), Dianne Pothier, “Connecting Grounds of Discrimination to Real People’s Real Experiences” (2001) 13 *C.J.W.L.* 37, Elizabeth Comack, *Women in Trouble* (Halifax: Fernwood, 1996), and Marilyn Assheton-Smith and Barbara Spronk, “Women and Social Location: Our Lives, Our Research” (Ontario: CRIAW, 1993).

restorative justice programs to meet these needs, the needs of the offender will also likely be more completely met.

(a) Feminist Theories: Tools for Understanding Restorative Justice

My aim in this chapter is to trace, using feminist theory, the multiple and relative ways in which women as a group experience oppressions, and how gender and race or culture interlock to inform these oppressions, with special attention to the circumstances of Aboriginal women. This will emphasize how important it is to include a gender analysis in planning and implementing criminal justice models, and some of the ways in which overlooking these factors can deepen oppression. There is a need within restorative justice theory and practice to recognize the gendered, systematic and historical nature of intimate violence and that it is supported by gender inequality in Canadian society. Feminist theories of experience and oppression are tools to identify patterns and practices of gendered oppression⁴ within restorative justice theory and practice that may not otherwise be made obvious. Analyses of intimate violence in contemporary restorative justice theory and practice most often focus on culture, while feminisms expand that analysis to include the nexus between gender, culture, violence and the law. Feminist theories' emphasis on marginalized groups show how structural inequalities such as sexism, underpin the abuse of women, and yet how they are submerged in the

⁴ In the context of restorative justice exclusion and silencing are active forms of oppression. On silencing as a manifestation of power imbalances see: Hestor Lessard, "Speaking/Listening: A Review of *At the Boundaries of Law*, Fineman and Thomadsen, eds. (1992) 7 *Canadian Journal of Legal Studies* 163.

naturalization⁵ of culture and communities in the context some restorative justice theory and practice.

In this thesis I adopt the concept of social location described by Sherene Razack, a Canadian anti-racist scholar. According to Razack social location is "...the complex tracing of the social narratives that script how women experience their gender and how others respond to it."⁶ Although I accept to an extent the postmodern assertion that social locations are relative to one another⁷ I reject the notion that this makes all identities formally equal and that therefore no objective assessment of oppression based on group characteristics is possible.⁸ Instead I rely also on more traditional feminist theories of power and domination, and assert that inequality as manifested through sexism is quantifiable and traceable, although at times in diverse ways for diverse women.⁹ For instance it is possible to discern who in Canada is poor. Despite the fact that Aboriginal women in Canada are more poverty stricken than their non-Aboriginal counterparts, it is still a truth to state that women as a group are poor relative to men. It is also important, however, to pay attention to how particular historical, social and economic factors (their social location) converge in the experiences of Aboriginal women to deepen their poverty.

⁵ Meaning the erasure of gender in emphasizing the importance of culture.

⁶ Sherene Razack, *Looking White People in the Eye: Gender, Race and Culture in Courtrooms and Classrooms* (Toronto: University of Toronto Press, 1998) at 158.

⁷ That is we can be in both a dominant and subordinate power position depending on whom we are engaged with.

⁸ See for instance: Keenan Malik, "Universalism and Difference? Race and Postmodernists" (1996) 37 *Race and Class* 1. As cited in Razack, *Supra*.

⁹ Dawn Currie, "Feminist Encounters with Post-modernism: Exploring the Impasse of Debates on Patriarchy and Law" (1992) 5 *C.J.W.L.* 63 at 86.

(ii) The Feminist Anti-Violence Movement: What Do We Know About Victims of Violence?

The history of the feminist movement in Canada is inextricably linked to the women's anti-violence movement. Early in the feminist movement violence against women in their homes, workplaces and on the street was recognized as a serious impediment to women's equality in all aspects of life.¹⁰ While feminist transformation of society has been, and still is, the overall goal of the feminist movement in Canada, there has been a parallel movement to provide pragmatic assistance to women victims of intimate violence.

Keeping women safe from male violence was (and is) seen not merely as a public service, but as part of the feminist political movement.¹¹ The feminist anti-violence movement has dedicated decades of work to ending intimate violence. They have gained a (tenuous) foothold in policy and government corridors, and a well-defined and organised presence in lobbying, litigation and protest. The movement is important and influential, and the theory and practice of the feminist anti-violence movement is well informed by sound, extensive research, and first hand feminist experience.

Front-line feminist efforts to address violence against women have included providing shelters to abused or sexually assaulted women, consciousness raising groups, and feminist counseling for victims,¹² the formation of feminist anti-violence collectives,

¹⁰ Ann Duffy and Julianne Momirov, *Family Violence: A Canadian Introduction* (Toronto: Lorimer, 1997) at 176. See also: Vancouver Rape Relief and Women's Shelter: Herstory online: <<http://www.rapereliefshelter.bc.ca/herstory/herstory.html>> (date accessed: August 2002), and Lee Lakeman, "Why 'Law and Order' Cannot end Violence Against Women; and Why the Development of Women's (Social, Economic and Political and Civil) Rights Might" (2000) 20 *Canadian Woman Studies* 24.

¹¹ See: Pauline Funston, "Feminism in the Transition House" (2000) 20 *Canadian Woman Studies* 41.

¹² Duffy and Momirov, *Supra* note 10 at 176 and 164.

sexual assault counseling centers, 'safety audits' and public marches to bring attention to the issue of violence against women.¹³ Alongside collective organizing and the founding of transition houses feminist advocates and lawyers engage with the criminal justice system to address the needs of victims of male violence. This engagement has meant accompanying women through the court process, lobbying for changes to criminal justice policy, and pushing for changes to the law itself.¹⁴ Restorative justice is the most recent of many Canadian criminal justice interventions that have attempted to address intimate violence. Historically the feminist movement has opposed or lobbied for, and strategised around numerous criminal justice reforms. Although the models have been diverse, an important guiding principle for anti-violence work has been prioritizing the well-being and safety of victims of intimate violence. That principle remains the same for analyses of restorative justice, and forms the foundations of my own observations.

A. *Anti-violence theory*

The feminist anti-violence movement in Canada has struggled for at least twenty-five years to end intimate violence.¹⁵ The theoretical and political foundation of Canadian anti-violence feminist activism is that crimes of intimate violence are not just private power imbalances between individual victims and offenders- they are perpetuated and

¹³ Holly Johnson, *Dangerous Domains: Violence Against Women in Canada* (Toronto: Nelson Canada, 1996) at 99. For more detail on women's marches see: The Canadian Women's March Committee, 'It's Time for Change: The World March of Women 2000' (2000) 20 *Canadian Women Studies* 21 and Lakeman, *Supra* note 10 at 24.

¹⁴ See for instance: Elizabeth Sheehy, "Legal Responses to Violence Against Women in Canada" (1999) 19 *Canadian Woman Studies* 62, Christine Boyle, "A Duty to Retreat" (1991) 25 *U.B.C.L.Rev.* 60, Laura Burt "The Battered Woman Syndrome and the Plea of Self- Defense: Can the Victim and the Accused be Strangers?" (1993) 27 *U.B.C.L.Rev.* 93, and Christine Boyle, Marie-Andreee Betrand, Celine Lacerte-Lamontagne and Rebecca Shamaï, "A Feminist Review of Criminal Law" (Ottawa: Minister of Supply and Services Canada, 1985).

¹⁵ Lakeman, *Supra* note 10 at 24, and Lorene Clark, "Feminist Perspectives on Violence Against Women and Children: Psychological, Social Service and Criminal Justice Concerns" (1989) 3 *C.J.W.L.* 420.

supported by normative, gendered power imbalances embedded in most aspects of society that ensure women's economic, political, and social subordination to men.¹⁶

Elizabeth Sheehy, a feminist legal academic and anti-violence advocate sums up the position this way: "Woman's vulnerability to male violence and our ability to harness law are inextricably linked to women's social, economic and political position in Canada."¹⁷

I support the notion that the systematic nature of intimate violence is an expression of normative gender inequality, and that this makes an incident-based approach (such as that used in some restorative justice models) wholly inadequate. Instead, responses to intimate violence must include legal and non-legal strategies¹⁸ that incorporate the gendered, systemic realities of victims of intimate violence before, during and after the criminal justice intervention. Within the criminal justice context this means that legal strategies must not only address the particular incident, they must take into account the economic, political and social factors that increase women's vulnerability to intimate violence.

In the case of *R v. Gladue*¹⁹ the Canadian judiciary are asked to do just this for Aboriginal offenders: to take into account their experiences of racism, economic and social oppression, and violence at the hands of the state in sentencing considerations. The same consideration must be given to victims of intimate violence in relation to *their* experiences with colonialism, gender, race, and cultural oppression, and experiences of

¹⁶ Sheehy, *Supra* note 14 at 62, Duffy and Momirov, *Supra* note 10 at 128-164, Regina Greycar and Jenny Morgan, *The Hidden Gender of Law* (2nd Ed.) (Sydney: Federation Press, 2002) at 108, Lee Lakeman, *Ninety-Nine Federal Steps Toward and End to Violence Against Women* (Toronto: National Action Committee on the Status of Women, 1993), Kathleen Mahoney, "The Legal Treatment of Spousal Abuse: A Case of Sex Discrimination" (1992) 41 *U. N.B.L.J.* 21, and "The Political Economy of Non-Violence" in Jane Kelly ed, *Violence Against Women* (Calgary: Calgary Institute for Humanities, 1995) at 7, and Bertha Wilson, "Family Violence" (1992) 5 *C.J.W.L.* 137.

¹⁷ Sheehy, *Supra* note 14 at 62.

¹⁸ Such as transition houses, education and the empowerment of women.

¹⁹ *R v. Gladue* [1999] 1 S.C.R. 688. For a more thorough discussion of this case see Chapter Three.

violence at the hands of the state and male abusers.²⁰ Even if a sentence reflects the experiences of colonialism of the offender, as required by the *Criminal Code*²¹ and *Gladue*, if it fails also to consider similar experiences of the victim or worse still revictimises her, then the outcome is not just.

B. *The psychology of battering*

In considering criminal justice responses to intimate violence understanding the psychology of battering is key to a successful intervention from the perspective of the victim, and in addressing her particular needs. Through decades of experience, research and writing anti-violence feminists have compiled a woman-centred breadth of knowledge on the effects of intimate abuse on its female adult victims. This information is very important in constructing criminal justice responses to intimate violence and providing important ways of understanding whether criminal justice responses will ultimately be useful or harmful to victims of intimate violence. This feminist knowledge and experience reveals that intimate violence is about power and control of men over women in every aspect. "Violence creates an extreme imbalance of power between the parties."²² It seems a simple observation to state that violence inhibits the ability of women to make choices; it makes us afraid to ask for things we want, to do things we

²⁰ Ironically the *Gladue* case dealt with an Aboriginal woman accused of murdering her husband. Despite setting the standard for sentencing in cases involving Aboriginal accused, Tanis Gladue was sentenced to a lengthy term of incarceration. At least one commentator feels that this is due to a narrow and gender-neutral interpretation of the facts. See: Jean Lash, "Case Comment *R v. Gladue*" (2000) 20 *Canadian Woman Studies* 85.

²¹ R.S.C. 1985, c. C-46 [hereinafter the *Criminal Code*].

²² Hilary Astor, "Swimming Against the Tide: Keeping Violent Men Out of Mediation" in Julie Stubbs, ed, *Women, Male Violence and The Law* (Sydney: Federation Press, 1994) at 150. See also: Barbara Hudson, "Restorative Justice: the Challenge of Sexual and Racial Violence" (1998) 2 *Canadian Journal of Law and Society* 237 at 247, and Provincial Association Against Family Violence, "Keeping and Open Mind: A Look at Gender Inclusive Analysis, Restorative Justice and Alternative Dispute Resolution" (Newfoundland: Department of Justice, 199) at 21.

want or need to do. The fear of physical, emotional, sexual, financial or spiritual violence, especially if you have already experienced it, is extremely powerful.²³ The power imbalance created by fear of violent repercussions or death, and supported by systematic economic, social and political inequality, can ensure that victims of intimate violence are coerced into doing things they do not want to do, and prevented from obtaining what they need or want.²⁴

(ii) Feminism(s) and Legal Responses to Intimate Violence: What Have We Learned from Mandatory Arrest and Charging Policies?

Feminist engagement with the criminal justice system is not without dilemmas, contradictions, and internal debate. Each time the feminist anti-violence movement critiques²⁵ a 'new' criminal justice model, similar questions about the efficacy of that strategy, the safety of women, the role of feminists and the role of the state arise within

²³ I am aware of the feminist debate about pathologising victims of intimate violence, and the fear of completely removing any sense of women's personal identity or agency. These fears are expressed, for instance, regarding the legally constructed concept of the "battered wife syndrome" or "learned helplessness". The theoretical debate around labeling and categorising the behavior of victims of intimate violence is beyond the scope of this paper. Suffice it to say that I rely on anti-violence theories of systemic male oppression of women, and the common sense notion that fear of violence or death effects human behavior. For more on this debate see: Elizabeth Comack, "Do We Need to Syndromize Women's Experiences: The Limitations of the 'Battered Women's Syndrome'" in Kevin D. Bonnycastle and George Rigakos, *Unsettling Truths: Battered Women, Policy, Politics and Contemporary Research in Canada* (Vancouver: Collective Press, 1998) at 105, and Isabel Grant, "The 'Syndromization' of Women's Experiences" (1991) 25 *U.B.C.L.Rev.* at 51, and Christine Boyle, "The Battered Wife Syndrome and Self-Defense: *Lavallee v R.*" (1990) 9 *Can.J.Fam.L.* 171.

²⁴ Transition House Association of Nova Scotia, "Abused Women in Mediation: A Nova Scotia Snapshot" (Halifax: THANS, 2000) at 3 and 5, and Sandra Goundry, "Restorative Justice and Criminal Justice Reform in British Columbia: Identifying some Preliminary Questions and Concerns" (Vancouver: BCASVACP, 1998) at 8 and 17.

²⁵ Or helps to create or reform.

the movement, with a view to ensuring the safest model possible for women.²⁶

Restorative justice is no exception to this pattern of inquiry.

There has been a wide range of legal reform that have been supported by the feminist anti-violence movement,²⁷ including calls for harsher penalties, mandatory arrest policies and the criminalization of intimate violence.²⁸ One area where feminist debates about criminal justice intervention have crystallized is in the use of mandatory arrest and charging policies.²⁹

Feminist anti-racism scholarship has made valuable contributions to this debate. Anti-racist feminism³⁰ begins from the central premise that "...an analysis of race needs to be integrated into feminist theorizing."³¹ Anti-racist feminism asserts that, sometimes, mainstream feminist analysis, discourse, theory, and practice exclude the experiences and

²⁶ See for instance: Annalise Acorn, *Domestic Abuse: Toward an Effective Response-Report for Discussion No. 15* (Edmonton: Alberta Law Reform Commission, 1995), Dawn Currie, "Battered Women and the State: From the Theory of Failure to the Failure of Theory" (1990) 1 *Journal of Human Justice* 77.

²⁷ Sheehy, *Supra* note 14, and Sheila McIntyre, with contributions from Christine Boyle, Lee Lakeman and Elizabeth Sheehy, "Tracking and Resisting Backlash Against Equality Gains in Sexual Offence Law"(2000) 20 *Canadian Woman Studies* 72.

²⁸ Sheehy, *Supra* note 9 at 62-69. Other legal responses have included extra-criminal strategies such as domestic violence statutes, and common law actions against abusers and police.

²⁹ For instance British Columbia's *Violence Against Women in Relationships Policy* that provides police and Crown Attorneys with directives on how to proceed in cases of intimate abuse. Mandatory arrest and pro-charging policies are discussed here in part as they represent the results of a significant and successful feminist lobby for legal reform, and the principles that underlie these policies are threatened by the introduction of diversion programs (especially pre-charge diversion programs) in cases of intimate violence.

³⁰ Anti-racist feminism is diverse and at times contradictory. I use the term anti-racist feminism as it has been used to encompass the basis of many theories that make both race and gender central (Enakashi Dua "Introduction" in Enakashi Dua and Angela Robertson, *Scratching the Surface: Canadian Anti-racist Feminist Thought* (Toronto: Women's Press, 1999) at 9).

³¹ Enakashi Dua and Angela Robertson, *Scratching the Surface: Canadian AntiRacist Feminist Thought* (Toronto: Women's Press, 1999) at 9.

theories of women of color.³² Within the realm of law anti-racist feminism asserts that the "...law has served to perpetuate unjust class, race and gender hierarchies."³³ In other words when feminists engage with the law they must begin from the presumption that the legal system perpetuates a *number* of systematic inequalities, which feminist engagement with the law should attempt to alleviate or lessen.

Those who support, and have advocated for, the institutionalization of mandatory arrest and charging policies have done so in order to meet the perceived needs of victims of intimate violence within the criminal justice process. Namely; to make victims of abuse more comfortable contacting the police, to reduce the incidence of abuse,³⁴ and repeated abuse,³⁵ to force the police and prosecutors to treat intimate violence seriously,³⁶ to show the public and the individual abuser that this is a crime, and not a private family matter,³⁷ to give the victim a respite from contact with her abuser, to demonstrate that intimate violence is underpinned by systematic gender inequality by collecting statistics on abuse rates through the charging process, to place these crimes on the public record in the event

³² See for instance: Sharon McIvor and Teresa A. Nahanee, "Aboriginal Women: Invisible Victims of Violence" in Kevin D. Bonnycastle and George Rigakos, *Unsettling Truths: Battered Women, Policy, Politics and Contemporary Research in Canada* (Vancouver: Collective Press, 1998) at 63, Patricia Hill Collins, *Black Feminist Thought: Knowledge, Consciousness and the Politics of Empowerment* (2nd ed.) (New York: Routledge, 2000) at 5-7, Dua, *Supra* note 27 at 9, and Patricia Monture-Angus, "Organising Against Oppression: Aboriginal Women, Law and Feminism" in *Thunder in My Soul* (Halifax, Fernwood Press, 1995) at 171.

³³ Adriene Wing, "Violence and State Accountability: Critical Race Feminism" (1999) 95 *Georgetown Journal of Gender and the Law* 96.

³⁴ Peter Jaffe, David A. Wolfe, Anne Telford and Gary Austin, "The Impact of Police Charges in Incidents of Wife Abuse" (1986) 1 *Journal of Family Violence* 37.

³⁵ Lynette Feder, "Police Handling of Domestic and Non-Domestic Assault Cases: is There a Case for Discrimination?" (1992) 2 *Crime and Delinquency* 2, and Jiwani, *Infra* note 36 at 5.

³⁶ Feder, *Ibid* at 2, Yasmin Jiwani and Lawrence Bughagiar, "Policing Violence Against Women in Relationships: an Examination of Police Response to Violence Against Women in British Columbia" (Vancouver: Feminist Research, Education, Development and Action Centre, 1997) at 5, Kelly Hannah-Moffat, "To Charge or Not to Charge: Front Line Officer's Perceptions of Mandatory Charge Policies" in Mariana Valverde, Linda Macleod and Kirsten Johnson eds. *Wife Assault and The Canadian Criminal Justice System* (Toronto: Centre for Criminology, University of Toronto, 1995) at 35.

³⁷ Feder, *Ibid* at 7.

of further abuse, and to keep these crimes in the public eye through prosecution, media coverage, police and criminal justice policy and practice.³⁸

Laureen Snider, a prominent feminist criminologist, disagrees with those who endorse mandatory arrest and charging policies. She, and other feminist commentators³⁹ assert that increased punishment is not a useful response to intimate violence offences. On the contrary she asserts that the use of mandatory arrest and charging policies:

Is practically, theoretically and morally wrong...Entrusting more power to (the apparatus of government) means investing it with increased control over women's lives, control that is essentially invisible and unmonitored... (and)...such solutions play into the hands of those who are interested in increasing the level of social control over populations seen as problematic (the young, the poor, ethnic groups, women and "radicals" of all kinds").⁴⁰

Snider's concern echoes those of restorative justice advocates: that mandatory arrest and charging policies place too much control in the hands of the state (embodied in the adversarial justice system), which has been shown to oppress and revictimize both women victims and racial minorities.

³⁸ Whether mandatory arrest and charging policies actually reduce abuse rates is a hotly contested issue. See for instance in support of these policies: Jaffe, *Supra* note 34 at 37, C.A. Burris and P. Jaffe, "Wife Abuse is a Crime: the Impact of Police Laying Charges" (1983) 25 *Can. J. Crim.* 309, R. Berk and L.W. Sherman, "The Specific Deterrent Effects of Arrest for Domestic Assault" (1984) 49 *American Sociological Review* 261. For arguments against see: J. Schmidt and L Sherman, "Does Arrest Deter Domestic Violence" in Eve and Carl Buzawa, eds. *Do Arrests and Restraining Orders Work?* (California: Sage, 1996) at 43, Jiwani, *Supra* note 36, and D. Martin and J. Mosher, "Unkept Promises: Experiences of Immigrant Women and the Neo-Criminalisation of Wife Abuse" (1995) 8 *C.J.W.L.* 3. I support the notion that arrest and charges deliver a message to the victim, the abuser, state agents (such as police) and the public that intimate abuse is a crime, and not a private dispute. For that reason I generally support pro-arrest and charging policies in the first instance.

³⁹ See for example: Dawn Currie and Brian MacLean, "Women, Men and Police: Losing the Fight Against Wife Battery in Canada" in Dawn Currie and Brian MacLean, eds. *Re-Thinking the Administration of Justice* (Halifax, Fernwood Press, 1992) at 25, Linda MacLeod, "Policy Decisions and Prosecutorial Dilemmas: the Unanticipated Consequences of Good intentions" in Mariana Valverde, Linda Macleod and Kirsten Johnson, eds., *Wife Assault and the Criminal Justice System* (Toronto: Centre of Criminology, University of Toronto, 1995) at 47, and Tammy Landau, "Women's Experiences with Mandatory Charging for Wife Assault in Ontario, Canada: A Case Against the Prosecution" (1999) 20 *Can.J.Crim.*

⁴⁰ Laureen Snider, "The Potential of the Criminal Justice System to Promote Feminist Concerns" (1990) 10 *Canadian Journal of Law and Society* 75.

These same concerns are clearly expressed in relation to intimate violence and mandatory arrest by anti-racist feminist Miriam Rutenburg, an American feminist legal scholar. Rutenburg reiterates Snider's critique: she speaks to how gender not only shapes a woman's vulnerability to male violence, but how race and culture can shape her community's vulnerability to state violence, in the form of racialized discrimination within the criminal justice system, and in incarceration rates. Rutenburg questions feminist anti-violence advocates who support mandatory arrest and charging policies. "In spite of the best intentions of many domestic violence advocates, who are mostly white women, the interests of many Black women are not served by asking the state for protection such as mandatory arrest laws."⁴¹ What Rutenburg, and other anti-racist scholars⁴² claim is missing from some feminist anti-violence analysis of criminal justice responses to intimate violence is an understanding of the experiences of women of color in the context of their communities of culture and race, as well as their gender. That experience is what Karen Flynn and Charmain Crawford, two Canadian anti-violence researchers of Caribbean descent, have labeled 'race treason'.⁴³ This phrase is used to describe the 'choice' that women from marginalized communities face in situations of intimate violence: to report the abuse to the police, who are viewed as racist

⁴¹ Miriam Rutenburg "A Feminist Critique of Mandatory Arrest: An Analysis of Race and Gender in Domestic Violence Policy" (1994) 2 *Journal of Gender and the Law* 171 at 172.

⁴² See for instance: Karen Flynn and Charmaine Crawford, "Committing 'Race Treason': Battered Women and Mandatory Arrest in Toronto's Caribbean Community" in Kevin D. Bonnycastle and George Rigakos, *Unsettling Truths: Battered Women, Policy, Politics and Contemporary Research in Canada* (Vancouver: Collective Press, 1998) at 93, Sherene Razack, *Looking White People in the Eye: Gender, Race and Culture in Courtrooms and Classrooms* (Toronto: University of Toronto Press, 1998) at 66, and Hudson, *Supra* note 22 at 243, note 23.

⁴³ Flynn and Crawford, *Ibid.* at 93.

and oppressive to the cultural or racial community and be targeted as a 'race traitor', or remain silent, and compromise their right to safety as targets of male violence.

As discussed below, this sense of being trapped between intimate and state violence is shared by Aboriginal women. Debates regarding the wisdom and efficacy of mandatory charging and arrest policies, in the context of marginalised communities, are echoed in debates about the use of restorative justice in similar circumstances. Anti-racism scholars such as Ruttenburg, Flynn and Crawford provide us with tools to understand the experiences of marginalised women, and how they may differ from other, differently situated women who are victims of intimate violence. Contextualising intimate violence within external racism, or political oppression does not, however, erase the gendered nature of it, nor does it alter the basic needs shared by all victims of intimate violence. It allows us to better understand the complex nature of women's oppressions, and to evaluate criminal justice initiatives from a *number* of feminist perspectives. Particularly this theoretical approach provides tools to understand the experiences of Aboriginal women, and how restorative justice initiatives can better address their experiences of colonialism.

**(b) Culture, Community and Violence: Intimate Violence
in Aboriginal Communities**

The second part of this chapter provides an outline of the historical, political, economic and gender factors that inform the social location of Aboriginal women. As previously mentioned one way to assist in establishing gender equality within restorative justice

projects is to demand the same consideration for the victim as that mandated for the offender in *Gladue*.⁴⁴ *Gladue* cites numerous studies and reports, discussed in Chapter Two, regarding the impact of colonialism on the lives of Aboriginal offenders, and directs judges and sentencing circles to take these needs and experiences into account in crafting sentences. In order to demand the same consideration of the needs and experiences of Aboriginal women, their gendered experiences must first be explored and understood. This section examines the lives of Aboriginal women as they are described in recent literature, and also discusses the presence and effects of internalised sexism within some Aboriginal communities.

Aboriginal women who are victims of intimate violence share some of the experiences of women from other marginalized groups. They experience the gut-wrenching ‘choice’ of ‘race treason’, the racism of the criminal justice system, and the economic oppression that many other marginalized groups in Canada experience. However, Aboriginal peoples in Canada have important and distinctive historical and colonial experiences that set them apart from other marginalized groups in the context of criminal justice. Aboriginal women, and others have articulated the unique impacts of sexism and colonialism on their own lives, within the context of a group that is the primary political and cultural foundation for restorative justice in Canada.

Aboriginal women in Canada are a diverse and complex group. Differentiated by such factors as nation, geography, and status, it is impossible to pinpoint a definitive profile of an Aboriginal woman in Canada. The impact of colonialism, however, has had a unique

⁴⁴ *Supra* note 19.

and devastating impact on Aboriginal women as a group that can be partly delineated by their gender. There have been a number of Canadian studies that have documented the impact of colonialism on Aboriginal women in Canada that give us a picture of the challenges facing them.⁴⁵ There is significant evidence of structural and systematic inequality against Aboriginal women both within and outside of Aboriginal communities. Despite making up a majority of the overall Aboriginal population women are outnumbered by men on reserve.⁴⁶ This is because Aboriginal women are often forced to leave the reserve, and the resources located there, due to reasons well beyond their control, and are frequently prevented from returning. Aboriginal women are frequently survivors of abuse.⁴⁷ They experience a disproportionately high level of physical and sexual abuse, both on and off reserve.⁴⁸ Aboriginal women experience three times the rate of intimate violence as other Canadian women, and physical injury is the leading cause of death of Aboriginal women on reserve.⁴⁹ Aboriginal women living in urban areas are also exposed to extremely high levels of violence.⁵⁰

⁴⁵ See Chapter Two, footnote 66.

⁴⁶ Canada, *Report of the Royal Commission on Aboriginal Peoples, Perspectives and Realities, Volume Four* (Ottawa: Minister of Supply and Service, 1996) at 9. ([hereinafter "Perspectives and Realities"].

⁴⁷ Maureen McEvoy and Judith Daniluk, "Wounds of the Soul: The Experiences of Aboriginal Women Survivors of Sexual Abuse" (1996) 36 *Canadian Psychology* 222. For a feminist discussion of the relationships between violence, poverty, illness and homelessness see: Karen-Lee Miller and Janice Dumont, "Countless Abused Women: Homeless and Inadequately Housed" (2000) 2 *Canadian Woman Studies* 115.

⁴⁸ "Perspectives and Realities", *Supra* note 46 at 573. See also: Jocelyn Proulx and Sharon Perrault, *No Place for Violence: Canadian Aboriginal Alternatives* (Halifax: Fernwood, 2000) at 102. See Chapter Four for commentary from Aboriginal women who disagree with these estimates of the violence rate in their communities.

⁴⁹ Anne McGillivray and Brenda Comaskey, *Black Eyes all of the Time: Intimate Violence, Aboriginal Women and the Justice System* (Toronto: University of Toronto Press, 1999) at 13.

⁵⁰ Carol LaPrairie, *Victimization and Family Violence, Report 3, Seen but Not Heard: Native People in the Inner City* (Ottawa: Department of Justice, 1994).

Although intimate abuse rates amongst the general female population of Canada are very high,⁵¹ the rates of intimate violence against Aboriginal women are consistently higher.

“ At least one in three is abused by a partner, compared with one in ten women overall, and some estimates are as high as nine in ten. Four in five have witnessed or experienced intimate violence in childhood.”⁵² The Ontario Native Women’s study on violence against women in Aboriginal communities reports that 80% of women are abused and assaulted.⁵³

Despite being better educated than their Aboriginal male counterparts, Aboriginal women are disproportionately unemployed and poor.⁵⁴ Urban Aboriginal women are also better educated than their counterparts on-reserve, yet maintain a higher unemployment rate.⁵⁵ Compared to their non-Aboriginal counterparts Aboriginal women fare even worse.⁵⁶ The average income of an Aboriginal woman in Canada is around \$11,900.⁵⁷ Eighty to ninety percent of female-headed Aboriginal households fall below the poverty line.⁵⁸

Studies show an overall housing shortage for urban Aboriginal people,⁵⁹ which, due to their numbers in urban areas, affects Aboriginal women and their children particularly.

Housing on-reserve is particularly tenuous for some Aboriginal women, as the land-

⁵¹ See introduction.

⁵² Proulx, *Supra* note 48 at 41.

⁵³ Marion Lynn and Eimear O’Neill, “Families, Power and Violence” in Nancy Mandell and Ann Duffy, eds. *Canadian Families: Diversity, Conflict and Change* (Toronto: Harcourt Brace, 1995), and Emma LaRoque, “ *Violence in Aboriginal Communities* (Ottawa: Health Canada, 1994) at 72.

⁵⁴ “Perspectives and Realities”, *Supra* note 46 at 9, and Allison Williams, “ Canadian Urban Aboriginals: A Focus on Aboriginal Women in Toronto” (1997) 75 *The Canadian Journal of Native Studies* 75.

⁵⁵ “Perspective and Realities”, *Supra* note 46 at 570.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ “Taking Responsibility for Homelessness: An Action Plan for Toronto.” Report of the Mayor’s Homelessness Action Task Force (Toronto: Mayor’s Homelessness Action Task Force, January 1999).

⁵⁹ “Perspectives and Realities”, *Supra* note 46 at 553.

holding system on most reserves effectively prevents them from owning property.⁶⁰

When common law or marriage relationships break down it often becomes impossible for Aboriginal women to claim a portion of the matrimonial property, as all other Canadian women can, due to these land-holding restrictions.⁶¹ Often she and her children are left without a home, substandard accommodation, or are forced to move from the reserve. In situations of intimate violence the system of land holding makes leaving an abusive partner even more difficult, as the victim could also lose her home.

These factors converge to place Aboriginal women in a unique social location, making them particularly vulnerable to being under housed, to poor health, poverty, sexual abuse and assault.⁶² In the context of intimate abuse these factors make Aboriginal women exceptionally vulnerable to the power imbalances created and perpetuated by gendered violence. Poverty, racism outside of their own communities, inadequate housing for them and their children, and poor employment prospects conspire to keep Aboriginal women in abusive intimate relationships in order to survive. High rates of intimate violence against women and children within Aboriginal communities contribute to normalizing violence,⁶³ and stigmatizing those who report it.⁶⁴ “Often a victim is confronted with disbelief, anger and family denial or betrayal. Secrecy is expected and enforced. There is, in effect,

⁶⁰ “Perspectives and Realities”, *Supra* note 46 at 50, and Mary Ellen Turpel, “Home/Land” (1991) 10 *Can. J. Fam.L.* 17.

⁶¹ “Perspectives and Realities”, *Supra* note 46 at 51-52.

⁶² Suzanne Lenon, “Living on the Edge: Women, Poverty and Homelessness in Canada” (2000) 20 *Canadian Woman Studies* 125, and Yasmin Jiwani, “Violence Against Marginalised Girls: A Review of the Current Literature” (Ottawa: Status of Women Canada, 1998) at 4-5.

⁶³ See for instance: “Perspectives and Realities”, *Supra* note 46 at 57, and 75, McGillivray and Comasky, *Supra* note 49 at 8-9, and Kelly MacDonald, *Literature Review: Implications of Restorative Justice in Cases of Violence Against Aboriginal Women and Children* (Vancouver, AWAN, 2001) at 35.

⁶⁴ Elizabeth Thomlinson, Nellie Erikson and Mabel Cook, “Could this Be Your Community?” in Proulx, *Supra* note 48 at 22.

ensorship against those who would report sexual assault or even other forms of violence.”⁶⁵ “ An abused woman risks social ostracism if she reports a crime and pursues it with a community that does not want to hear about it or believes it is the victim’s responsibility to put up with abuse.”⁶⁶

(i) The State and Aboriginal Women: Implications for Restorative Justice

Many Aboriginal women have a deep desire to remain part of their culture and community, in order to help in rebuilding their nations in the wake of colonialism, and regain their traditional roles within their cultures. This means ending the intergenerational cycles of violence and abuse that have invaded their lives, brought into their families by residential schools, poverty, and other agents of colonialism. Within Aboriginal communities there are several visions outlined by Aboriginal women (feminist and not) on how to build gender equal, violence-free communities. These visions⁶⁷ are informed by Aboriginal women’s relationships with the state.

In the context of restorative justice the role of the state is a complicated one. ‘The state’ has multiple meanings, and creates multiple sites of oppression and opportunity for resistance. This complex, and at times contradictory understanding of the state frames Aboriginal women’s reactions to restorative justice. In many cases restorative justice initiatives are created and run, or supported and influenced by some form of the state that has, and in some cases continues to, actively oppressed Aboriginal women.

⁶⁵ LaRoque, *Supra* note 53 at 109.

⁶⁶ Evelyn Zellerer, “ Restorative Justice in Indigenous Communities: Critical Issues in Confronting Violence Against Women” (1999) 6 *International Review of Victimology* 349.

⁶⁷ Which will be outlined in Chapter Four.

The Canadian state is the site, in the context of conventional criminal justice interventions in domestic violence, where all Aboriginal people have experienced racism and oppression, both as victims of crime and as offenders. Restorative justice ostensibly offers a state-sanctioned⁶⁸ criminal justice response that addresses and alleviates the racism experienced by all Aboriginal peoples at the hands of the Canadian state. In the lives of Aboriginal women the state must also include band councils, a Canadian state-imposed, legislated form of largely male-dominated governance that dictates housing, education, social and economic policy in reserve communities.⁶⁹ Band councils often play an important role in Aboriginal justice initiatives.

The relationship of Aboriginal women to each manifestation of the state is complex. On one hand Aboriginal women have been the victims of numerous specific forms of sexism and colonialism at the hands of the Canadian state, notably the sexist provisions of the *Indian Act*.⁷⁰ Aboriginal people (both men and women) have been incarcerated and abused by a racist criminal justice system, their children apprehended in record numbers, and their resources stolen. Yet when they are victims of intimate violence Aboriginal women are expected to rely on the state-run criminal justice system to protect them and their children from harm.

⁶⁸ Either brought in by Federal or provincial government policies or legislation such as provincial Alternative measures programs or negotiated protocols. In most cases state sanctioned, funded and controlled.

⁶⁹ See for instance: Sharon McIvor, "Self-Government and Aboriginal Women" in Dua, *Supra* note 27 at 167 and 175, Mary Ellen Turpel, "Aboriginal Peoples and the Canadian Charter of Rights and Freedoms; Contradictions and Challenges" (1989) 10 *Canadian Woman Studies* 337, Rhoda Johnson, Winona Stevenson and Donna Greshner, "Peekiskwetan" (1993) 6 *C.J.W.L.* 165, "Inuit Women Meet to Discuss Their Plight" *The Edmonton Journal* (February 21, 1994) A3, and Teresa Anne Nahanee, "Indian Women, Sex Equality and the Charter" in Caroline Andrew and Sanda Rogers, *Women and the Canadian State* (Montreal and Kingston: McGill-Queen's University Press, 1997) at 90.

⁷⁰ R.S. 1985 C. 1-5.

On the other hand, some band councils have instituted rules and conducted themselves in such a way that Aboriginal women (feminist or not) have seen them as sexist and repressive.⁷¹ Yet in many circumstances Aboriginal women must stand in solidarity with Aboriginal men who largely control the band council against the Canadian state to prevent child apprehension,⁷² to fight for resources and to ask for self-government. To speak out against the abuses of the band council invites racism from white Canadians, and increased, unwanted, ham-handed intervention from the Canadian state. When Aboriginal women experience intimate violence within reserve communities, they are “caught between a rock and a hard place”; their community under band council rule is not necessarily a safe place for them, yet to turn to the Canadian state is to commit ‘race treason’.⁷³

(ii) Internalized sexism

The legislated, largely male-dominated model of the band council is not a traditional form of Aboriginal governance; it has been imposed upon Aboriginal peoples by the colonial Canadian state. Intimate violence and other forms of sexism are reflections of internalized sexism, also imported into Aboriginal cultures and governance through centuries of colonial oppression.⁷⁴

⁷¹ See for instance: Jo-Anne Fiske, “Native Women in Reserve Politics: Strategies and Struggles” (1990-91) 30-31 *Journal of Legal Pluralism* 121, and Joyce Green, “Constituting the Patriarchy: Aboriginal Women and Aboriginal Government” (1993) 4 *Constitutional Forum* 110 at 110-112.

⁷² Tracey Renee Fleck, “Aboriginal Child Welfare: Solutions to the Crisis” (1994) 1 *Aboriginal Women’s Law Journal* 13, and Lauren Sasaki, “The Contribution of the Child Welfare System to the Deterioration of Aboriginal Culture and the Need for Aboriginal Control” (1994) 1 *Aboriginal Women’s Law Journal* 31.

⁷³ “Perspectives and Realities”, *Supra* note 46 at 66.

⁷⁴ See: Patricia Monture-Angus, “Thinking About Aboriginal Justice: Myths and Revolution” in Gosse and Youngblood Henderson eds., *Continuing Poundmaker and Riel’s Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice* (Saskatoon, Purich Press: 1994) at 222 [hereinafter “Myths and Revolution”], Mary Ellen Turpel-Lafond, “Patriarchy and Paternalism: The Legacy of the Canadian State for First Nations Women” in Caroline Andrew and Sanda Rogers, *Women and the Canadian State* (Montreal and Kingston: McGill-Queen’s University Press, 1997) at 68 [hereinafter “Patriarchy and

Mary Ellen Turpel-Lafond, an Aboriginal judge and Aboriginal rights scholar, describes her conflicted relationship to the Canadian and band council states in this way:

It is difficult for us to look to this (Canadian) State for any change when the presence of the State has been synonymous with a painful dividing of our houses. We have had to struggle against these state-imposed or sanctioned initiatives. At the same time, we have had to react to and struggle with the internal imprint of State-enforced patriarchy on our men and on our political structures.⁷⁵

(I)t is wholly distracting and irresponsible to place the blame for First Nations women's experiences at the feet of First Nations men. Yet, neither can we exonerate them today when they are shown the context yet decide to ignore it and embrace learned patriarchy.⁷⁶

In attempting to address internalised sexism within Aboriginal communities, it is necessary to understand and acknowledge that the primary root of this violence is colonialism. This does not mean, however, that the analysis should end there. In proposing feminist inspired change and transformation of Aboriginal communities solutions will include changing the role of the colonizing Canadian state. This is inevitable due to the inextricable and oppressive economic, social and political 'relationship' between the Canadian state and Aboriginal nations. It would be shortsighted and naïve to propose change that did not include fundamental shifts in the policies and practices of the Canadian state in relation to Aboriginal peoples.

Paternalism"], Canada, *Report of the Royal Commission on Aboriginal Peoples*, " Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada" (Ottawa: Canada Communication Group, 1996) at 273 [hereinafter "Bridging the Cultural Divide"]. There is a debate within Aboriginal women's scholarship as to whether violence against women, or other forms of sexism pre-dated colonial contact. While the consensus seems to be that there was no pre-contact violence against women, even those who assert that such violence did exist agree that colonial oppression exacerbated any sexism within Aboriginal communities to immeasurable proportions. See for instance: Patricia Monture-Angus, *Thunder in My Soul: a Mohawk Woman Speaks* (Halifax: Fernwood Press, 1995) at 236-243, and LaRoque, *Supra* note 53 at 107.

⁷⁵ "Patriarchy and Paternalism", *Supra* note 74 at 181.

⁷⁶ "Patriarchy and Paternalism", *Supra* note 74 at 71.

When analyzing behaviors of largely male-dominated Aboriginal leadership that adversely impact Aboriginal women we must always see the specter of the Canadian state in the background, and acknowledge its role in action and inaction. The contemporary power of the Canadian state to oppress Aboriginal peoples as a whole, and create internal divisions inside Aboriginal communities is extremely powerful.

A critique, however, of the colonial Canadian state does not fully capture the experiences of oppression of Aboriginal women. It is also important that we support Aboriginal women in their quest to end sexism within their own communities, and to acknowledge the autonomous role that Aboriginal men, and male-dominated leadership do play in some forms of violence against Aboriginal women.

Although there are numerous examples of gender-based oppression within Aboriginal communities, there are two examples which stand out for their duration and tenacity, and also for the ways in which the sexist agenda of the Canadian state has been co-opted by the largely male Aboriginal leadership in the name of group rights. In these recent circumstances largely male-dominated band councils have pursued lengthy and acrimonious litigation against groups composed of and led primarily by women from their own bands, in order to secure a greater share of power and wealth for themselves. The implications of these trends for restorative justice are many. First, it is clear that internalized sexism has had a deep and lasting impact upon Aboriginal communities. Although voting rights and access to native languages do not directly effect restorative justice, the fact that these rights and privileges are being denied along gender lines

demonstrates that gender discrimination is a normalized part of some Aboriginal communities. The traditional or spiritual elements of restorative justice are no guarantee that similar sexist, gender-neutral approaches will be avoided in dealing with cases of intimate violence.

Second, it shows that there *are* serious gendered power imbalances at work in Aboriginal communities, and that explicit, self-conscious measures must be taken to ensure that they are not imported into restorative justice initiatives. This means that not only culture, but gender must be on the agenda from the inception of projects, and the entrenched sexism openly discussed, acknowledged and strategies developed with Aboriginal women to counter it.

Finally, other rights controlled by band councils such as access to housing or funds for education have a more direct impact on victims of intimate violence. In order for any woman who is a victim of intimate abuse to be able to make real post-abuse choices about her life, options such as where to live, what kind of work to do, educational opportunities and economic support must be in place. These kinds of resources ensure that women are able to choose to leave abusive relationships, and still continue to feed, clothe and house themselves, and possibly their children. Aboriginal women who are denied access to on reserve housing, educational funding, child care and health benefits due to circumstances created by Bill C-31 or a denial of on-reserve voting rights, as discussed below, face insurmountable systemic barriers to resources that some non-Aboriginal survivors of abuse do not. In planning and implementing holistic restorative

justice models these types of systemic barriers to equality and autonomy, and the needs they create for Aboriginal women should be explicitly taken into account.

A. Bill C-31: The Right to Belong to a Band

In 1869 the federal government passed the first piece of legislation purporting to deal with Aboriginal peoples.⁷⁷ This was the precursor to the 1876 *Indian Act*, the first of many acts by that name that were designed to regulate all aspects of the lives of Aboriginal peoples.⁷⁸ The 1869 Act was the first to introduce provisions that undermined the esteemed position of Aboriginal women in their communities. Primary among those provisions of the *Indian Act* that were damaging to Aboriginal women was the section which governed who retained status upon marrying a non-Aboriginal or non-status person.⁷⁹ This provision dictated that Aboriginal women who married non-Aboriginal (or non-status) men would lose their status, along with their children, while Aboriginal men who married non-Aboriginal (or non status) women would retain their status, along with their children.

The effects of this provision were deep and profound for many Aboriginal women and their children.⁸⁰ The practical meaning was that Aboriginal women who lost their status

⁷⁷ *An Act for the Gradual Enfranchisement of Indians, the Better Management of Indians and to extend the provisions of the Act 31st Victoria*, Chapter 42, SC 1869, c.6.

⁷⁸ Isaac and Maloughney, *Supra* note 31 at par 10, and Audrey Huntley, Fay Blaney et al, "Bill C-31: Its Impact, Implications and Recommendations for Change in British Columbia- Final Report" (Vancouver: Aboriginal Women's Action Network, 1999), and "Perspectives and Realities", *Supra* note 46 at 24.

⁷⁹ This was first seen as section 6 of the 1869 Act, and remained a part of the *Indian Act*, in its many manifestations until 1985.

⁸⁰ Until 1951 a woman in such a situation was forced to elect either a lump sum payout from the band she was banished from, or to continue to collect treaty and band monies. After 1951, however, that option

no longer had a home on reserve, access to schools, spiritual ceremonies and leaders, their community, language or band funds. They were effectively banished, many going to urban areas to find employment; facing racism and poverty.

Legal challenges by these disenfranchised women and their descendants to this legislation began in 1973,⁸¹ continued in 1976,⁸² and were finally addressed by federal legislation in 1985 with the passage of Bill C-31.⁸³ The effect of Bill C-31, put simply, was to allow women⁸⁴ who lost their status through the *Indian Act* to apply to regain both status and band membership. The Act also allowed for their children to apply for the same privileges.

Significantly 90% of "Bill C-31" Aboriginals whose applications have been successful (still) live off reserve, having been unable to regain the rights they won under Bill C-31.⁸⁵

The rights and benefits that accrue to an Aboriginal person reinstated under Bill C-31 are

ceased to exist and women who lost their status had to "relinquish ...all rights associated with that, including their homelands." (Huntley et al, *Supra* note 78 at 8).

⁸¹ *Lavell v. Canada (A.G.)* [1974] 38 D.L.R. (3d) 481 [hereinafter *Lavell*]. See Isaac and Maloughney, *Supra* note 31 at par 14, Huntley et al, *Supra* note 78 at 8, and "Perspectives and Realities", *Supra* note 46 at 32. The National Indian Brotherhood intervened in this case, arguing against the women and their descendants.

⁸² In this case the New Brunswick Human Rights Commission took the issue into the realm of international law, launching a complaint on behalf of all women disenfranchised by the *Indian Act* with the United Nations Human Rights Committee, pursuant to the *International Covenant on Civil and Political Rights* (ICCPR). Following a spate of delay tactics by the Canadian government, the Committee found, in a unanimous decision, that the treatment of Aboriginal women was a violation of Article 27 of the ICCPR, the right against discrimination. (Isaac and Maloughney, *Supra* note 31 at par 16 and 19, Huntley et. al, *Supra* note 78 at 9, and "Perspectives and Realities", *Supra* note 46 at 33.) *The Case of Sandra Lovelace*, Human Rights Communication R.6/24.

⁸³ *An Act to Amend the Indian Act*, S.C. 1985, c. 13. [hereinafter Bill C-31]. An important factor in the implementation of Bill C-31 was the imminent ratification of the *Canadian Charter of Rights and Freedoms*, which would have seen section 12(1)(b) of the *Indian Act* challenged and defeated under section 15.

⁸⁴ Of the 133,000 seeking status, three quarters of those who regained status (as opposed to receiving status for the first time) are women. ("Perspectives and Realities", *Supra* note 46 at 36, note 55)

⁸⁵ "Perspectives and Realities", *Supra* note 46 at 36 note 52.

far from clear. They have, in fact, become the subject of significant litigation between those who have been re-instated and their bands.⁸⁶ While the federal government's lack of funding is an important factor in the bands unwillingness to extend housing or services to 'Bill C-31' individuals, some women maintain that the resources that are available are "...distributed on the basis of favoritism and nepotism.",⁸⁷ rather than principles of fairness or entitlement. A recent report by the Aboriginal Women's Action Network, which is based on interviews with "Bill C-31" women, contains significant evidence of unfair distribution of resources on reserve.⁸⁸

B. Corbiere: The Right to Vote in Band Elections

The *Corbiere*⁸⁹ case challenged a provision of the *Indian Act* restricting voting rights in band council, band chief and referendums to those who live on reserve.

Band councils, and band chiefs exercise significant powers under the *Indian Act*. They are able to allot land on reserve, pass by-laws regulating who can use on-reserve facilities

⁸⁶ *Sawridge v. Canada* [1997] F.C.J. No. 1013 (F.C.T.D.) online: QL (A.B.R.T.), [2000] F.C.J. No. 749 (F.C.A.) online: QL (ABRT), *Mousseau v. Canada* [1993] N.S.J. No. 382 (N.S.S.C.), [1993] N.S.J. No. 607(N.S.C.A.) online: QL (ABRT). For litigation involving housing benefits see also: *Sandy Bay Band of Indians v. Canada* [1988] F.C.J. No. 144 (F.C.T.D.) online: QL (A.B.R.T.), *Scrimbitt v. Sackimay Indian Band Council* [2000] 1 F.C.J. 513 (F.C.T.D.), online: QL (ABRT), *Courtois* (1991) 1 C.N.L.R. 40 (C.H.R.T.) online: QL (A.B.R.T.), *Desjarlais v. Piapot Band* [1990] 1 C.N.L.R. 39 (A.M.S.A.T.D.) online: QL (ABRT), *News v. Whata Mohawks* [2000] F.C.J. No. 637 (F.C.T.CD.) online: QL (ABRT), [1999] F.C.J. No 374 (F.C.T.D.) online: QL (ABRT), affirmed at [2001] F.C.J. No. 641 (F.C.A.), online: QL (ABRT), *Sampson Cree v. Canada (Minister of Indian and Northern Affairs)* [1999] A.J. No 225 (A.Q.B.) online: QL (A.B.R.T.), *Canada v. Garden River* (1997) 33 OR (3d) 782, *Marchand v. Indian and Northern Affairs, Registrar* [2000] B.C.J. No 2363 (B.C.C.A.)online: QL (A.B.R.T.), *McArthur v. Saskatchewan Registrar, Indian and Northern Development* [1992] S.J. No. 189 (S.Q.B.) online: QL (ABRT), *Sinclair v. Canada (Registrar)* (2001) 4 C.N.L.R. 11 (F.C.T.D.), *Landry v. Canada (Minister of Indian and Northern Affairs)* [1996] F.C.J. No. 372 (F.C.T.D.), *Poitras v. Sawridge* [2001] F.C.J. No. 1031(F.C.T.D.)online; QL (A.B.R.Q.), *Wilson v. Canada (Registrar)* [1999] B.C.J. No. 2510 (B.C.S.C.T.D.) online: QL (ABRQ), *Gros-Louis v. Huron-Wendatt Band* (1990) 1 C.N.L.R. 46 (F.C.A.), *Tuplin v. Canada (Registrar)* [2001] P.E.I.J. No. 113 (P.E.I.S.C.T.D.)online; QL (ABRQ), *APG v. KHA*, [1994] A.J. No. 984 (A.Q.B.) online: Ql (A.B.R.Q.).

⁸⁷ Huntley et al, at 29.

⁸⁸ Huntley et al.

⁸⁹ *Corbiere v. Canada* [1994] 1 C.N.L.R. 55 at 57 (S.C.C.).

and participate in activities, and they determine who can return to live on reserve. Band councils and chiefs are able to raise, appropriate and allot band money, regulate the creation of new housing on reserve, and often negotiate on behalf of the band in land claim and self-government talks. Band funds and land are considered to be the communal property of all band members, regardless of where they live.⁹⁰ Not allowing off-reserve Aboriginals⁹¹ to vote in choosing these powerful representatives eliminates their ability to democratically select those charged with the management of these limited communal resources.

The off-reserve Aboriginal people (mostly women) who challenged the legislation were successful at the Supreme Court of Canada. The Court declared that section 77(1) of the *Indian Act* violated the section 15 equality rights of off-reserve members of all bands. The remedy however was delayed for 18 months to allow the federal government to consult with Aboriginal bands and leadership in drafting new legislation, allowing for off-reserve band members to vote in most on-reserve elections.⁹² Confusion, miscommunication and bad faith ensued.⁹³ Competing national (mostly male-dominated)

⁹⁰ *Corbiere* at pars. 75-78. This designation of band resources and land as communal property is emphasized in both the media, and in academic writing. See for example: Thomas Isaac "Case Commentary: *Corbiere v. Canada*" [1994] 1 *C.N.L.R.* 55 at 57.

⁹¹ As noted above women make up the majority of the urban Aboriginal population, despite outnumbering Aboriginal men overall. This means that legal and policy decisions that impact off-reserve Aboriginals disproportionately affect Aboriginal women.

⁹² Patricia Hughes, "*Corbiere v. Canada: Case Comment*" [1999] 12 *N.J.C.L.* 69, Thomas Isaac "Case Commentary: *Corbiere v. Canada*" [1994] 1 *C.N.L.R.* 55 at 57, and Vic Savino, "On the Law (*Corbiere* case on off-reserve voting)" (2000) 9 *First Perspective* at 7.

⁹³ As the controversy and confusion raged on at the national level, individual bands began to take things into their own hands. Despite warnings from the Supreme Court of Canada against doing so (*Corbiere* at par 112) bands began to pass or to enforce already existing 'custom election codes', or Band Membership Codes. These are restrictive local laws passed by counsel and chief limiting the voting rights of off-reserve band members indirectly by imposing strict band membership requirements, usually including a residency requirement. One newspaper report claims that of the 633 First Nations bands across Canada only 288 apply the *Indian Act* provisions. (Stanley Arcand "Native Voting Not Helped by High Court" *Edmonton*

Aboriginal leadership did not agree on proposed policy or legislation. The federal government failed to provide sufficient funding for consultations, the national Aboriginal leadership failed to complete the consultations in the allotted time, and the Assembly of First Nations (AFN) made a court application to have the deadline extended. Their request was denied.⁹⁴

In a shocking and unilateral move just prior to the November deadline, the federal government changed the *Indian Act* regulations dealing with off-reserve voting "...so as to allow for the enumeration of off-reserve voters and to allow them to vote, either by mail-in ballot or in person if they show up at the polling station on the reserve on election day."⁹⁵ These regulations currently govern off-reserve voting rights, instead of legislation that is the product of consultation, as ordered by the Supreme Court of Canada.

Several converging factors have pushed Aboriginal people into litigation in an attempt to clarify and enforce the rights gained in *Corbiere*. The first is that the regulations governing the electoral process are not a product of real consultation and negotiation; rather the federal government unilaterally imposed them. The parties on both sides of the debate (on and off-reserve Aboriginals) have never come to a self-determined compromise, and therefore continue to fight legally to protect their perceived interests.

Journal (November 20, 2000) A15) This means that the majority of Canadian bands are likely employing discriminatory, illegal custom election codes that exclude the predominantly female urban population.

⁹⁴ "First Nations chiefs don't want to comply yet with ruling" *Edmonton Journal* (November 3, 2000) A5. See also "No Extra Time for Bands", *Montreal Gazette* (November 4, 2000) A16.

⁹⁵ Vic Savino, "On the Law (Corbiere case on Off-reserve voting)" (2000) 9 *First Perspective* at 7. The regulations were posted on October 2, 2000, and came into effect on October 20, 2000. Paul Barnsley, "John Corbiere to Run for Chief: off reserve voting begins November 20" (2000) 8 *Windspeaker* at 1.

Presently there is serious confusion amongst Aboriginal people regarding who is eligible to vote in what on-reserve elections. Supported by the AFN, band councils have interpreted the new legislation and regulations in ways that restrict the voting rights of off-reserve band members. Critiques of the AFN's position have come from many quarters, including Aboriginal feminists. Fay Blaney, President of the Aboriginal Women's Action Network, claims that band chiefs are unwilling to share resources and power with "...off-reserve natives, many of whom are women who fled poverty or violence...the mostly male chiefs (are) grumbling and saying 'The women are going to be coming in from the city and take over'".⁹⁶ A number of elections have come and gone, and off-reserve women have been denied voting rights. Once again they have been forced to litigate.⁹⁷

A survey of the cases and policies surrounding Bill C-31 and off-reserve voting reveal several disappointing trends. First, it is clear that both bands, and the Canadian state are willing and able to engage in lengthy and acrimonious policy negotiations and litigation against a group of predominantly poor and disempowered Aboriginal women. There is little consideration given to the important role to be played by these women in the continued survival and flourishing of their respective nations, or the negative impact their

⁹⁶ Suzanne Fournier, "Off-Reserve Natives Gain a Major Voice", *Times Colonist* (November 13, 2000) Final B2.

⁹⁷ *Gros-Loius v. Nation Huronne-Wendat* [2000] F.C.J. No. 1529 (F.C.T.D.) online: QL (A..B.R.T.), *Napoleon v. Garbitt* [1997] B.C.J. No. 1250 (B.C.S.C.T.D.) online: QL (A.B.R.T.), *Medieros v. Ginoogaming First Nation* [2001] F.C.J. (F.C.T.D.) online: QL (ABRT), *Lovelace v. Ontario* [2000] 1 S.C.R. 950, *Lawrence Badger v. Sturgeon Lake Cree* [2002] F.C.J. No. 172 (F.C.T.D.) online: QL (A.B.R.T.), *Gordon v Canada (Minister of Indian and Northern Affairs)* [2001] F.C.J. No. 114 (F.C.T.D.), online: QL (A.B.R.T.). (This case goes one step further and challenges the provisions of the *Indian Act* that prevent off-reserve band members from running in on-reserve elections). See also "Horse Lake Deal an Ironic Puzzle" *Edmonton Journal* (March 26, 2001) A10 for discussion of a case involving distribution of resources in a voting context.

absence will have on communities that are attempting to heal and grow. Instead the struggle boils down to a desire to control resources and power on reserve by mostly male-dominated bands and the Canadian state.

Second, all of these important legal cases, with very few exceptions, were made with little understanding of and no reference to the social location of Aboriginal women as they are outlined above. Specifically there is little or no understanding of the particular vulnerabilities of Aboriginal women due to their gender, disproportionate poverty, and displacement from reserves, or as frequent survivors of violence. There is no analysis of the gendered impact of these decisions. In fact in at least one case, despite the fact that all of the plaintiffs were women, the court insisted that there was no gender discrimination intended by the band in question.⁹⁸

Finally it is still patently unclear how the *Indian Act*, and its regulations interact with case law to define exactly what rights and benefits re-instated status or voting rights confer. The courts are obviously unclear, and conflicting powers in the *Indian Act* itself make statutory interpretation difficult. Only the long awaited outcome of the many outstanding Bill C-31 and *Corbiere* cases making their way through the courts, or a revamping of the legislation, can clarify these rights. In the interim bands continue to deny “Bill C-31” and off-reserve band members rights and benefits, hoping that the lack of legal clarity and the cost of litigation will make them “go away”.

⁹⁸ See *McArthur v. Saskatchewan Registrar*, *Supra* note 86.

CHAPTER TWO: WHAT IS RESTORATIVE JUSTICE? THE HISTORICAL, POLITICAL AND THEORETICAL ROOTS OF TWO MODELS

The main purpose of this chapter is to define the elusive concept of restorative justice. This chapter will outline some of the diverse theoretical, political, cultural and historical ideas that inform the current uses of restorative justice in Canada. I will discuss recurring themes and ideas as they appear in the literature with a view to providing categories of restorative justice. These categories will provide definitional structure for feminist analysis in later chapters.

The term “restorative justice” is attributed to the American criminologist Albert Eglash, in a 1977 article discussing restitution.¹ This has been adopted by a wide range of actors in many criminal justice systems around the world, and carries with it multiple meanings. One recent paper commissioned by the Law Commission of Canada asserts that “...the label restorative justice is attached to any practice that takes place outside a courtroom without two lawyers and a judge.”² In Canada it is used to describe such diverse initiatives as conditional sentencing, justice projects in Aboriginal communities, victim-offender mediation and community justice programs sponsored and informed by faith communities. There are as many definitions as proponents and detractors, often making

¹ Daniel Van Ness and Karen Heetderks Strong attribute this term to Eglash in their book *Restoring Justice* (Cincinnati, Oh: Anderson Publishing, 1997) at 24. See also: A. Eglash, “Beyond Restitution: Creative Restitution” in Joe Hudson and Burt Galaway eds., *Restitution in Criminal Justice* (Lexington, MA: D.C. Heath and Company, 1977) at 91. Restitution is a movement that was “rediscovered” in the 1960’s in the Western world, proponents claim its roots lay in the justice practices of several ancient civilizations. Its basic tenet is “paying back the victim” in one of several ways, including monetary compensation or compensation in kind. The movement’s target is the needs of the victim, which they claim will then serve the larger interests of society by promoting healing and forgiveness amongst community members. See Llewellyn and Howse, *Infra* note 2 at 7.

² Jennifer Llewellyn and Robert Howse “Restorative Justice: A Conceptual Framework” by (Ottawa: Law Commission of Canada, 1999) at 9.

it difficult to pinpoint the exact meaning or origin of the term as it is currently used. The proliferation of the use of this term has led to some confusion and often to the conflation of disparate historical and political underpinnings that inform varied visions of restorative justice. When discussing “restorative justice” it is vital that the historical, political and cultural basis of the model or program in question be made clear. This facilitates evaluation of whether a restorative justice initiative meets the needs of victims of violence by framing the discussion of a particular model, with particular attributes or problems. Speaking generally of “restorative justice” runs the risk of generalising about the (in)effectiveness of initiatives that are quite varied in their responses to intimate violence. While those who support and practice restorative justice often do so out of a desire to end social injustices and inequalities, it is necessary to evaluate from the perspective of the victim whether this is, in fact, accomplished.

In recent decades restorative justice has captured the imagination of many who are dissatisfied or disillusioned with conventional models of criminal justice in Western countries such as Canada, the United States, New Zealand and Australia. This popularity is marked by a proliferation of conferences, websites,³ community groups,⁴ a restorative

³ A recent search under the term “restorative justice” on the World Wide Web yielded over 2000 individual web sites devoted to the discussion, condemnation or promotion of restorative justice in many different forms and jurisdictions. More concretely a working subcommittee of the United Nations is examining the concept of restorative justice and will prepare a draft resolution on the adoption of basic principles for presentation at a United Nations conference this year, based upon a resolution by Canada in April of 2000. See: Robert Cormier, “ Restorative Justice: Directions and Principles-Developments in Canada” (Ottawa: Public Works and Government Services Canada, 2002) at 9 and United Nations Resolution: ECOSOC/2000/14.

⁴ See for example: Patrick Rafferty, ed., *After One Year: the Restorative Justice Coalition* (Victoria, BC: Pithy Penal Press, 2001) at 11. This publication discusses the role of both the Restorative Justice Coalition and Victim’s Voice, the former is a prison-centred advocacy group for the promotion of restorative justice and the latter a national victims rights organization involved in promoting restorative justice. They are both based in Victoria, British Columbia and work out of the William Head Institution. See also: John Howard Society of Canada “ Briefing Paper on Restorative Justice” in Timothy F. Hartnagel ed., *Canadian Crime*

justice training ‘boot camp,’⁵ and “how to” manuals provided for mass distribution.⁶ The Correctional Service of Canada marks national ‘Restorative Justice Week’, in November,⁷ and restorative justice is the “...stated new justice wave” for several provinces including Saskatchewan, British Columbia, Alberta, Nova Scotia, New Brunswick, Newfoundland, Prince Edward Island, and Manitoba.⁸ In fact, one recent British Columbia publication on restorative justice claims that there are more than 60 restorative justice programs operating in this province alone.⁹ It is also evident in policy and legislation recently adopted in these jurisdictions incorporating the principles and practices of restorative justice into the criminal justice system itself, and in the extensive array of scholarly writing on the topic.

The growth and support of restorative justice in Canada is not limited to the criminal courts. Restorative justice principles are also being extensively employed in non-criminal contexts.¹⁰ British Columbia schools have begun to use restorative justice principles in

Control Policy: Selected Readings (Toronto: Harcourt and Brace, 1998) at 91, which discusses the role of the John Howard Society of Canada in promoting restorative justice at the level of policy and legislation. These are but a few examples.

⁵ Emma Poole, “Seminar Takes Fresh Look at Justice” *Calgary Herald*, March 30, 2001, Final Edition, B5.

⁶ See for example: Solicitor General Canada, “Making it Work: Planning and Evaluating Community Corrections and Healing Projects in Aboriginal Communities” by Rick Linden and Don Clairmont, (Ottawa: Solicitor General Canada, 1998). See also: Part B of the same work: “Evaluations, Manuals and Programs” for an extensive list of manuals available in Canada.

Online: < <http://www.sgc.gc.ca/epub/Abcore/e199805b/e199805b.htm> > (date accessed: February 2003).

⁷ “Reintegrating Offenders into Society” *St. John’s Telegram*, November 20, 2001, Final Edition, A5, and Robert Cormier, “Restorative Justice: Directions and Principles-Developments in Canada (Ottawa: Public Works and Government Services Canada, 2002) at 5.

⁸ See: Carol LaPrairie, “Understanding Restorative Justice” (2001) [unpublished], Manitoba Looks at Expanding Alternative Justice in Criminal Cases, *St. John’s Telegram* (Sept. 2, 2001) A5, Summerside Supports Inquiry Dealing with Family Violence, *The Charlottetown Guardian* (Sept. 1, 2001) A3, and “Reintegrating Offenders into Society”, *St. John’s Telegram* (November 20, 2001) A5.

⁹ Dawn Wilkinson, “Central Okanagan Restorative Justice” (Vancouver: The Canadian Bar Association of British Columbia, Criminal Law Section, 2001) at 1.

¹⁰ See generally: Heather Strang and John Braithwaite eds., *Restorative Justice and Civil Society* (New York: Cambridge University Press, 2001).

negotiating student conflicts.¹¹ Some Canadian family law practitioners are adopting a non-adversarial approach to legal disputes called “collaborative practice”, based on restorative justice principles of negotiation and relationship-building.¹² Mandatory and voluntary mediation of civil and family disputes in Canadian court systems is often based on goals and principles that draw on restorative justice models.¹³

The following is a brief overview and comparison of the philosophical and cultural underpinnings of the two main models of restorative justice currently in use in Canada: Western Restorative Justice¹⁴ and Aboriginal Justice. Most Canadian models borrow from both conceptions of restorative justice, accordingly the categories described below are not discrete compartments but often overlap into one another in practice.

The term restorative justice is also used interchangeably throughout the literature with other, more recently developed terms such as transformative justice, community-based

¹¹ Janet Steffenhagen, “Cooling School Violence: restorative justice programs bring feuding parties together to talk about their disputes” *The Vancouver Sun* (Wednesday, August 22, 2001) D2. See also: Valerie Braithwaite, “Values and Restorative Justice in Schools” in Heather Strang, John Braithwaite, eds., *Restorative Justice: Philosophy to Practice* (Aldershot: Ashgate, 2000) at 121.

¹² Janice Mucalov, “I’ll never see you in court: the rise of collaborative family law” (2001) 10 *The National* at 44.

¹³ See: The Honorable Sir Anthony Mason, “Restorative Justice: Courts and Civil Society” in Heather Strang, John Braithwaite, eds., *Restorative Justice: Philosophy to Practice* (Aldershot: Ashgate, 2000) at 1, Newfoundland and Labrador Provincial Association Against Family Violence, “Keeping an Open Mind: A Look at Gender Inclusive Analysis, Restorative Justice and Alternative Dispute Resolution” (St. John’s: Provincial Association Against Family Violence, 1999), and The Transition House Association of Nova Scotia, “Abused Women in Family Mediation: A Nova Scotia Snapshot” (Halifax: The Transition House Association of Nova Scotia, 2000).

¹⁴ I use the term “Western” here due to the origins of some restorative justice theory in Western democracies such as the United States, Canada, New Zealand, Australia and Western Europe. Although Western restorative justice claims to draw upon other cultures and time periods it is primarily fashioned as a response to the perceived social injustices entrenched in and perpetuated by the current criminal justice systems in these jurisdictions.

justice, peacemaking, and alternative measures. I will attempt wherever possible to use the terminology employed by the particular group or program to which I am referring.

(a) The Roots of Western Restorative Justice

Although Eglash is credited with coining the term restorative justice in the late 1970's the current manifestations are, according to John Braithwaite, criminologist and proponent of restorative justice, the rebirth of justice as it was practiced in *many* ancient cultures.

“...(R)estorative justice has been the dominant model of criminal justice throughout most of the human history for all the world's people.”¹⁵ Daniel Van Ness and Karen Heetderks Strong, restorative justice advocates and members of the Prison Fellowship Ministries, trace the roots of the modern Western restorative justice movement to the justice practices of many pre-colonial African, ancient Hebrew, and indigenous societies.¹⁶ They describe criminal justice in all of these societies as being “...aimed less at punishing criminal offenders than at resolving the consequences to their victims...to restore a community that has been sundered by crime.”¹⁷ Howard Zehr, Director of the Mennonite Central Committee, who has been called the “grandfather” of restorative justice, supports this historical location of the roots of restorative justice. He characterizes

¹⁵ John Braithwaite, “Restorative Justice: Assessing an Immodest Theory and a Pessimistic Theory” (Review Essay, University of Toronto Law Course, 1997) at 3. Online <<http://www.aic.gov.au>> (date accessed Jan. 2001). For a brief history of early restorative justice practices in the Western world see: E. Weitekamp, “Towards a Victim Oriented System”, (1993) 1 *European Journal on Criminal Policy and Research* at 70-93.

¹⁶ Daniel Van Ness and Karen Heetderks Strong, *Supra* note 1 at 8 and 9. These assertions of cultural and historical legitimacy are not without detractors, see for instance Kathleen Daly, “Restorative Justice: the Real Story” (2002) 4 *Punishment and Society* 12 at 15 and 16. For further discussion see Chapter 3.

¹⁷ Van Ness and Strong, *Supra* note 1 at 9. The belief that current restorative justice theory is rooted in ancient justice models from Western and non-Western cultures is shared by a number of other proponents of restorative justice. See for example: Thomas Quinn, “The Future and Restorative Community Justice” (International Crime Prevention Practitioners Conference, Vancouver, British Columbia, April 1, 1996) [unpublished] at 13, and Herman Bianchi, *Justice as Sanctuary: Toward a System of Crime Control* (Bloomington: Indiana University Press, 1994) at 10.

the justice practices of many early cultures as “community justice” and describes their philosophical underpinnings in this way:

(Community Justice) recognized the harm that had been done to people, that the people involved had to be central to a resolution, and that reparation of harm was critical. Community justice placed a high premium on maintaining relationships, on reconciliation.¹⁸

This direct relationship and healing process between victim and offender is seen by the restorative justice movement as vital to the process of repairing the harm done to the community following a crime. Van Ness and Strang trace an historical evolution from this type of community-based conflict resolution to the domination of the State over all conflict. As the king became the primary, and only, victim of crime the focus of the justice system shifted from the community to the state and the courts.¹⁹ Nils Christie, a Norwegian criminologist and supporter of restorative justice, sees the intervention of the State in the conflict (the crime) between victim and offender as “theft” of both the conflict and the tools to repair it.

This loss is first and foremost a loss of *opportunities for norm – clarification*. It is a loss of pedagogical possibilities. It is a loss of opportunities for a continuous discussion of what represents the law of the land... Lawyers are, as we say, trained into agreement on what is relevant in a case. But that means a trained incapacity in letting the parties decide

¹⁸ Howard Zehr, *Changing Lenses: A New Focus for Crime and Justice* (Waterloo: Herald Press, 1990) at 106. Zehr is credited with introducing the term “retributive justice” to describe contemporary Western justice systems, and using the term “restorative justice” to outline his vision of an alternative based on “community justice”.

¹⁹ Van Ness and Strong, *Supra* note 1 at 9. According to Daniel Van Ness this paradigm shift can be traced to the Norman invasion of Britain in 1066. William the Conqueror and his descendants used the criminal justice process to centralize personal power. William’s son Henry I issued the *Legis Henrici* taking royal jurisdiction over the king’s peace. To violate this peace was as offence against the king. Daniel Van Ness, David Carleson jr., Karen Strang, *Restorative Justice: Theory* (Washington DC: Justice Fellowship, 1989) at 50. In the Canadian context Judge Barry Stuart also sees this ‘theft’ of conflict as an impetus for the implementation of sentencing circles in Northern Communities, see Barry Stuart, “Circle Sentencing: Turning Swords into Ploughshares” in Galaway and Hudson eds., *Infra* note 23 at 193.

what *they* think is relevant. It means that it is difficult to stage what we might call a political debate in the court.²⁰

Christie is associated with the informal justice movement, which according to Van Ness has influenced and informed Western restorative justice theory by questioning the absolute and universal authority of the law. The informal justice movement asserts that "...legal structures and ways of thinking about law are specific to particular times and places, and that in virtually all societies justice is pursued in both formal and informal proceedings."²¹ According to proponents of Western restorative justice such as Van Ness, Strong, Christie and Zehr, by "stealing" conflict from the community and the victim the state has institutionalized conflict, making it impossible for the victim, offender and community to rebuild and strengthen after a crime as they were able to do when "community justice" was the norm.²²

Joe Hudson and Burt Galaway, both criminologists and proponents of restorative justice, have articulated three fundamental elements for any Western restorative justice definition. Their emphasis on the ownership of conflict by the community, the offender and the victim highlights the importance of these concepts in the current Western restorative justice movement.

Three elements are fundamental to any restorative justice definition and practice. First, crime is viewed primarily as a conflict between individuals that results in injuries to victims, communities and the offenders themselves, and only secondarily as a violation against the state. Second, the aim of the criminal justice process should be to create peace in communities by reconciling the parties and repairing the injuries caused

²⁰ Nils Christie "Conflict as Property" (1977) 17 *British Journal of Criminology* at 1. Christie elaborates on the connection between this theft of conflict and what he views as our current ineffective and unfair Western justice systems in *Limits on Pain* (Oslo-Bergen-Tromsø: Universitetsforlaget, 1981) and *Crime Control as Industry: Towards Gulags Western Style* (2nd Ed.) (New York, Routledge, 1994).

²¹ Van Ness and Strong, *Supra* note 1 at 16. See also Roger Matthews, "Reassessing Informal Justice" in Roger Matthews ed., *Informal Justice?* (Newbury Park: Sage Publications, 1998).

²² Lewellyn and Howse, *Supra* note 2 at 4-6.

by the dispute. Third, the criminal justice process should facilitate active participation by victims, offenders and their communities in order to find solutions to the conflict.²³

These founding principals are echoed in restorative justice movements and scholarship across the Western world. Two definitions that also espouse these principles come from a recent report by the Law Commission of Canada entitled "From Restorative Justice to Transformative Justice".²⁴ These definitions highlight the emphasis placed in many Canadian models on healing and supporting "community", "victim" and "offender" as three integral parts of restoring harmony to a community after a crime has been committed:

Restorative justice is a response to conflict that brings victims, wrongdoers and the community together to collectively repair harm that has been done in a manner that satisfies their conceptions of justice.²⁵

Restorative justice is a way of dealing with victims and offenders by focusing on the settlement of conflicts arising from crime and resolving the underlying problems which cause it...Central to restorative justice is the recognition of community rather than criminal justice agencies, as the prime site of crime control.²⁶

In Western restorative justice theory, then, it is equally important to support and heal the victim, and the community at large as it is to provide support and healing to the offender. These goals, although at times difficult to reconcile in cases of intimate violence are not

²³ Joe Hudson and Burt Galaway, *Restorative Justice: International Perspectives* (Monsey, NY: Criminal Justice Abstracts and Press, 1996) introduction at 2.

²⁴ D. Cooley, "From Restorative Justice to Transformative Justice: A Discussion Paper" (Ottawa: Law Commission of Canada, 1999) online: <<http://www.lcc.gc.ca>> (date accessed Jan. 2001). 'Transformative justice', according to Canadian scholar, activist and penal abolitionist Ruth Morris, is a step beyond restorative justice whereby restorative justice "...still accepts the idea that one event now defines all that matters of right and wrong- it leaves out the past, and the social causes of the event." R. Morris, *Stories of Transformative Justice* (Toronto: Canadian Scholar's Press, 2000) at 4.

²⁵ Cooley, *Ibid.* at 19.

²⁶ New Zealand Ministry of Justice, *Restorative Justice: a Discussion Paper* (Ministry of Justice, New Zealand, 1996) at 1, online: <<http://www.justice.govnt.nz/pubs/reports/1996/restorative/index.html>>, accessed Jan. 2001. As cited in Lewellyn and Howse, *Supra* note 2.

described in any hierarchy, but rather are seen by restorative justice theorists as complimentary and simultaneously achievable.

(i) Founding Movements

These basic formulations of conflict described above, and their roles in Western restorative justice, have been expanded upon and complimented by other contributors. Below is a brief outline of some of the movements that have informed and shaped Western restorative justice since its “rebirth” in the late 1970’s in North America. The ideas and concepts discussed here, along with such contributors as the informal justice movement and the restitution movement, emerged simultaneously within restorative justice discourse, and represent the scholarly work and activism of numerous criminologists, clergy, activists, lawyers and academics over the past two decades. According to Van Ness and Strong “(n)one of these movements alone has led to restorative justice theory, but all have influenced its development, if only because many who are now preoccupied with restorative justice came to it from one of these perspectives.”²⁷ They provide some parameters to the multiple and complex influences upon the formation of Western restorative justice in Canada, and give us some insight into the values, political roots and aspirations of those who advocate for restorative justice. Knowing where restorative justice comes from will give us a more clear picture of where restorative justice is headed, and where cases of intimate violence fit into that agenda.

²⁷ Van Ness and Strong, *Supra* note 1 at 24.

A. A Social Movement

Restorative justice has been called a “social movement”²⁸ in mediation circles. Indeed much of the impetus behind the Western restorative justice movement is in the perception that the criminal justice system as it currently functions in North America, New Zealand, Western Europe, and Australia is riddled with persistent problems that either create or perpetuate social injustice for the victim and/or the offender. Van Ness refers to those who espouse restorative justice out of an inherent concern for social well being as a unified “social justice” movement, despite their varied perspectives.²⁹ Restorative justice, it is claimed, can not only provide a solution to these persistent problems, but it has features which will likely help to eliminate some of these structural inequities created or perpetuated by the conventional Western justice system. An important goal of Western restorative justice is to end social injustice for both the victim and the offender.

B. Faith Communities

In many senses the Christian faith is inextricably linked with the Western restorative justice movement. The solutions and alternatives promised by restorative justice have been hailed as “miraculous” and “magic”.³⁰ Although other faith communities such as

²⁸ M. Price, “Personalizing Crime: Mediation Produces Restorative Justice for Victims and Offenders” Fall (2000) 4 *Dispute Resolution Magazine* at 9.

²⁹ Van Ness and Strong, *Supra* note 1 at 22. Van Ness includes here such diverse groups as “feminist movements” and Quakers.

³⁰ See for example: Morris, *Supra* note 24 at 146 and 254, and Rafferty, *Supra* note 4 at 10. For a discussion of the implications of Christianity in the restorative justice movement for victims of intimate violence see Chapter Five.

Aboriginal spirituality have made distinct contributions,³¹ Christian values have been a primary motivator in the development of Western restorative justice theory and practice.

Among the varied and diverse restorative justice models and projects that currently exist in Canada, many have been conceived and are run by faith communities. In a recent book on restorative justice Harold Pepinsky, criminologist and prison abolitionist, notes that:

In the process of organizing the Fifth International Conference on Penal Abolition (ICOPA), I discovered that by far the strongest contingent among the hundreds of correspondents are workers and activists with religious affiliations, notably the peace churches and ecumenical peace groups.³²

Both Daniel Van Ness³³ and Howard Zehr,³⁴ trace their involvement in the restorative justice movement to their Christian convictions. Van Ness argues that “biblical justice” is focused on the rights of victims, and the value of offenders, and he proposes a series of public policy applications based upon this premise.³⁵ Thomas Quinn, a presenter at Vancouver’s International Crime Prevention Practitioner’s Conference, quotes the Bible as “religious justification” for endorsing restorative justice practices.³⁶ There is, in fact, a long history of Christian involvement in movements for better prison conditions and, later in prison abolition and alternatives to imprisonment.³⁷ It is a much-noted fact that the first victim-offender mediation project in North America took place in Kitchener-

³¹ See the section on Aboriginal restorative justice below.

³² H. Pepinsky, “Peacemaking in Criminology and Criminal Justice” in H. Pepinsky and R. Quinney eds., *Criminology as Peacemaking* (Indiana: Indiana University Press, 1991) 299-300. In fact this work offers a full chapter on *Religious and Humanist Peacemaking Traditions*.

³³ Daniel Van Ness “Perspectives on Achieving Satisfying Justice: Values and Principles of Restorative Justice” (Achieving Justice Symposium, Vancouver, BC, March 21, 1997) at 5.

³⁴ Zehr is the Director of the Mennonite Central Committee U.S. Office of Criminal Justice. Van Ness and Strong, *Supra* note 1 at 26. See also: Gerald A. McHugh, *Christian Faith and Criminal Justice: Toward a Christian Response to Crime and Punishment* (New York: Paulist Press, 1978) and W. Cragg, *The Practice of Punishment* (New York: Routledge, 1992)

³⁵ Daniel Van Ness, *Crime and Its Victims: What We Can Do* (Downers Grove, IL: Crossway Books, 1989).

³⁶ Quinn, *Supra* note 17 at 13.

³⁷ Van Ness and Strong, *Supra* note 1 at 10-12 and 22-23, Morris, *Supra* note 24 at 137, 158, and Michael Jackson, *Prisoners of Isolation* (Toronto: University of Toronto Press, 1983) at 13 to 19.

Waterloo in Ontario, and was conceived of and run by the Mennonite Central Committee.³⁸

Today the involvement of the Christian faith community has not diminished. Many of those who continue to advocate in a secular way for Western restorative justice world wide are motivated by their religious beliefs. The Mennonite Central Committee, for instance maintains a Victim Offender Ministry in British Columbia whose role is to be "...a major bearer and exporter of the vision and practice of restorative justice."³⁹

Advocates and scholars such as Reverend Jim Consedine,⁴⁰ a New Zealand prison abolitionist and scholar, and the late Ruth Morris, a Canadian prison abolitionist and restorative justice advocate, have actively advocated in a secular manner for restorative justice reforms, while employed or motivated by Christian organizations.

C. *The Prison Abolition Movement*

The late Ruth Morris, restorative justice advocate, and prison abolitionist, calls the Canadian criminal justice system "expensive, unjust, immoral and a failure".⁴¹ Some Western restorative justice advocates believe that it is time for a complete paradigm shift

³⁸ See: Quinn, *Supra* note 17 at 18, Van Ness and Strong, *Supra* note 1 at 26, Morris, *Supra* note 24 at 18, Hudson and Galaway, *Supra* note 1 at 2, and D.E. Peachey, "The Kitchener Experiment" in M. Wright and B. Galaway, eds., *Mediation and Criminal Justice: Victims, Offenders and Community* (Newbury Park: California: Sage, 1989) at 14-26.

³⁹ Resource List provided to British Columbian victims services providers in a package for a workshop on diversion expansion in British Columbia, held on Feb. 11 and 12, 1997 by the Ministry of the Attorney General for British Columbia. Package materials archived at FREDA Centre for Research on Violence Against Women and Children, Vancouver, British Columbia.

⁴⁰ Jim Consedine, *Restorative Justice: Healing the Effects of Crime* (Lyttleton, New Zealand, Ploughshare Publications, 1995), Jim Consedine and Helen Bowen eds., *Restorative Justice: Contemporary Themes and Practice* (Lyttleton, New Zealand: Ploughshare Publications, 1999).

⁴¹ *Supra* note 24 at 3-7.

away from the retributive model of justice currently employed in most Western jurisdictions towards a more restorative approach. For some this movement is rooted in a desire to reform or eliminate the use of incarceration.

Despite an estimated recidivism rate ranging from 70 to 90 percent for Federal offences, judges continue to levy sentences on the myth that incarceration will serve to rehabilitate and deter. Prosecutors delight in disclosing the full length of an offender's RAP sheet in open court to provide irrefutable evidence that this time the offender should receive even more jail time. Curiously the fact that the last several terms failed to influence the offender's behavior has not until recently raised questions as to the efficacy of the system.⁴²

Intense critiques of the utility and humanity of prisons are the backdrop to another, related commentary on the business of building and maintaining prisons. The "prison industrial complex", as it is called by Nils Christie describes the trend in many Western democracies to overuse incarceration as tool to boost and maintain economic development.⁴³ Nils Christie argues that the overuse of incarceration necessitates spending billions of dollars a year warehousing those who commit crime due to poverty and desperation, instead of providing the social change or restructuring that would allow them to lead a crime-free life. According to prison abolitionists young offenders who spend time in adult prisons for petty crimes "graduate" from prison, emerging with newly acquired skills and contacts to commit further, more serious offences.⁴⁴ More insidious than this is the tendency for prisons to become an industry by moving into smaller, poor

⁴² Judith Doulis, "Restorative Justice Systems" (October 15, 1996)[unpublished, archived at the FREDA Center for Research on Violence Against Women and Children] at 1. This critical stance on the utility and humanity of the overuse of incarceration is a common refrain amongst some restorative justice advocates. For example see: Quinn, *Supra* note 17 at 1 and 8, Van Ness and Strong, *Supra* note 1 at 12, and John Braithwaite and Philip Petit, *Not Just Deserts: a Republican Theory of Criminal Justice* (Oxford: Clarendon Press, 1990) at 5.

⁴³ See: Richard Swift, "Crime and Civilization: An Interview With Nils Christie" (1996) 2 *New Internationalist* at 10. See also: Christie, *Crime Control as Industry*, *Supra* note 20.

⁴⁴ See for instance: Doug Small, "On Stocks and Bonding: Justice Down Under" (1995) *The National* at 47.

towns and providing the only employment in the area, perpetuating the need to fill these prisons as an economic prerogative.⁴⁵ Ruth Morris points out that it costs between 80 and 200 dollars per day to keep a single person in a North American prison, stressing what she sees as an urgent need to stop the huge economic momentum behind the overuse of incarceration.⁴⁶

Advocates such as Morris and Christie claim that Western restorative justice will address the effects of the (over)use of incarceration first, obviously, by diverting more people away from the courts and prison systems. Secondly restorative justice will help to address these problems by rebuilding communities that will foster relationships, support victims and offenders, addressing the root causes of crime. The goal of eliminating or seriously reducing the use of incarceration has special meaning for victims of intimate violence. As will be discussed in Chapter Five the incarceration of those who commit crimes of intimate abuse has practical and symbolic significance for their victims.

D. The Victims Movement

One of the major critiques of the processes and institutions of Western criminal justice systems is the ways in which they ignore, diminish and even revictimize the victims of crime. Almost all models of Western restorative justice emphasize the role of the victim, and claim that while the retributive justice system is offender-driven,⁴⁷ restorative justice

⁴⁵ See: Richard Swift, "Rush to Punishment" (1996) 2 *New Internationalist* 7, and Quinn, *Supra* note 17 at 4.

⁴⁶ *Supra* note 24 at 5. See also Russ Immarigeon, "Beyond the Fear of Crime: Reconciliation as the Basis for Criminal Justice Policy" in H. Pepinsky and R. Quinney eds., *Criminology as Peacemaking* (Indiana: Indiana University Press, 1991) at 70.

⁴⁷ Mark Umbreit, "Restorative Justice Through Victim-Offender Mediation: A Multi-Site Assessment" (1998) 1 *Western Criminology Review* 1 at 2, and Matthews, *Supra* note 21 at 8.

is victim-centred.⁴⁸ Throughout Western restorative justice literature the plight of the (ungendered) victim is a common and consistent thread.⁴⁹ Studies have shown that victims in the retributive justice system not only suffer from monetary loss, physical injury, and psychological stress due to the crime, their losses are compounded by the loss of time, delays, humiliating testimony and cross examination, and lack of input.⁵⁰ Marty Price, director and founder of the Victim-Offender Reconciliation Program Information and Resource Centre in Washington, characterizes the peripheral role played by victims in the criminal justice system:

Victims may be viewed, at worst, as impediments to the prosecutorial process- at best, as valuable witnesses for the prosecution of the state's case. Only the most progressive prosecutors offices view crime victims as their clients and prioritize the needs of victims.⁵¹

Restorative justice, he claims, is better able to serve the victim and the offender by providing ownership of the conflict, keeping offenders out of harmful prisons, recognizing the wrong done to the victim, finding out what needs to be done to "repair the harm", and bringing closure to the victim and the offender by making the offender accountable for his actions.

An emerging issue within the victims rights movement, and one which is central to this thesis, is whether restorative justice is in fact appropriate in more serious cases, particularly intimate violence. The Canadian experience is varied in that some programs

⁴⁸ Quinn, *Supra* note 17 at 4.

⁴⁹ See for example: Matthews, *Supra* note 21 at 8-11, Van Ness and Strong, *Supra* note 1 at 19-21, John Howard Society, *Supra* note 4 at 91, Morris, *Supra* note 24 at 9-13, Llewellyn and Howse, *Supra* note 2 at 21.

⁵⁰ John Howard Society, *Supra* note 4 at 95.

⁵¹ Price, *Supra* note 21 at 8.

accept violent offenders, and some do not.⁵² Many Western restorative justice advocates feel that the victims of any crime are much better assisted in a restorative justice model than in the retributive justice system. Many programs and advocates hope to expand their work into more serious crimes. Price recommends that time be taken in extreme cases.

“A number of programs have now mediated violent assaults, including rapes, and mediations have taken place between murderers and the families of their victims... In severe crime mediations, case development may take a year or more before the mediation can take place.”⁵³

The theoretical and political roots of Western restorative justice in such social justice and religious movements as Christianity, prison abolition and the victims movement make it clear that improving the quality of justice for offenders and victims alike is the primary goal. The challenge to advocates of restorative justice is to ensure that victims of intimate violence are equal beneficiaries in this ‘new’ model of justice.

⁵² For example The North Vancouver Restorative Justice Society does not accept cases of intimate violence. Online: <http://www.restorativejustice.ca/Org.asp?Id=17437> (date accessed: March, 2003). The Fraser Region Community Justice Initiatives Association does accept cases dealing with intimate violence. Online: <http://www.nicr.ca:8080/Org.asp?id=18019> (Date accessed: March, 2003). There is variety amongst Aboriginal justice initiatives as well. The Aboriginal Ganootamaage Justice Services Diversion Program in Winnipeg does not divert either sexual assaults or domestic violence. Jocelyn Proulx and Sharon Perrault, *No Place for Violence: Canadian Aboriginal Alternatives* (Halifax, Fernwood, 2000) at 62. The Aboriginal Legal Services of Toronto Community Council Diversion Project diverts all offences, including sexual assault and intimate violence. (Protocol Between Aboriginal Legal Services of Toronto and the Toronto Crown Attorney’s Office with Regard to the Community Council Project) <online:http://aboriginallegal.ca/docs/protocol_provincial.htm> (date accessed July 19, 2002). The Ahousaht Holistic Society in Ahousaht, BC diverts those accused of intergenerational sexual abuse and intimate violence. (Pam Frank, “Ahousaht Holistic Society, Ahousaht Holistic Centre Staff and Ahousaht Health Clinic Staff Directory” a paper prepared for Canadian Association of Elizabeth Fry Society’s “Restoring Justice” Conference, New Westminster, BC, April 24, 2001)

⁵³ *Supra* note 28 at 10.

(b) The Roots of Aboriginal Justice

Although there has been some discussion amongst advocates of Western restorative justice of the role played by race and culture in restorative justice theory it has been superficial.⁵⁴ The use of “restorative justice” methods in historical Aboriginal cultures are often cited briefly as one of several cultural sources of historical legitimacy and authenticity for Western restorative justice theory and practice.⁵⁵ The relationship between Canada’s Aboriginal peoples and the Canadian criminal justice system requires a much closer, more specific and subtle examination of the role of restorative justice in this interaction; informed and led by Aboriginal peoples.

In an attempt to allow Aboriginal observers from various arenas to speak in their own words about what Aboriginal justice is to them, this section contains lengthy quotations from several sources. Although it is key to emphasize here that “...Aboriginal peoples are not homogeneous...”⁵⁶ it is possible to trace some common values and ideas that inform varied visions of Aboriginal justice employed in Canada. This, I feel, is the most accurate way to get at the nuances and commonalities of Aboriginal justice which my own cultural and linguistic background may prevent me from accurately expressing.

⁵⁴ See for example: Morris, *Supra* note 24 at 6. She cites the over incarceration of Blacks and indigenous peoples as evidence of the unjust nature of Western criminal justice systems. See also: Fred D. Butler, “The Question of Race, Gender and Culture in Mediation Selection” *Dispute Resolution Journal* (Nov. 2000/ Jan. 2001) 36.

⁵⁵ See for example: Van Ness and Strong, *Supra* note 1 at 9, Umbreit, *Supra* note 47 at 4, John Howard Society, *Supra* note 4 at 103, Rafferty, *Supra* note 4 at 5, Lewellyn and Howse, *Supra* note 2 at 6, and Quinn, *Supra* note 17 at 13, and John Winterdyk, “ It’s Time, it’s Time...is it Time for Restorative Justice?” (1998) April/May *Law Now* at 21.

⁵⁶ Patricia Monture-Okanee and Mary Ellen Turpel, “ Aboriginal Peoples and Canadian Criminal Law: Rethinking Justice” (1992) *U.B.C.L. Rev.* Special Edition at 248 [hereinafter “Rethinking Justice”] at 242.

There is also an emphasis on the voices of Aboriginal women and their visions of restorative justice. This is a choice that reflects the focus of this thesis: bringing the marginalized voices of women, Aboriginal and non-Aboriginal, to the fore in the discussion of restorative justice.

(i) Aboriginal Peoples and the Canadian Criminal Justice System: a Legacy of Despair

It is asserted by many Commissions of Inquiry, the Canadian Bar Association, and the Supreme Court of Canada, that the Canadian justice system has failed Aboriginal peoples.⁵⁷ The failure of the mainstream justice system seems undeniable as we face the new millennium plagued by a staggering over-representation of Aboriginal peoples in our prisons,⁵⁸ and a justice system that enforces goals and processes that are foreign to many Aboriginal people.⁵⁹ The need to address the legacy of colonialism for Aboriginal offenders is plain, yet the vital question remains: how to achieve real justice for offenders in a way that provides true healing, safety and protection for the victim and the community. Aboriginal justice is viewed as one important way, and in some cases as the only way, to alleviate the oppression of all Aboriginal peoples by the Canadian criminal justice system.

⁵⁷ *Infra*, note 65.

⁵⁸ For debate on this assertion see below.

⁵⁹ See for instance: Mary Ellen Turpel, "Reflections on Thinking Concretely About Criminal Justice Reform" in Gosse and Youngblood Henderson eds., *Continuing Poudmaker and Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice* (Saskatoon, Purich: 1994) at 210 [hereinafter "Thinking Concretely"] at 206, Proulx, *Supra* note 52 at 15 and 16, and Canada, *Report of the Royal Commission on Aboriginal Peoples*, "A Report on Aboriginal People and Criminal Justice in Canada" (Ottawa: Canada Communication Group, 1996) (Co-Chairs: R. Dussault & G. Erasmus) [hereinafter "Bridging the Cultural Divide"] at 12-33.

(ii) Over-representation: the Fallout of Colonialism

Overrepresentation in this context means that despite making up a very small proportion of the Canadian population, Aboriginal peoples make up a much larger proportion of those who have been incarcerated in Canada. Numerous federal and provincial studies, inquiries and task forces have quantified and documented the overwhelming problem of over-representation of Aboriginal adults and youth in our correctional facilities, and the symptoms and causes of Aboriginal peoples' devastating history within the Canadian criminal justice system.⁶⁰ The subject of Aboriginal over-representation in Canada's prison systems has also been the subject of much scholarly attention.⁶¹ Generally progressive Canadian scholars attribute Aboriginal over-representation to a number of factors, mainly related to the devastation caused to Aboriginal culture and society during

⁶⁰ These include: Canadian Bar Association, *Locking Up Natives in Canada* (Ottawa: Canadian Bar Association, 1989), Manitoba, *Report of the Aboriginal Justice Inquiry of Manitoba: The Justice System and Aboriginal People*, Vol. I (Winnipeg: Queen's Printer, 1991) (Commissioners: A.C. Hamilton & C.M. Sinclair), Carol La Prairie, *Victimization and Family Violence*, Report 3, "Seen But Not Heard: Native People in the Inner City" (Ottawa: Department of Justice, 1994), C. Griffiths and S. Verdun-Jones eds., *Canadian Criminal Justice*, 2nd ed. (Toronto: Harcourt Brace, 1994), "Bridging the Cultural Divide", Canada, *Creating Choices: The Report of the Task Force on Federally Sentenced Women* (Ottawa: Correctional Services Canada, 1990) [hereinafter "Creating Choices"], Alberta, *Justice on Trial: Report of the Task Force on the Criminal Justice System and Its Impact on The Indian and Metis People of Alberta* (Calgary: Attorney General of Alberta, 1991) [hereinafter "Justice on Trial"], Manitoba, *Report of the Aboriginal Justice Inquiry of Manitoba*, Volume I: the Justice System and Aboriginal People (Winnipeg: Aboriginal Justice Inquiry, 1991) [hereinafter "Manitoba Justice Inquiry"].

⁶¹ See for instance: Anne McGillivray and Brenda Comasky, *Black Eyes All of the Time: Intimate Violence, Aboriginal Women and the Justice System* (Toronto: University of Toronto Press, 1999) at 115 [hereinafter "Black Eyes All of the Time"], Patricia Monture-Angus, "Lessons in Decolonization: Aboriginal Overrepresentation in Canadian Criminal Justice" in D.A. Long and O.P. Dickason, eds. *Visions of the Heart: Canadian Aboriginal Issues* (Toronto: Harcourt Brace, 1996) at 335, Michael Jackson, "In Search of Pathways to Justice: Alternative Dispute Resolution in Aboriginal Communities" (1992) *U.B.C. L. Rev.* Special Edition 147 at 148-150 [hereinafter "Pathways to Justice"], Patricia Monture-Angus, *Thunder in My Soul: a Mohawk Woman Speaks* (Halifax: Fernwood, 1995) [hereinafter "Thunder in My Soul"] at 222, "Rethinking Justice", *Supra* note 56 at 260, Claude Denis, *We are Not You: First Nations and Canadian Modernity* (Peterborough, Ont: Broadview Press, 1997) at 80, and E. Adelburg, "Aboriginal Women and Prison Reform" in E. Adelburg and C. Currie eds., *In Conflict With the Law: Women and the Canadian Justice System* (Vancouver: Press Gang, 1993) at 76.

the colonial oppression of Aboriginal peoples by settlers of European descent. It should be noted that this colonial oppression is not seen as an historical event, but rather a continuing reality. Law and the legal system have played an important role in this oppression: “(a)ll oppression of Aboriginal Peoples in Canada has operated with the assistance and the formal sanction of the law. The legal system is at the heart of what we must reject as Aboriginal nations and Aboriginal individuals.”⁶² The current rates of incarceration of Aboriginal youths in Canadian facilities, sexual exploitation of Aboriginal youth, and the disproportionate number of Aboriginal children taken into foster care are but a few indicators of the law’s continuing role in the oppression of Aboriginal peoples.⁶³

Professor Michael Jackson extensively explores several models that have been used to explain the causes of over-representation. Among these Jackson notes “...systematic discrimination...”⁶⁴ against Aboriginal peoples within the justice system, disproportionate poverty and economic deprivation,⁶⁵ and finally “...a result of a particular and distinctive historical and political process which has made native peoples

⁶² Patricia Monture-Angus, “Thinking about Aboriginal Justice: Myths and Revolution” in Gosse and Youngblood Henderson eds., *Continuing Poundmaker and Riel’s Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice* (Saskatoon, Purich: 1994) 210 at 223. [hereinafter “Myths and Revolution”].

⁶³ Aboriginal youth made up 26% of those taken into custody and 18% of those on probation in 1998-99, despite the fact that they made up only 5% of the population. Statistics Canada, *The Daily*, Friday, September 29, 2000. On Aboriginal youth in care see: Marlee Kline, “Child Welfare Law, ‘Best Interests of the Child’ Ideology, and First Nations” (1992) 30 *Osgoode Hall L.J.* 375 and British Columbia, *Strategic Plan for Aboriginal Services* (Victoria: BC Ministry for Children and Families, 2000), and Canada,

“Sacred Lives: Canadian Aboriginal Children and Youth Speak out About Sexual Exploitation” National Aboriginal Consultation Project (Ottawa: Save the Children Canada, 2000).

⁶⁴ “Pathways to Justice”, *Supra* note 61 at 150.

⁶⁵ *Ibid.* at 153.

poor beyond poverty...colonization.”⁶⁶ Some other significant manifestations of colonization in Canada include residential schools,⁶⁷ the establishment of Aboriginal reserve lands, the imposition of *Indian Act*⁶⁸ governing structures, the forced abandonment of traditional ways of survival, and the persecution of Aboriginal peoples who continued to practice their spiritual traditions.⁶⁹

The presence of systematic bias against Aboriginal peoples in the Canadian criminal justice system has been noted in the Supreme Court of Canada. In the case of *R v Williams*⁷⁰ the Court notes that “(t)here is evidence that this widespread racism (against aboriginal peoples) has translated into systematic discrimination in the criminal justice system.” The effects of colonization are also explicitly acknowledged by the Supreme Court of Canada as the cause of Aboriginal overrepresentation. Citing numerous Aboriginal scholars, and several of the government reports and inquiries noted above the Supreme Court of Canada in *R v. Gladue*⁷¹ found that judges must consider the effects of colonization on Aboriginal offenders in the sentencing process as an attempt to reduce the number of Aboriginal people incarcerated.⁷² “(I)t must be recognized that the

⁶⁶ *Ibid.* At 154. Monture-Angus echoes Jackson in citing systematic discrimination against Aboriginal peoples within the Canadian justice system as a serious contributing factor in over-representation.

⁶⁷ Carol LaPrairie, “Native Women and Crime in Canada: a Theoretical Model” in E. Adelberg and C. Currie, eds., *Too Few to Count: Canadian Women in Conflict With the Law* (Vancouver: Press Gang Publishers, 1987) at 107, and J.Proulx and S. Perrault, “The MaMawi Wi Chi Itata Stony Mountain Project: Blending Contemporary and Traditional Approaches for Male Family Violence Offenders” in Proulx, *Supra* note 52 at 100.

⁶⁸ Patricia Monture-Angus, “Women and Risk: Aboriginal Women, Colonialism and Correctional Practice” (2000) 19 *Canadian Woman Studies* at 24-28.

⁶⁹ Denis, *Supra* note 61 at 42, and Constance Backhouse, “ ‘Bedecked in Gaudy Feathers’: The Legal Prohibition of Aboriginal Dance: Wandunta’s Trial, Manitoba, 1903” in C. Backhouse *Color-Coded: A Legal History of Racism in Canada, 1900-1950* (Toronto: The Osgoode Hall Society, 1999) at 56.

⁷⁰ [1998] 159 D.L.R. (4th) 493, at para. 58.

⁷¹ [1999] 1 S.C.R. 688.

⁷² For a more detailed explanation of the effects of this case see Chapter 3. There is some controversy over the exact nature and implications of Aboriginal over-representation. See for instance Carol LaPrairie, “The

circumstances of aboriginal offenders differ from those of the majority because many aboriginal people are victims of systematic and direct discrimination, many suffer the legacy of dislocation, and many are substantially affected by poor social and economic conditions.”⁷³

The links between colonialism, over-representation and Aboriginal justice are many and complex.⁷⁴ Many government reports and commissions, academic articles and court cases recommend the use of some form of restorative or Aboriginal justice system to alleviate Aboriginal alienation from the mainstream justice system, to reduce the use of incarceration across the board, and to address the ongoing process of healing the effects of colonization. Most importantly legislation introduced in Canada in 1996, Bill C-41, is premised on the notion that over-representation is a national reality.⁷⁵

As the following chapters will point out, however, over-representation is not the only, or potentially the most significant manifestation of colonial oppression for Aboriginal women. Although Aboriginal women are over-represented in the Canadian prison

Role of Sentencing in the Over-Representation of Aboriginal People in Correctional Institutions” in Timothy F. Hartnagel *Canadian Crime Control Policy: Selected Readings* (Toronto: Harcourt and Brace, 1998) at 112, Philip Stenning and Julian V. Roberts, “Empty Promises: Parliament, The Supreme Court, and the Sentencing of Aboriginal Offenders (2001) 64 *Sask. L.Rev.* at 137-168 and Jonathan Rudin and Kent Roach, “Broken Promises”: A Response to Stenning and Roberts’ “Empty Promises” (2002) 65 *Sask. L.Rev.* at 1. In the final analysis the disparity between the positions put forward by each side of the academic debate on over-representation statistics is about whether it is merely a regional problem, or a national problem. Both camps agree that there is, in fact, over-representation. The conclusions that they draw from their interpretation of the data are, however, far more polarized, but are beyond the scope of this thesis.

⁷³ *Gladue*, *Supra* note 71 at 413, para 68.

⁷⁴ “Bridging the Cultural Divide”, *Supra* note 59 at 39.

⁷⁵ See Chapter 3 for a discussion of how restorative justice has become part of the legal landscape.

system,⁷⁶ most feminist commentators highlight violence against them and their children in their homes and communities as the overwhelming legacy of colonialism for Aboriginal women. Patricia Monture-Angus and Mary Ellen Turpel, have asserted that "...aboriginal people must be allowed to design and control the criminal justice system inside their communities in accordance with particular aboriginal history, language and social and cultural practices of that community."⁷⁷ But as Monture-Angus has also pointed out "...if you see any aboriginal justice project that doesn't centrally involve the women, then you are not looking at real justice."⁷⁸

(iii) Aboriginal Justice as Distinguished from Western Restorative Justice

Many commentators, government policy makers and scholars conflate the Western restorative justice and Aboriginal justice movements, either seeing Aboriginal justice as the historical basis of Western restorative justice, or as a "type" of restorative justice informed by Western restorative justice.⁷⁹ Michael Jackson, a professor of law at the University of British Columbia and Aboriginal and prisoners' rights advocate, makes a distinction between the Alternative Dispute Resolution (ADR)⁸⁰ movement and Aboriginal justice. Jackson states that they are separate and distinct movements, coming

⁷⁶ Aboriginal women comprise 21.1% of the incarcerated community and 12.1% of the population. Canada, *The Transformation of Federal Corrections for Women: Towards Creating Choices* (Ottawa: Correctional Service Canada, 2000) see "Facts and Figures".

⁷⁷ "Rethinking Justice", *Supra* note 56 at 256-7.

⁷⁸ "Thunder in My Soul", *Supra* note 61 at 4.

⁷⁹ See for example: Patrick Rafferty, ed., *After One Year: the Restorative Justice Coalition* (Victoria, BC: Pithy Penal Press, 2001) at 12 and 13, and British Columbia, Ministry of the Attorney General, News Release 9911 "Healing the Harm: Restorative Justice Helps to Heal the Effects of Crime" (March 3, 2000). Online <www.ag.gov.bc.ca/media/9911nov/healing_the_harm.htm> (date accessed Jan. 2001), and Doulis, *Supra* note 42 at 1. The British Columbia government's press release discusses restorative justice as being rooted both in "aboriginal cultures" and "the teachings of faith communities".

⁸⁰ ADR is one manifestation of Western restorative justice, employed in both the criminal and civil law contexts.

from different historical, political and cultural places. In the Canadian context Jackson traces legislative and policy reforms around Canada's overuse of incarceration to the ADR movement:

There has been in Canada an incremental acceptance of the legitimacy of diversion in its broadest meaning particularly in terms of encouraging greater community participation in criminal justice issues and in constructing viable alternatives to adjudication and imprisonment particularly through mediation, reconciliation and restitution.⁸¹

Jackson distinguishes Aboriginal justice from these reforms as being deeply rooted in a response to the colonial oppression of Canada's Aboriginal peoples, anchored in pre-colonial spiritual, cultural and societal norms, and grounded in modern political self-determination. Jackson asserts, in fact, that the ADR movement in Canada has much to learn from Aboriginal justice.⁸² This differentiation based on cultural, political and historical differences is a useful one. Although the origins, and contemporary manifestations of Aboriginal justice are far from uncontroversial or undisputed, Jackson's delineation of ADR and Aboriginal justice provides some helpful, specific parameters for discussions and critiques of restorative justice in the following chapters.

Patricia Monture- Okanee also makes a sharp distinction between Aboriginal justice and ADR. "The way in which disputes were (and sometimes are) resolved in Aboriginal communities does not correspond with any process that I have any knowledge about that exists within the current (ADR) system".⁸³ Monture- Okanee goes on to explain that

⁸¹ "Pathways to Justice", *Supra* note 61. Jackson also provides a useful account of policies at the federal government level around restorative justice theories (ADR) and sentencing reforms that occurred in the late 1980's and early 1990's at page 170.

⁸² *Ibid.* at 234.

⁸³ "Thunder in My Soul", *Supra* note 61 at 256.

“peacemaking”,⁸⁴ not ADR best describes the process of Aboriginal systems of social order. Unlike ADR, whose values include objectivity and neutrality⁸⁵, peacemaking incorporates both subjective and objective elements. “Peacemaking is both family-based and spiritual. An “offender” in the Navajo system is often described, “[h]e acts as if he had no relatives”.⁸⁶ Monture-Okanee feels that the conflation of ADR and peacemaking is dangerous, as it may mask fundamental cultural and value differences that are essential to understanding the Aboriginal peacemaking process.

The dichotomy between the conventional justice system and restorative justice alternatives dominates debate in much of the scholarly literature on Western restorative justice. The sometimes intense debate over the relative benefits and detriments of each of these justice models shapes the discussion into an ‘either/or’ proposition; either you support restorative justice as it is defined in the Western restorative justice movement, or you support the conventional justice system. Jackson and Monture-Okanee provide a context that allows us to interrogate and examine the forms that restorative justice takes in a critical context that can include culture and race without necessarily rejecting restorative justice principles.

The Legal Services Society of British Columbia, a community based, anti-poverty legal resource, discusses the differences between Western restorative justice and Aboriginal restorative justice at the level of implementation. In a recent newsletter discussing the

⁸⁴ The term peacemaking is also frequently employed in the Western restorative justice movement. See for example: Harold Pepinsky and Richard Quinney, *Criminology as Peacemaking* (Bloomington: Indiana University Press: 1991).

⁸⁵ Monture-Okanee and Turpel point out that the values of objectivity and neutrality in the mainstream justice system often do not apply in cases where the offender is a member of a marginalized group, where race-based biases negatively influence outcomes. “Rethinking Justice”, *Supra* note 56 at 248.

⁸⁶ “Thunder in My Soul”, *Supra* note 61 at 256.

inception of the Vancouver Aboriginal Restorative Justice Program, the Society stated that in contrast to non-Aboriginal restorative justice programs:

...aboriginal initiatives have a greater sense of collective responsibility. They are more likely to involve extensive community and family networks, and are typically grounded in spiritual beliefs...In aboriginal programs...a culturally appropriate deliberative body determines the actions the offender must take.

This delineation between the Aboriginal justice and Western restorative justice movements is a critical one, and it will be used in the chapters that follow. The Western restorative justice and Aboriginal justice movements *do* have features in common, and where relevant these similarities will be emphasized. However, differentiating between these models and movements based upon factors such as history, culture and political motivation allows the discussion of restorative justice to emerge from the overwhelmingly positive, abstract language used to describe Western restorative justice. As Mary Ellen Turpel has stated: “Romantic projections of perfect cultural regimes with superior concepts of goodwill will not get far because they are disconnected from the real experiences of Aboriginal peoples across the country”.⁸⁷ By giving Aboriginal restorative justice models a social location rooted in culture, as suggested by Jackson and Monture-Okanee, it is easier to understand the players within these models as something more than abstracted “offender”, “victim” and “community”.

(iv)What is Aboriginal justice?

While there is a consensus as to Aboriginal justice’s role in self-determination, there is no consensus on what constitutes Aboriginal justice in Aboriginal communities either within

⁸⁷ “Thinking Concretely”, *Supra* note 59 at 210.

Canada's Aboriginal peoples, or mainstream society. Instead, as with most approaches to criminal justice, there are diverse and, at times, divergent opinions on the utility, legitimacy, safety and value of Aboriginal justice.

A. *'Living Nicely Together': Community and Collective Rights*

Many Aboriginal writers emphasize the fundamental differences between the mainstream justice system and the processes undertaken in Aboriginal communities when a crime is committed. Monture –Okanee describes it this way:

The two systems start in fundamentally different places. Canadian law starts with the presumption that there will be conflicts, that there will be disputes; and we need a system to prevent chaos. But historically aboriginal systems started from the presumption that people in communities wish to live nicely together.⁸⁸

Monture-Okanee and Mary Ellen Turpel have gone further than this, asserting that “ (t)he Canadian justice system is completely alien to aboriginal people. The criminal justice system is constructed with concepts that are not culturally relevant to an aboriginal person or to aboriginal communities.”⁸⁹

“Living nicely together” partly captures one important aspect of Aboriginal justice that resurfaces in many accounts of the role of the Aboriginal community in sanctioning criminal behavior. Monture-Okanee and Turpel describe the process of peacemaking in this way:

...balance and harmony can be restored only through strengthening connections with one's community. This notion of restoring balance and harmony is the cultural equivalent of rehabilitation in aboriginal cultures.

⁸⁸ Patricia Monture- Angus, “ The Existing System Can't be Indigenized” (Conference: Restorative Justice: Four Community Models, Saskatoon, Saskatchewan, March 17 and 18, 1995) at 4.

⁸⁹ “Rethinking Justice”, *Supra* note 56 at 244.

Through the kinship system (and/or the clan system of governments) and through the involvement of Elders, balance and harmony is restored for the offender, the victim and the community.⁹⁰

This sense of collective responsibility is discussed in contradistinction to the conventional justice system, where the individual bears the responsibility for their anti-social actions, and must face the punishment of the objective state, alone as an individual. The theme of community participation and harmony in dealing with criminal behavior is translated, by some Aboriginal commentators, into a discussion of individual versus collective rights. Collective rights are defined as “Aboriginal”, growing from the interreliance of community, spirituality and harmony with one another. This is reflected in the subjective involvement of the community in criminal justice: the offender is helped by people he knows, rather than judged by a state who looks at his actions alone. In contrast individual rights are cast as “white” rights, where the well-being and protection of the individual is paramount. Joan Crow, an Aboriginal woman trained as a lawyer explains collective and individual rights in the legal context:

The Charter I learned about in white law school is about individual rights. That is not how I and many of my people look at ourselves....Fundamentally, people who espouse these individual rights do not accept that we are inherently *connected* to each other...Because if I am connected to you and I don't treat you right, you will hold me accountable...Because we're connected. That's what is called collective rights.⁹¹

Emphasis on collective rights, subjective judgment of wrong-doing by peers, and the desire for social harmony can potentially create an atmosphere that both supports victims and offenders, and creates an informal net of social control. Such values may also

⁹⁰ “Rethinking Justice”, *Supra* note 56 at 248.

⁹¹ Joan Crow, “Standing on Principle: The Constitution and First Nations” *Kinesis* (April, 1992) at 7 as cited in Denis, *Supra* note 61 at 72. See also: Ovide Mercredi and Mary Ellen Turpel, *In the Rapids: Navigating the Future of First Nations* (Toronto: Penguin Books, 1993) at 96-106 on collective versus individual rights.

function to silence marginalized groups within a community that perceives itself to be homogenous, and to entrench 'community' norms, such as ignoring or silencing victims of abuse.⁹² "An abused woman risks social ostracism if she reports a crime and pursues it with a community that does not want to hear about it or believes it is the victim's responsibility to put up with abuse."⁹³ In communities where accountability and safety mechanisms are not in place the potential for subjective norms to work against female victims of intimate violence is great.

B. A Flexible, Holistic Approach to Justice

Another theme which often emerges in the discussion of Aboriginal justice is a desire to implement a holistic approach; meaning that not only must systems of social control address crime, they must do so in a way that examines and addresses the root causes of the anti-social behavior. "The Royal Commission on Aboriginal Peoples Report on the Criminal Justice System: Bridging the Cultural Divide" provides an extensive discussion of the underlying values of Aboriginal justice. Keeping in mind that Aboriginal peoples were not, and are not homogenous, the RCAP Report outlines some commonalities, using specific examples from several Aboriginal peoples.

Aboriginal perspectives on justice are different. That difference is a reflection of distinctive Aboriginal world views and in particular a holistic understanding of people's relationships and responsibilities to each other and to their material and spiritual world...Aboriginal conceptions of

⁹² I recognize that intimate abuse was not a traditional practice amongst Aboriginal peoples, and that it is one of the many legacies of colonialism. For extensive discussion of the dynamics of 'community' in intimate abuse see Chapters below.

⁹³ Evelyn Zellerer, "Restorative Justice in Indigenous Communities: Critical Issues in Confronting Violence Against Women" (1999) 6 *International Review of Victimology* 349.

justice must be understood as part of the fabric of social and political life rather than as a distinct, formal legal process.⁹⁴

The Assembly of First Nations, in their brief to the Royal Commission explains aboriginal justice as a process rather than a procedure:

Even though First Nations do not adhere to a single world view or moral code, there are nonetheless commonalities in the approach of all First Nations to justice issues. A justice system from the perspective of First Nations is more than a set of rules or institutions to regulate individual conduct or to prescribe procedures to achieve justice in the abstract. "Justice" refers instead to an aspect of the natural order in which everyone and everything stands in relation to each other. Actions of individuals reflect the natural harmony of the community and of the world itself. Justice must be a felt experience, not merely a thought. It must, therefore, be an internal experience, not an intrusive state of order, imposed from the outside and separate from one's experience of reality.⁹⁵

These definitions provide some basic underlying values and parameters for understanding Aboriginal justice. The fact that Aboriginal peoples are not homogenous in their views of what constitutes and informs their visions of Aboriginal justice means that a single, universal definition of Aboriginal justice is neither possible nor desirable. It is, in fact, a consistent characteristic of aboriginal justice that models are fluid, and conform to the needs of individual communities, and even particular persons.⁹⁶ Although this characteristic makes aboriginal justice more difficult to define, it is seen as absolutely critical to the development of effective justice models in Aboriginal communities. The Law Commission of Canada, for instance, calls for flexibility in every aspect of

⁹⁴ "Bridging the Cultural Divide", *Supra* note 59.

⁹⁵ "Bridging the Cultural Divide", *Supra* note 59 at 10.

⁹⁶ For example in his discussion of community sentencing and treatment circles in Canada's North Judge Barry Stuart emphasizes that "The process before, during and after a hearing has evolved uniquely in each community." In Hudson and Galaway eds., *Supra* note 16 at 194.

restorative justice⁹⁷ implementation. "...(J)ustice must be flexible and dynamic. The process of developing restorative justice will be one of trial and error."⁹⁸ "Bridging the Cultural Divide" also highlights this trait, with special reference to its importance for aboriginal peoples:

One of the strongest messages to emerge from the Commission's round table on justice was that successful justice projects must be firmly rooted in the community they are intended to serve...Communities themselves know best what justice issues they wish to address and how they wish to address them. There can be no one model of justice development. Any attempt to force Aboriginal nations and communities to develop justice projects along particular lines will fail.⁹⁹

Flexibility in both the overall vision, and in procedural rules seems an integral part of Aboriginal justice as described by its proponents. The absence of structured appeal mechanisms and procedural rules and safeguards, however, may serve to eliminate both institutionalized safety and accountability mechanisms that currently function within the conventional justice system.¹⁰⁰ Despite their shortcomings these mechanisms do supply a level of safety for and accountability to victims of intimate violence. In order to be truly concerned with the healing and safety of the victim, any model of Aboriginal justice must provide the same, if not better safety and accountability to victims.

⁹⁷ The Law commission does not make a clear delineation between Aboriginal justice and Western restorative justice, however it does touch upon factors specific to the history, culture and political motivations of Aboriginal peoples in Canada. In this instance "restorative justice" is used to refer to both models, denoting a similarity.

⁹⁸ Cooley, *Supra* note 24 at 35-36.

⁹⁹ "Bridging the Cultural Divide", *Supra* note 59 at 175.

¹⁰⁰ The accountability and safety mechanisms currently in place within the conventional justice system have been harshly critiqued, and I would not propose that they necessarily be used as blueprints in Aboriginal justice project.

C. Traditional Justice?

The notion that restorative justice principles are “traditional” is an accepted fact in the Western restorative justice movement. For instance the John Howard Society of Canada, whose mandate is to advocate for men in conflict with the law, asserts that:

Restorative justice principles can also be seen in Aboriginal justice movements across Canada. In essence, traditional Aboriginal justice is based on the restorative model. The goal is to facilitate restoration, rehabilitation and reintegration. Increasing numbers of Aboriginal groups are lobbying for a return to traditional justice.¹⁰¹

The exact nature of restorative justice’s traditional roots and what that means for contemporary justice models in Aboriginal communities is more controversial and complex than these types of statements allow. The term “traditional” does not have a static or singular meaning that is easily encapsulated and applied. The consistent use of the term traditional, as though it had one, easily discernable meaning by Western restorative justice advocates represents a conflation of Aboriginal values with those of this movement. This is a homogenization of Aboriginal cultures, and an appropriation of the idealized images this homogenized stereotype conjures, in support of Western restorative justice theories. It presents Aboriginal culture and traditions as a homogeneous monolith; uncomplicated by race, class, gender, sexual orientation or geography. Aboriginal culture, tradition and spirituality, if applied in progressive and authentic ways, has real potential to begin addressing the impacts of colonialism for *all* members of Aboriginal communities. It is counterproductive, and potentially dangerous to victims of intimate violence where it is used in ways that ignore contemporary realities, the traditional roles of Aboriginal women, or in ways that rely on idealized stereotypes of Aboriginal peoples.

¹⁰¹ John Howard Society of Canada “ Briefing Paper on Restorative Justice” in Timothy F. Hartnagel *Canadian Crime Control Policy: Selected Readings* (Toronto: Harcourt and Brace, 1998) at 103.

Debates over the meaning and role of tradition in Aboriginal justice are occurring at several levels. At one level is the question of homogenizing Aboriginal peoples and their beliefs and traditions in the name of constructing a culturally appropriate alternative to the mainstream justice system. As noted above many Aboriginal justice advocates see commonalities amongst Aboriginal peoples' traditions and values.¹⁰² These commonalities are seen as insufficient, however, where justice models are employed that do not correspond with the traditions and values of the community where they are being applied. Aboriginal feminist activist Viola Thomas (formerly of United Native Nations) has spoken out against restorative justice models being employed in Vancouver, stating that they homogenize First Nation's diversity and constitute "beads and feathers" First Nation's culture.¹⁰³ Mary Crnkovich, a non-Aboriginal, feminist lawyer and anti-violence advocate offers a critique of the "traditional" justice models being employed in Inuit communities in Canada's North:

The distinction between the (justice) alternatives and the existing criminal justice system is rooted in this premise that the latter is non-Inuit and therefore non-traditional. This dichotomy is artificial in my view. Many of the alternatives to the existing justice system initiated and used in Inuit communities such as diversion, mediation, and sentencing circles are also non-Inuit, have varying degrees of Inuit participation and, for the most part, are part and parcel of the existing criminal justice system as it exists today.

...

Inuit who are looking for their past traditions or values for clues to deal with social conflict and disorder in the community would be hard pressed to come up with a community justice committee, a community-based sentencing circle or adult diversion, in my view.

¹⁰² See for instance "Bridging the Cultural Divide", *Supra* note 59 at 19-33, Doulis, *Supra* note 42 at 4 and "Thunder in My Soul" at 238 and 240.

¹⁰³ "Is 'Restorative Justice' working for Aboriginal Women in cases of Violence", Friday, June 30, 2000, Simon Fraser University, public forum sponsored by the Aboriginal Women's Action Network. Her commentary may also be a response to the consistent conflation of Western restorative justice models and aboriginal justice in the government, media and in practice. She may also be responding, in part, to the appropriation and homogenization of aboriginal culture and tradition by Western restorative justice advocates.

...

There seems to be a practice adopted by those who write about aboriginal justice reform to refer to “community-based initiatives” and “traditional practices” as if they are synonymous.¹⁰⁴

Crnkovich also emphasizes the fact that in the Inuit community where she lives and works the Aboriginal justice reforms have been initiated and supported by reform-minded, non-Aboriginal judges and lawyers.¹⁰⁵

Monture-Okanee and Turpel see applications of Aboriginal justice in this manner as well-intentioned but wrong-headed. “It is (also) counter-productive when non-Aboriginal people, particularly lawyers, reflect upon Aboriginal peoples and our ways with a view to imposing “solutions” to the “problems” presented by Aboriginal peoples within the existing non-Aboriginal paradigm, and not with a view to discussing with us what our vision of the future is, or our conceptions of justice.”¹⁰⁶

The debate over the traditional roots of Aboriginal justice, then, stems not from a lack of consensus on the existence of separate and legitimate Aboriginal justice models dating back to pre-colonial times, but rather from what constitutes the misapplication and

¹⁰⁴ Mary Crnkovich, “The Role of the Victim in the Criminal Justice System- Circle Sentencing in Inuit Communities” (Canadian Institute for the Administration of Justice Conference, Banff Alberta, October 11-14, 1995)[unpublished] at 5-6. See also M. Crnkovich “ Report on the Circle Sentencing in Kangiqsujuaq” Prepared for Pauktuutit and Department of Justice, Canada, 1993 [hereinafter “Kangiqsujuaq”], and M. Crnkovich, “ A Sentencing Circle” (1996) 36 *Journal of Legal Pluralism* 159. For a different view on the value of Aboriginal traditional practices from a different Aboriginal cultures see: James B. Waldram, *The Way of the Pipe: Aboriginal Spirituality and Symbolic Healing in Canadian Prisons* (Peterborough, Broadview press, 1997) at 164- 169. Waldram discusses cases in Canadian prisons that support the notion that even if the participant does not come directly from the tradition employed that they can still derive benefit from participating in a pan-Aboriginal activity. See also: “Bridging the Cultural Divide” at 136-137.

¹⁰⁵ Ibid. at 5. Many of these reform-minded judges and lawyers are influenced by Western restorative justice movements. See for instance commentary by Judge Barry Stuart in the case of *R v Moses* (1992) 71 CCC (3d) 347 at 351-352, considered to be the pioneering use of circle sentencing in an aboriginal community in Canada. Stuart J. considers some of the arguments put forth by Western restorative justice on the overuse of incarceration, and sets those against a backdrop of the colonial oppression of Canada’s aboriginal peoples in deciding to use a sentencing circle. See also Barry Stuart, “ Circle Sentencing: Turning Swords into Ploughshares” in Galaway and Hudson, *Supra* note 16 at 193 to 206 and Judge Cunliffe Barnett, “ Circle Sentencing/ Alternative Sentencing” (1995) 3 *C.N.L.R.* at 1-7.

¹⁰⁶ “Rethinking Justice” at 242.

misapprehension of these models and traditions by those employing and planning initiatives. As we shall see in the following chapter some Aboriginal feminists question the traditional authenticity of Aboriginal justice models, even those conceived of and run by Aboriginal communities, that do not afford Aboriginal women their traditional respect, stature and leadership role. Whether the traditions used are 'legitimate' or not depends on their acceptance by a broadly defined community. If only those planning or implementing the program accept and embrace the authority of a particular model, such as a sentencing circle, then the impetus and motivation to abide by dispositions resulting from a traditional process is removed. Traditions and spirituality become authentic and important tools of social control and harmony only when they are not imposed from above. In cases of intimate violence it may become impossible to actively heal, and ensure the safety of the offender, the victim and the community if one or more of these participants feels that the approach lacks authenticity.

A second point of contention rests on assertions of cultural continuity as a prerequisite for "authentic" Aboriginal justice models. The main question becomes what ought "traditional" Aboriginal practices look like when they are brought forward in time to the present?¹⁰⁷ The current construction of pre-colonial Aboriginal practices, and their application to contemporary Aboriginal rights have been very much shaped by Aboriginal rights litigation, and Canadian courts' delineation of these traditional rights. More recently Aboriginal scholars, and non-Aboriginal advocates have focused the discussion of tradition on the evolving needs of Aboriginal peoples, and their desire to construct contemporary responses to these needs that are grounded in tradition. These

¹⁰⁷ See for instance E.J. Dickson-Gilmore, "Finding the Ways of the Ancestors: Cultural Change and the Invention of Tradition in the Development of Separate Legal Systems" (1992) 34 *Can. J. Crim.* 479.

commentators critique the courts' approaches to tradition as culturally biased and extremely limiting. While the particular cases referred to by these commentators do not limit the legal existence of current Aboriginal justice programs in Canada,¹⁰⁸ the way these rights are framed constrains our understanding of tradition, and legitimizes these narrow views by incorporating them into the legal record.

Claude Denis, a non-Aboriginal legal academic and Aboriginal rights activist, examines what he calls the "whitestream" view of Aboriginal cultural authenticity, constructed mainly through the lens of Aboriginal rights litigation. In his book *We are Not You* Denis criticizes Canadian courts approach to the definition of Aboriginal rights by reference to Aboriginal practices that pre-existed colonial influence.¹⁰⁹ "The pre-existence test (for the recognition of an aboriginal right) requires that aboriginal peoples show that they are doing now the exact same things that they were doing centuries ago."¹¹⁰ Denis sees this interpretation of tradition as racist and unfair:

On the face of it, this test of pre-existence is absurd and particularly unfair. ...there was never such thing as a pristine traditional practice, for change did occur in aboriginal societies before Europeans showed up.

...

Oppression is compounded through the pre-existence test, through which the whitestream insists on the cultural stagnation of First Nations....the pre-existence test is constitutive of whitestream conceptions of self, which require that only European peoples truly have a history, others must be static.¹¹¹

¹⁰⁸ See Chapter 3 for a complete discussion of the legal basis for Aboriginal and Western Restorative justice programs.

¹⁰⁹ Claude Denis, *We are Not You: First Nations and Canadian Modernity* (Peterborough, Ont: Broadview Press, 1997). The pivotal Canadian case establishing this 'frozen rights' principle is *R v Van der Peet* [1996] S.C.J. No. 77, online: QL (SCR). For a discussion of the impact of the 'frozen rights' doctrine on Aboriginal rights see: John Borrows "The Trickster: Integral to A Distinctive Culture" (1997) 2 *Constitutional Forum* at 27.

¹¹⁰ Denis, *Ibid.* at 87.

¹¹¹ *Ibid.* at 85-86.

Michael Jackson also addresses the question of traditional aboriginal practices, and questions the validity of constraining “tradition” to “...an attempt to reconstruct a system relevant to times long past.”¹¹² Jackson contends, like Denis, that Canadian courts, and by extension many Canadian people and policy makers, view Aboriginal rights and traditions in such a way that narrows and limits their scope and application unfairly.

“Essentially it denies native people the right to be contemporary, the right to develop their own indigenous systems of government and decision making to cope with the realities of contemporary life, without acknowledging their own demise as distinctively native societies.”¹¹³

Monture-Okanee views the emergence of the Aboriginal justice movement as a “(A)ctively pursuing the goals of justice re-created.”¹¹⁴ She emphasizes modern challenges to Aboriginal justice such as domestic abuse, and alcohol and drug addiction, and asserts that Aboriginal justice must build on the past but also innovate to effectively respond to these challenges. Monture-Okanee insists that building on the traditions of aboriginal peoples is forward, not backward-looking:

A word of caution is necessary regarding my use of the word traditional. This word is frequently misinterpreted in the mainstream discourse. It does *not* mean a desire to return through the years to some historic way of life. Aboriginal traditions and cultures are neither static nor frozen in time. It is not a backwards-looking desire. Traditional ways have not been lost as some would assert, but the right to be recognized, respected and to exercise these distinct ways of being have been overtly and covertly oppressed. Traditional perspectives include the view that the past and all its experiences inform the present reality.¹¹⁵

¹¹² “Pathways to Justice” at 170.

¹¹³ *Ibid.* at 193.

¹¹⁴ “Thunder in My Soul” at 224, and “Thinking Concretely” at 208.

¹¹⁵ “Thunder in My Soul” at 217, fn 4.

The understanding and application of tradition is an integral component in the construction of aboriginal justice initiatives, and also differentiates this movement from the Western restorative justice movement. The way that tradition informs Aboriginal justice is complex and, at times, controversial. Monture –Okanee and Turpel, however, assert that these decisions must be made by Aboriginal communities for themselves. “...(A)boriginal people must be allowed to design and control the criminal justice system inside their communities in accordance with the particular aboriginal history, language and social and cultural practices of that community.”¹¹⁶

Restorative justice models that incorporate ‘forward looking’ traditions, as espoused by Monture-Okanee, must include an understanding of the traditional role of Aboriginal women, informed by the contemporary realities of intimate abuse, internalized colonial sexism and the gendered power imbalances they perpetuate within Aboriginal communities.

D. Self-government

The desire of Aboriginal peoples to understand and apply tradition on their own terms is part and parcel of Aboriginal self-government.¹¹⁷ As well as promising a more culturally appropriate approach to criminal justice, aboriginal justice has been characterized as having important implications for the larger project of aboriginal peoples’ self-government and self-determination. Social control and the formulation of an appropriate

¹¹⁶ “Rethinking Justice” at 256-7.

¹¹⁷ For more on self-government see: Richard Gosse, James Youngblood Henderson and Roger Carter eds., *Continuing Poundmaker and Riel’s Quest: Presentation made at a Conference on Aboriginal Peoples and Justice* (Saskatoon, Purich, 1994) Part III, and Kent McNeil ed., *Emerging Justice?: Essays on Indigenous Rights in Canada and Australia* (Saskatoon: Native Law Centre, 2001) Part II.

response to crime is a fundamental tool in shaping a nation. In relation to the recently opened Vancouver Aboriginal Transformative Justice Initiative this link has been explicitly made:

The development of Vancouver's Aboriginal Restorative Justice Program is consistent with broader trends in Canada, and internationally, in the recognition of the collective rights of indigenous peoples to self-governance and self-determination... The need for justice systems that are designed and controlled by aboriginal peoples is well established... both aboriginal peoples and the broader Canadian public would be better served by allowing for the development of aboriginal justice structures that run parallel to , and /or independent of, the mainstream justice system.¹¹⁸

For Monture-Okanee and Turpel aboriginal justice is one small part of the larger project of self-determination for Aboriginal peoples, and one step towards control that will facilitate meaningful changes within Aboriginal communities." Self-determination is our primary political agenda item for the very reason that control over our lives, lands and community is the only way out of the widespread oppression we face."¹¹⁹

The political agenda of self-determination creates a much larger backdrop against which aboriginal justice must be viewed and the recent implementation of Aboriginal justice projects could be seen as one step towards the goal of self-government. Unlike Western restorative justice projects and theories Aboriginal justice initiatives must contribute to the furthering of Aboriginal independence and self-sufficiency. This criteria further complicates feminist analysis of Aboriginal justice as the roles of women in theory and practice are not only roles within a criminal justice system, but occupy places in what Aboriginal peoples hope will become a different governance and social structure. The

¹¹⁸ T. Palys, "Vancouver's Aboriginal Restorative Justice Program: the Challenges Ahead" *Aboriginal Justice Bulletin*, Summer 1999 at 2.

¹¹⁹ "Rethinking Justice" at 262. The integral role of Aboriginal justice in the self-determination project is also recognized in "Bridging the Cultural Divide" at 64, and "Pathways to Justice" at 156.

roles played by women, and the attention given to their concerns in Aboriginal justice are reflective of where they will sit in any form of Aboriginal self-government.

CHAPTER THREE: THE LEGAL BASIS FOR RESTORATIVE JUSTICE IN CANADA

The purpose of this chapter is to describe the legal foundations of restorative justice. I will outline by what authority restorative justice is used in Canada, and discuss some of the legal and administrative regimes that support its use. I will also provide a feminist critique of some aspects of these regimes by discussing ways in which administrative or legal problems may particularly affect victims of intimate violence who come in contact with them. These critiques will provide for recommendations for change in Chapter Five. Both Western and Aboriginal restorative justice initiatives are a well-established part of Canada's criminal justice system. They are made possible by diverse legal mechanisms and funded by a variety of sources, both government and non-government. While different models share common goals and characteristics, they may be created or maintained under different legal regimes with variable levels of administrative accountability, community control and built-in safeguards for victims of intimate violence. The legal regime regulating a particular initiative is an important consideration, as it will contain provisions that have differentiated effects on the safety and healing of the offender, community and victim.

Some initiatives combine characteristics of both Western and Aboriginal justice while others, especially Aboriginal justice initiatives, are more conscious of applying distinct principles.¹ Each initiative is unique in the way it deals with (or does not deal with)

¹ For instance the Ma Mawi Wi Chi Itata Stoney Mountain Project in Winnipeg combines contemporary individual and group therapy, and traditional healing in attempts to treat male abusers. (Jocelyn Proulx and Sharon Perrault, "The Ma Mawi Wi Chi Stony Mountain Project: Blending Contemporary and Traditional

intimate violence, and must be evaluated on its own principles, practices and legal regime. Some common problems, however, can be readily identified.

(a) Historical Overview: Restitution in Canada Prior to Bill C-41

The primary legal foundation for the current use of restorative justice was laid with legislative changes occurring in 1996, with Bill C-41.² This was not the first instance, however, of the use of alternatives to incarceration in Canada. Under previous legislative regimes similar principles were applied prior to 1996.

As mentioned in Chapter Two restorative justice initiatives are rooted in diverse social and political movements including the prison abolition movement, victims' rights movements, and the Aboriginal self-government movement. Prior to Bill C-41 these and other groups had some success in institutionalizing alternatives to incarceration in several forms. Beginning in the 1930's alternatives such as restitution³ were available for young offenders.⁴ Discussion and implementation of such alternatives for adult offenders began in earnest in the 1970's, with a series of sentencing reform papers by the Law Reform Commission of Canada advocating restitution, compensation and pre-trial diversion.⁵

These were published contemporaneously with a number of other scholarly works

Approaches for Male Family Violence Offenders" in Jocelyn Proulx and Sharon Pereault, eds, *No Place for Violence: Canadian Aboriginal Alternatives* (Winnipeg: Fernwood and Resolve, 2000) at 99), The Gladue court in Toronto, and the Cree court system in Northeastern Saskatchewan combine Aboriginal culture with the conventional court model. (Amy Jo Ehman, "A People's Justice" (2002) 1 *The National* 12.)

² *An Act to Amend the Criminal Code (Sentencing)*, S.C. 1995 c. 22, passed into law September, 1996.

³ "Restitution" is defined as a sanction imposed by an official of the criminal justice system requiring the offender to make a payment of money or service to the crime victim or a substitute. J. Hudson and B. Galaway, *National Assessment of Adult Restitution Programs. Preliminary Report IV: Monetary Restitution and Community Service. Annotated Bibliography*, 1980.

⁴ Bruno Theoret, "Childhood and Juvenile Detention: The Case of the Winnipeg Youth Tribunal Between 1930 and 1959" (1995) 28 *Criminologie* 119.

⁵ M. Jackson, "In Search of the Pathways to Justice: Alternative Dispute Resolution in Aboriginal Communities" (1992) *U.B.C.L.Rev. Special Edition* 170.

advocating and evaluating the expanded use of alternatives to incarceration in Canada and other jurisdictions.⁶

Restitution became a sentencing option as an addition to other penalties during the late 1970's and early 1980's.⁷ Support for alternatives to incarceration was further bolstered by a large Canadian symposium on criminal reparation in 1982 held by the Ministry of the Solicitor General. It extensively discussed and endorsed the use expanded of reparative sanctions such as restitution.⁸ Despite other support for restitution from a variety of parliamentary⁹ and Sentencing Commissions, and a Supreme Court of Canada decision,¹⁰ the use of this sentencing option remained cautious and reserved.¹¹ Two legislative amendments attempting to broaden the use of restitution were introduced in the 1980's, however neither produced legislation mandating an expanded use of

⁶ See for instance: J. Hudson, B. Galaway and S. Chesney, "When criminals repay their victims: a survey of restitution programs" (1977) 60 *Judicature* 312, B. Galaway, and J. Hudson (eds.), *Criminal Justice, Restitution, and Reconciliation* (Monsey, NY: Criminal Justice Press, 1990), T. Dittenhoffer, R. Ericson, "The Victim Offender Reconciliation Program: A Message for Correctional Reformers" (1983) 33 *U.T.L.J.* 315, J. Bonta, J. Boyle, L. Montiuk and P. Sonnichsen, "Restitution in Correctional Half Way Houses: Victim Satisfaction, Attitudes and Recidivism" (1983) 20 *Canadian Journal of Corrections* 140, J. Heinz, B. Galaway, and J. Hudson, "Restitution or Parole: A Follow-up Study of Adult Offenders" (1976) 50 *Social Service Review* 148.

⁷ S. Thorvaldson, "Restitution by Offenders in Canada: Some Legislative Issues" (1987) 29 *Can. J. Crim.* 1 at 2.

⁸ Canada, Ministry of the Solicitor General, *Proceedings: Crime and Redress, National Symposium on Reparative Sanctions*, May 31st-June 2nd, 1982, Vancouver, B.C. (Ottawa: Ministry of the Solicitor General, 1986).

⁹ In 1988 the Parliamentary Standing Committee on Justice and the Solicitor General conducted a review, and published a report entitled *Taking Responsibility* (also known as the Daubney Report) (Canada, House of Commons, 1988) that endorsed the use of restorative justice. (Robert Cormier, "Restorative Justice: Directions and Principles-Developments in Canada" (Ottawa: Public Works and Government Services Canada, 2002) at 4.)

¹⁰ *R v. Zelensky* [1978] 2 S.C.R. 940. The court stated that it was within the jurisdiction of the federal government under the criminal power to order restitution in criminal cases. It was, however, quite cautious and reserved regarding the extent to which restitution ought to be used.

¹¹ J. Hudson, "A Review of Research Dealing with Financial Restitution" in Messmer and Otto eds. *Restorative Justice on Trial: Pitfalls and Potentials of Victim-Offender Mediation: International Perspectives* (The Netherlands: Kluwer, 1992) at 275, and Thorvaldsen, *Supra* note 7 at 2.

restitution.¹² Today section 738(1)(a) of the *Criminal Code*¹³ still allows a court to order restitution to be paid to victims of crime for property damage or bodily harm.¹⁴

Community service orders were also a sentencing option prior to the 1996 *Criminal Code* amendments. Offenders deemed a “safe risk”¹⁵ could perform community service as part of a probation order in Ontario, British Columbia and Quebec during the 1970’s.¹⁶ At around the same time in Saskatchewan, and other provinces, a Fine Option Program was initiated which allowed low income offenders who were fined to “work out” outstanding amounts in activities benefiting the community instead of spending time in prison for fine default.¹⁷ Both community service and fine options programs continue to exist today.¹⁸

As will be discussed below, the legislation introduced by Bill C-41 is intended to provide more alternatives to incarceration for more serious offenders than these previous regimes of restitution and community service orders. It is intended to significantly change sentencing in Canada in ways that previous legislation was not intended, or was unable to do.

¹² Bill C-19, 1984 died on the order paper, and Bill C-89, 1987 was passed in July of 1988, however the provisions relating to the expanded use of restitution never came into force. *Canada Legislative Index*, 2nd Session, 33rd Parliament, Proclamations at 5, SI/88-198.

¹³ R.S.C. 1985, c. C-46 [hereinafter the *Criminal Code*].

¹⁴ These provisions came into force in September of 1996. *Order fixing September 3, 1996 as the Date of the Coming into Force of Certain Sections of the Act, Canada Gazette Part II, Vol. 130, No. 17* at 2719. Section 738 (2) allows for the lieutenant governor of each province to pass regulations prohibiting the inclusion of a restitution order in probation or conditional sentence orders. See also *R v DeBay* [2001] 49 W.C.B. (2d) 344, and *R v Seimens* [1999] 43 W.C.B. (2d) 85 for recent uses of restitution in sentencing.

¹⁵ “...a first or second offender convicted of a minor offence who has been screened as nondangerous.” (Canada, *Community Participation in Sentencing* (Ottawa: Law Reform Commission 1977)).

¹⁶ Anne Newton, “Sentencing to Community Service and Restitution” (1979) 11 *Criminal Justice Abstracts* 435 at 444-446.

¹⁷ These programs were aimed particularly at Aboriginal peoples, as they were instituted on 44 “Indian reserves” in 1975. *Ibid.* at 445-6.

¹⁸ See *Criminal Code* Ss: 736 (Fine Options Program) and 732.1 (fine option as a condition of a probation order). See also: *R v Brand* (1996) 105 C.C.C. (3d) 225 (community service as a condition of a probation order). Community service may also be imposed as a condition of a conditional sentence.

(b) Restorative Justice in Canada Today

In policy, government rhetoric and legislation there is often confusion regarding the meanings of the terms 'diversion', 'alternative measures' and 'restorative justice'.¹⁹ These terms are used interchangeably to describe methods of controlling anti-social or criminal behavior that focus on rehabilitating the offender, supporting the victim, involving the community, and often avoid the use of incarceration.

Definitions for these terms abound. Carol LaPrairie sees restorative justice as being committed to giving "...a much greater role to "community"..."²⁰ than other alternative movements. Brenda Comasky and Anne McGillivray define 'diversion' as "...dropping charges or not charging in order to divert an offender to a program or disposition outside the criminal justice system..." and 'alternative measures' as "...where the disposition is decided and provided in a community context..."²¹ Programs currently in use in Canada defy easy categorization, often possessing these characteristics while employing various titles. While there is no single, clear legal definition for diversion, alternative measures or restorative justice, all three terms are used to describe programs that deal with abusers and victims of intimate violence outside of or in conjunction with the conventional court-based justice system. Below I will provide some basic legal parameters on the functioning of restorative justice, alternative measures and diversion in Canada; focusing

¹⁹ For instance in British Columbia and New Brunswick the Alternative Measures Programs administered by the province are explicitly based on principles of 'restorative justice'.

²⁰ Carol LaPrairie, "Understanding Restorative Justice" [unpublished] 2001.

²¹ Anne McGillivray and Brenda Comasky, *Black Eyes All of the Time: Intimate Violence, Aboriginal Women and the Justice System* (Toronto: University of Toronto Press, 1999) at 125.

on aspects and program models that are of particular concern for victims of intimate violence.

(i) Basic Structures

Restorative justice models can be used to deal with both adults and youth offenders.²²

Restorative justice principles²³ can be used at various stages of an offender's involvement in the justice system. According to a meta-analysis of Canadian restorative justice practices by Jeff Latimer, a government policy analyst, "...there are five identified entry points into the criminal justice system where offenders may be referred to a restorative justice program:

1. Police (pre-charge)
2. Crown (post charge)
3. Courts (pre-sentence)
5. Corrections (post sentence)
6. Parole (pre-revocation)",²⁴

This spectrum allows for numerous possible ways in which victims of intimate violence can participate in restorative justice processes, including those options that require face-to-face meetings with the abuser at various stages, or that allow a complete absence of personal involvement between the victim and the offender.²⁵

²² For discussion of restorative justice models in the context of youth offenders see: Dawn Wilkinson, "Central Okanagan Restorative Justice" (Vancouver: The Canadian Bar Association of British Columbia, Criminal Law Section, 2001), Timothy Hayes and Richard Wortley, "Making Amends: Final Evaluation of the Queensland Community Conferencing Pilot" (Brisbane, Australia: Queensland Department of Justice, Juvenile Justice Branch, 1998).

²³ As described in the previous chapter.

²⁴ Jeff Latimer, Craig Dowden, and Danielle Muise, "The Effectiveness of Restorative Justice Practices: A Meta-Analysis" (Ottawa: Research and Statistics Division, Department of Justice, 2001).

²⁵ Kathleen Daly, "Restorative Justice and Sexual Assault" in Heather Strang and John Braithwaite, eds. *Restorative Justice and Family Violence* (Oxford: Cambridge University Press, 2002) 62 at 67. A 1991

Restorative justice processes can take place prior to (or in lieu of) laying criminal charges,²⁶ or following the laying of charges but before a court hearing.²⁷ Restorative justice models such as victim-offender mediation may be offered in conjunction with an on-going court process, or at any stage of the offender's involvement in the criminal justice process. Restorative justice also operates after a guilty plea (or finding of guilt in a trial) to inform the sentencing of an offender.²⁸ Finally it may be used in an attempt to rehabilitate offenders in prison,²⁹ or in anticipation of and following their release from prison.³⁰

The needs of victims of intimate violence can be successfully met in restorative justice models, in part, by relying on a well-established principle of restorative justice: flexibility. A recent Canadian study has demonstrated that in restorative justice models, even in serious violence cases, flexibility, control and choice for the victim are closely connected with indicators of victim satisfaction. When victims of serious crimes have the

European study by Kilchling, a criminologist, showed that victims' desire to participate in restorative justice increased when they were not required to participate in a face to face meeting with the offender. (M. Kilchling, "Interests of the Victim and Public Prosecution" in G. Kaiser, H.Kury and H. -J. Albrecht Eds., *Victims and Criminal Justice* (1991) 1 Max Planck Institute for Foreign and International Penal Law at 30). While a Canadian study shows that 72% of victims of sexual assault were not interested in meeting their offenders face to face. (J. Tufts, "Public Attitudes Toward Criminal Justice Systems" (Ottawa, Statistics Canada, 2000)). On reluctance generally of victims of crime to meet offenders face to face see also J-A. Wemmers, *Victims in the Criminal Justice System* (Amsterdam: Kugler Press, 1996).

²⁶ As in cases of diversion.

²⁷ In this case legislation generally provides judicial discretion to drop charges upon the completion of certain conditions.

²⁸ Sentencing circles and conditional sentencing for example. See below for details.

²⁹ See for instance: Michael Jackson, *Justice Behind the Walls: Human Rights in Canadian Prisons* (Vancouver: Douglas & McIntyre, 2002) at 103, Proulx, *Supra* note 1 at 99 (in reference to the Stoney Mountain Prison Project), Patrick Rafferty, ed., *After One Year: the Restorative Justice Coalition* (Victoria, BC: Pithy Penal Press, 2001) (Regarding restorative justice within William Head Institute), and Lila Rucker, "Peacemaking in Prisons" in Harold Pepinsky and Richard Quinney, eds. *Criminology as Peacemaking* (Indiana: Indiana University Press, 1991) at 172.

³⁰ See Cormier, *Supra* note 9 at 4 for a discussion of community-assisted hearings by the National Parole Board regarding the conditional release of an offender into the community under sections 79 to 84 of the *Correction and Conditional Release Act*, R.S. 1992, c.20, and Proulx, *Supra* note 1 at 20.

freedom to choose if, when, where, how and why they interact with the person who committed the crime against them preliminary results show high levels of satisfaction with Victim-Offender Mediation.³¹ This spectrum of restorative justice options indicates that there is likely, in most cases, a restorative justice option that will fit the needs of particular victims of intimate violence. At a very basic level restorative justice models can successfully respond to the needs of victims of intimate violence by building flexibility and creativity into each intervention. Restorative justice models should avoid programs which rigidly prescribes if, when and how victims of intimate violence will interact with their abusers. There must be room within programs for uncoerced choice, and for women to participate differently depending on their resources and readiness.

(ii) Common Law : the Sentencing Circle

Some of the first instances of the application of restorative justice as an identifiable principle within the Canadian criminal justice system were by white activist judiciary in northern Canada in the early 1990's. These have been some of the most high-profile uses of restorative justice principles, sparking much public debate about sentencing generally.³² As these judges were flown into and out of small Northern communities for circuit court they often encountered recidivist Aboriginal offenders.³³ Several of these

³¹ Canada, "Victims' Experiences With, and Expectations and Perceptions of Restorative Justice: A Critical Overview of the Literature" (Ottawa: Department of Justice Canada, Victim Issues Research Series, March 2002) at 31. Although the study deals with intimate violence only in a perfunctory way, it does provide more in-depth evaluation of responses from victims of very violent crimes such as sexual assault, attempted murder and burglary.

³² See for instance: Trevor Lautens "How Our Justice System is Abused", *The Vancouver Sun* (October 26, 1996) A19, P. Cochrane, "14 Years for Terrorizing Women" *The Edmonton Journal*, (November 23, 1996) A6, and Ellie Teshner, "The Case for 'Sentencing Circles'" *The Toronto Star* (September 19, 1996) A2.

³³ Recently non-Aboriginal offenders have been sentenced using sentencing circles, or have requested the use of sentencing circles. See: Les Perreux "Victim Rejects Native Justice for Ex-Offenders" *The*

judges expressed frustration at the apparent inability of the criminal justice system to address the needs of these offenders. They also expressed alarm at the number of Aboriginal people being sent to prisons in Southern Canada from their courtrooms.³⁴ Claude Farfard, a judge of the Provincial Court of Saskatchewan has expressed his frustration this way:

I believe we have an offender-processing system, but I'm not sure we have a criminal justice system. At least that's been my experience in northern Saskatchewan, and I'm now in my nineteenth year in La Ronge, flying the northern circuit...I get on my plane at six or seven o'clock at night having dealt with many cases, and the conflicts that were brought before me in the morning are still there. I haven't resolved anything.³⁵

This kind of frustration prompted judges to seek out and employ alternatives to the conventional courtroom procedures, primarily the sentencing circle.³⁶

Although sentencing circles were in use prior to 1992,³⁷ the case of *R v Moses*³⁸ is widely recognized as the jurisprudential starting point for sentencing circles in Canada. Presiding Territorial Court Judge Stuart describes the dynamics of the circle:

Rearranging the court in a circle without desks or tables, with all participants facing each other with equal access and equal exposure to

National Post (December 1, 2001) National Edition, A8, Heather Sokoloff, "Sentencing Circles Gain Judge's Approval" *The National Post* (May 15, 2002) National Edition, A3, "The Case for Sentencing Circles" *The Toronto Star* (September 19, 1996) A2, and Lee Lakeman, "Why 'Law and Order' Cannot End Violence Against Women" (2000) 3 *Canadian Woman Studies* 33.

³⁴ See for instance: D. H. Eber, *Images of Justice* (Montreal: McGill-Queen's U Press, 1997), Judge Barry Stuart, "Circle Sentencing: Turning Swords into Ploughshares" in B. Galaway and J. Hudson eds. *Restorative Justice: International Perspectives* (New York: Criminal Justice Press, 1996) at 193, B. Stuart, "Sentencing Circles...Making Real Differences" (Ottawa: Department of Justice, 1996), and Cunliffe Barnett "Circle Sentencing/Alternative Sentencing" [1995] 3 *C.N.L.R.* 1. See also Ross Gordon Green, *Justice in Aboriginal Communities: Sentencing Alternatives* (Saskatchewan: Purich, 1998) at 38.

³⁵ Claude Farfard, "On Being A Northern Judge" in Gosse, Henderson and Carter eds. *Continuing Poundmaker and Riel's Quest: Presentations made at a conference on Aboriginal peoples and justice* (Saskatoon: Purich, 1994) at 403-404.

³⁶ Sokoloff, *Supra* note 33 at A3.

³⁷ Judge Cunliffe Barnett recounts having used restorative justice methods as early as 1978. See Barnett, *Supra* note 34 at 3.

³⁸ (1992) 71 C.C.C. (3d) 347 (Y.Ter. Ct.) [hereinafter *Moses*].

each other dramatically changes the dynamics of the decision-making process...The circle breaks down the dominance that traditional courtrooms accord lawyers and judges...Community involvement through the circle generates new information about the accused and the community. The circle, by enhancing community participation, generates a richer range of sentencing options and by improving the quality and quantity of information provides the ability to refine and focus the use of sentencing options to meet the particular needs in each case.³⁹

This model of decision-making has been adopted in many courtrooms across Canada in dealing with Aboriginal offenders, and has been used in a number of controversial cases involving intimate violence.⁴⁰ As will be outlined below the use of restorative justice models such as the sentencing circle have become enshrined in the *Criminal Code*, and continue to be used extensively today under that mandate.⁴¹

³⁹ *Moses*, *Supra* note 38 at 347-8. For perspectives on the functioning of sentencing circles in Aboriginal communities, and their traditional role see: Mallett, Bent and Josephson, "Aboriginal Ganootamaage Justice Services of Winnipeg (AGJSW)" in Proulx and Perrault, eds., *No Place for Violence: Canadian Aboriginal Alternatives* (Halifax: Fernwood, 2000) at 71, B. Stuart, "Sentencing Circles: Turning Swords in Ploughshares", *Supra* note 34 at 193, A. Janvier, "Sentencing Circles" in Gosse, Henderson and Carter eds. *Supra* note 35 at 301, and Green, *Supra* note 34 at 67-83.

⁴⁰ See for instance: *R v. Naappaluk* [1994] 2 C.N.L.R. 143 (Q.C. (Crim Div.)), *R v. Johnson* [1994] 91 C.C.C. (3d) 21 (Y. Terr. Ct. App.), *R v. Bennett* [1992] Y.J. No. 192 (Y. Terr. Ct.) online: QL (B.C.J.), *R v. Charleyboy* [1993] B.C.J. No. 2854 (B.C. Prov. Ct. (Crim Div.)) online: Q1 (B.C.J.), *R v. Green* [1992] Y.J. No. 217 (Y. Terr. Ct.) online: QL (B.C.J.), *R v. D.N.* [1993] Y.J. No. 193 (Y. Terr. Ct.) online: QL (B.C.J.), *R v. S.E.H.* [1993] B.C.J. No. 2967 (B.C. Prov. Ct. (Crim. Div.)) online: QL (B.C.J.), *R v. Seymour* [1989] M.J. No. 273 (Man. Prov. Ct. (Crim. Div.)) online: QL (M.J.), *R v. Clement* [1994] B.C.J. No. 1247 (B.C. Prov. Ct. (Crim. Div.)) online: Q1 (B.C.J.). See especially: *R v. Taylor* [1995] 104 C.C.C. (3d) 346 (Sask. C.A.), in this case of violent sexual assault by an estranged partner the majority and dissent clearly lay out their opposing views on the use of sentencing circles in cases of intimate violence.

⁴¹ At a speaking engagement at the University of British Columbia Faculty of Law, Territorial Court Judge Barry Stuart stated that sentencing circles had been used in over 400 criminal matters since 1991. Judge Barry Stuart, "Sentencing Circles" (Faculty of Law, University of British Columbia, June 9, 2000).

(iii) Negotiated Protocols

While most restorative justice programs in Canada function under the auspices of federal legislation, several initiatives have been created under negotiated protocols that do not fall within the purview of the *Criminal Code*.⁴²

The Hollow Water sexual offender circle is one such initiative. It exists by virtue of a written protocol between the Manitoba Department of Justice and a group of professionals and volunteers formed to address the issues of intergenerational sexual abuse in that community (Hereinafter the Community Holistic Circle Healing Program or 'CHCH'). The protocol was not initiated under any provisions of the *Criminal Code* or other pre-charge diversion initiatives described below. Instead it allows the community to determine a treatment program for offenders. The criminal justice system is involved only to receive a plea of guilty, or if there is a trial (which the CHCH attempts to avoid), and in a secondary supervisory role through probation officers after the community-based sentence has been passed.

"This protocol was negotiated by CHCH to give the assessment team input into sentencing and to avoid repeatedly educating Crown attorneys about the CHCH approach."⁴³ The Hollow Water project has been described as the "...most mature

⁴²It is also significant to note that several Aboriginal justice initiatives which incorporate sentencing circles pre-date the *Criminal Code* amendments, and continue to function today. Many of these initiatives now exist under the auspices of section 217 (1) (a) of the *Criminal Code* which allows for programs of "alternative measures" to be authorized by the Attorney General or their delegate. See below.

⁴³ Green, *Supra* note 34 at 88.

healing process in Canada...”,⁴⁴ and is considered to be a successful role model for restorative justice programs dealing with intimate violence, especially sexual abuse. Hollow Water has been operating for nearly a decade. Due to its unique nature the initiative will be described in some detail below.

The initiative was born out of the concerns of an Aboriginal research and resource group formed in 1984 within the Hollow Water community, the core group of those who founded and administer the program are women.⁴⁵ They concluded after a careful study that intergenerational sexual abuse was rampant.⁴⁶ Over the next several years they developed a community training and education program, a protocol to deal with sexual offenders and victims, and created a culturally appropriate sexual abuse assessment and intervention team. They approached the local Crown counsel, judiciary and the Manitoba Department of Justice to negotiate a protocol which would allow them to treat serious sexual abusers in the community with minimal intervention from the criminal justice system.⁴⁷ One of the main goals of CHCH was to reduce the use of incarceration in dealing with sexual abusers from their community.

⁴⁴ Dr. Joe Couture et al, “A Cost-Benefit Analysis of Hollow Water’s Community Holistic Circle Healing Process” (Ottawa: Solicitor General, 2001) at iv. For more discussion on the Hollow Water Initiative see Chapter Five.

⁴⁵ Canada, *Report of the Royal Commission on Aboriginal Peoples*, “Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada” (Ottawa: Canada Communication Group, 1996) at 274 [hereinafter “Bridging the Cultural Divide”].

⁴⁶ T. Lajeunesse, Canada, Solicitor General Canada, “Community Holistic Circle Healing: Hollow Water First Nation” (Ottawa: Solicitor General, 1993).

⁴⁷ Protocol for Manitoba Department of Justice Support for the Community Approach of the Hollow Water Community Holistic Circle Healing (Brandon, Manitoba, 1991). Lajeunesse, *Supra* note 46, Appendix C.

When the assessment and intervention team receives a disclosure of sexual abuse there are two approaches that can be taken.⁴⁸ The first is to lay charges, and proceed with court involvement. There the abuser is encouraged to plead guilty, and receive the support and recommendation of CHCH, avoiding a trial. If the abuser accepts responsibility for their actions the CHCH prepares a lengthy pre-sentence report detailing a five-year healing plan for the abuser in the community. Lajeunesse, the author of the government report on Hollow Water, has noted that very few abusers plead not guilty.⁴⁹

The second option is followed if there is insufficient evidence for a charge to be laid.⁵⁰ The process will proceed for the victim alone, if they agree to be assisted. Counseling and therapy are provided as needed, and this often brings forth a full disclosure, leading to charges.⁵¹ Once the case is within the court system, the protocol with the Department of Justice takes effect. Since 1993 sentencing has been taking place in the community itself, in the form of a circle. This is seen as an improvement over traveling to another, distant community for a conventional sentencing hearing in circuit court.⁵² Although the sentencing judge is not technically obliged to follow the recommendations of CHCH, so far all abusers who have expressed an interest in participating in the program have been

⁴⁸ It has been noted that not all disclosures of serious abuse have resulted in charges. Green, *Supra* note 34 at 90 notes that in some cases the community chooses to completely control the "dispute resolution" process and avoid entering into the criminal justice system altogether.

⁴⁹ Lajeunesse, *Supra* note 36 at 7-10. See also: "Bridging the Cultural Divide", *Supra* note 45 at 165.

⁵⁰ The local police technically decide this, although the community members claim to "do the police work" in terms of investigation. Canada, Aboriginal Corrections Policy Unit, *The Four Circles of Hollow Water*, (Ottawa: Solicitor General, 1997) at 152.

⁵¹ Lajeunesse, *Supra* note 36 at 3-5.

⁵² Green, *Supra* note 35 at 86, and Aboriginal Corrections Policy Unit, *Supra* note 50 at 152. Prior to moving the sentencing to Hollow Water, CHCH was routinely able request a 4-month adjournment in sentencing, in order to present an extensive pre-sentence report. Rupert Ross, "Duelling Paradigms? Western Criminal Justice Versus Aboriginal Community Healing" in Gosse, Henderson and Carter eds., *Supra* note 35 at 247. See also: *R v S (HM)* [1989] M.J. No. 273 (Man. Prov. Ct. (Crim. Div.)) online: (QL) (M.J.).

allowed to do so. This means that instead of a sentence of incarceration, which would certainly follow many of the serious charges of abuse being dealt with, other legal mechanisms are engaged which allow the community to work with the abuser while maintaining a minimal level of supervision by the criminal justice system.

The abuser receives a three year suspended sentence, which places him probation, a condition of which is to follow the directives of CHCH.⁵³ Despite the fact that the treatment program takes 5 years, it is only possible to place abusers on 3 years probation, the maximum allowed by law. This means that for the final 2 years of the program there is no legal sanction flowing from the initial intervention for those who breach their probation conditions.⁵⁴

Under the law these conditions must be supervised by a probation officer, however in practice the CHCH team provides supervision. Technically, so long as the sentence is still running, the abuser can be charged with breach of probation or conditions, however this must involve the probation officer.⁵⁵

The Hollow Water project is one of several such programs operating under a special protocol with the federal or provincial governments. There is little or no research available on the functioning of these other projects, or results particular to victims of intimate violence. They are included below to provide other examples of negotiated protocols, and to give some information (where available) on how they function.

⁵³ Green, *Supra* note 34 at 90.

⁵⁴ Lajeunesse, *Supra* note 46 at 2 and 8. So far research data shows only two reported breaches. Couture, *Supra* note 44 at v.

⁵⁵ Green notes that there is some 'confusion' within CHCH regarding charging non-compliant offenders with breach of probation. Green, *Supra* note 34 at 95.

The Aboriginal Legal Services of Toronto Community Council Program operates under a protocol similar to that used in the Hollow Water project.⁵⁶ This is a pre-charge diversion program for Aboriginal offenders.

The Toronto Project consciously decided, after community consultation, not to divert cases of intimate violence.

The Family Violence Working Group, assembled to look at the conditions under which family violence cases could be diverted to the community council, concluded that the provision of services, particularly to offenders, was a prerequisite for the diversion of such charges. Without these healing resources, the working group concluded, nothing significant could be offered to the offender other than what the current system already provides. No one favoured incarceration, but there was no debate that the spouse or partner would be in danger until options became available to treat offenders and change their behavior. Under these circumstances, the working group believed it would be irresponsible to divert such charges. Once the resources are in place, then diversion can begin.⁵⁷

The Program's current mandate is broad: "The decision on whether a person can be helped by the Council depends solely on the resources available in the community - not on any particular characteristic of the offence".⁵⁸ However crimes of intimate violence are still not being diverted. According to Jonathan Rudin, Program Director for the Toronto Project the resources in to deal with such cases are not yet available in the community.

"...the program is not prepared to take cases until the community is confident that we can handle the cases- it is not simply a matter of what those in the program think. In order to meet this criteria we work closely with the Aboriginal Family Violence Roundtable. Members of the Roundtable include organizations that work with abused women and provide services for abusive men. We have worked

⁵⁶ Protocol Between Aboriginal Legal Services of Toronto and the Crown Attorney's Office of Toronto with Regard to the Community Council Program, online, <<http://www.aboriginallegal.ca>. > (date accessed July 2002.)

⁵⁷ "Bridging the Cultural Divide", *Supra* note 45 at 173-174.

⁵⁸ "Aboriginal Legal Services of Toronto Community Council Program" online, <<http://aboriginallegal.ca/docs/outline.htm> > (date accessed July 2002.)

with the Roundtable in determining what modifications to the protocol are necessary in cases of family violence and what training issues have to be addressed prior to the Council taking on those cases. As well, when the Council does take these cases, only those Council members who feel comfortable hearing those cases will deal with them.”⁵⁹

For all other crimes the procedure is as follows: upon being selected by Crown counsel, and accepted by the Community Council, the accused must make an admission of responsibility, and is accepted into the diversion program. With most crimes the charges are stayed or withdrawn, and charges can only be refiled in rare and exceptional circumstances, even where the offender does not comply with the Community Council.⁶⁰ For cases of intimate violence this would be different, “...in cases of domestic violence, charges would not be stayed or withdrawn until the person completed the Council decision. In this way, all bail conditions on the offender would remain in place until the Council decision was completed.”⁶¹ These proposed consultations mechanisms and administrative safeguards show insight into the dynamics of intimate abuse, concern for the victim and knowledge of how to ensure their safety.

A third Aboriginal justice program operating in Canada under a negotiated protocol is the Aboriginal Ganootamaage Justice services of Winnipeg. This program is modeled on the Toronto initiative, and offers diversion, a Community Council, and community-based treatment to Aboriginal offenders in the Winnipeg area. The Winnipeg program excludes the following offences: “...driving offences such as refusing a Breathalyzer; criminal

⁵⁹ Letter from Jonathan Rudin to Angela Cameron (March 27, 2003).

⁶⁰ “Aboriginal Legal Services of Toronto Community Council Program” online, <<http://aboriginallegal.ca/docs/outline.htm>> (date accessed July, 2002.)

⁶¹ Letter from Jonathan Rudin to Angela Cameron (March 27th, 2003).

negligence and dangerous or impaired driving; sexual offences and domestic abuse (child abuse, spousal and/or partner abuse).”⁶²

In British Columbia the Fraser Region Community Justice Initiatives Association operates both an adult and a youth Victim-Offender Reconciliation Program (VOMP). This program, in existence since 1982, accepts cases involving physical assault, sexual assault, domestic and sexual abuse.⁶³ The program does not focus on Aboriginal offenders, and unlike the previous programs is designed and run by a Christian organization. Dave Gustafson the Executive Director, a Mennonite activist, and prison abolitionist, sees his organization as having both a training and a therapeutic component.⁶⁴ The VOMP offers a number of important safeguards for victims of intimate violence. First, in all cases the offender is incarcerated during the interaction, which takes place months or even years after the offence.⁶⁵ Under such circumstances this may be a model of restorative justice that meets the needs of some victims. The threat to the immediate physical safety of the victim is eliminated by incarcerating the offender, the victim does not have to negotiate for her safety with either the offender or her community. By meeting or indirectly communicating with an offender in this way,⁶⁶ after a period of safety and healing, a victim may be able to obtain closure and a sense of

⁶² Kathy Mallet, Kathy Bent and Dr. Wendy Josephson, “ Aboriginal Ganootamaage Justice Services of Winnipeg (AGJSW)” in Jocelyn Proulx and Sharon Perrault eds. *No Place for Violence: Canadian Aboriginal Alternatives* (Halifax: Fernwood and Resolve) 2000 at 62.

⁶³ See online: <[http:// www.nicr.ca:8080/Org.asp?id=18019](http://www.nicr.ca:8080/Org.asp?id=18019)>, National Institute of Conflict Resolution, and Dave Gustafson, “ Mediation can Make Communities Safer” in *Restorative Justice; Four Community Models* a Conference held in Saskatoon, Saskatchewan, March 17 and 18, 1995 Organised by Saskatoon Community Mediation Services and the Mennonite Central Committee Ministry.

⁶⁴ Four Community Models, *Supra* note 63 at 17.

⁶⁵ David L. Gustafson, “ Facilitating Communication between Victims and Offenders in Cases of Serious and Violent Crime”(1997) 4 *I.C.C.A. Journal on Community Corrections, Best Practices Edition* 44 at 46.

⁶⁶ There are a range of options for the victim from communicating with the offender by letter, to video taped statements, to face to face meetings. *Ibid.* at 46.

security, even an apology. It may also offer an offender a healing opportunity in apologizing and taking responsibility. The program also provides staff who are trained in victim assistance, clinical counseling and who have clinical experience with sexual and violent offenders.⁶⁷ This model is quite different, in my opinion, from models such as sentencing circles or victim-offender mediation that force the victim to speak to and defend her own interests and safety in relation to the offender's sentence and presence in the community.

Although many interventions are initiated by the victim themselves,⁶⁸ some are initiated on behalf of offenders by criminal justice staff (such as corrections officers or prison chaplains). In cases involving intimate violence, particularly long-term abuse, such offender-initiated contact may be dangerous for victims. Despite a lack of physical contact the psychology of battering may dictate that indirect contact will renew fear and control over the victim. In cases of intimate violence, unlike some other serious crimes, contact should be unilaterally initiated by the victim, as the risk of re-starting the cycle of violence and control inherent in abusive intimate relationships is a serious one.

The 'extra-legal' nature of programs run under the auspices of negotiated protocols generally removes them from the type of public scrutiny to which criminal cases are exposed. Frustrating attempts to uncover research information for this thesis is an example of how difficult it is to obtain details on program policies, practices and safeguards. Interventions are not systematically reported, a record of charges is not

⁶⁷ The program offers clinical counseling for victims both before and after any contact with the offender. *Ibid.* at 44.

⁶⁸ *Ibid.* at 47.

necessarily maintained, and crimes involving intimate abuse often 'disappear' from the public record.

Despite the promising information on these two programs that deal with intimate violence, and the one that is carefully planning to do so in the future, the lack of research information and evaluation is a serious shortcoming. The research material available on Hollow Water make it the best candidate to examine in relation to Optional Protocols. However each protocol and initiative is unique, so that conclusions drawn about the safety and efficacy of Hollow Water are not necessarily transferable to the Toronto or the Fraser Valley Project. I will return to these concerns and discuss them in more detail in Chapter Five.

(iv) Federal Legislation: Bill C-41

In 1996 the Parliament of Canada undertook a major revamping of portions of the *Criminal Code* dealing with sentencing principles. The thrust of these provisions was to promote principles of sentencing that better reflected Canadian's views on how to deal with criminal behavior, by moving from a purely retributive and deterrent position on sentencing to one which also fostered the values of healing and restoration. The Supreme Court of Canada notes "(t)he enactment of the new Part XXIII (Bill C-41) was a watershed, marking the first codification and significant reform of sentencing principles in the history of Canadian criminal law."⁶⁹ Bill C-41 was designed to significantly alter sentencing practices in Canada. The following excerpt from the House of Commons Debates about Bill C-41 demonstrates the aims of Parliament in passing this legislation:

⁶⁹ *R v. Gladue* [1999] 1 S.C.R. 688 at 702.

A general principle that runs through Bill C-41 is that jails should be reserved for those who should be there. Alternatives should be put in place for those who commit offences but who do not need or merit incarceration.

...

This bill creates an environment which encourages community sanctions and the rehabilitating of offenders together with reparation to the victims and promoting in criminals a sense of accountability for what they have done.⁷⁰

The amendments reflect a serious intent to reduce the use of incarceration. These legislative changes codify models such as alternative measures; acknowledging and affirming their place in the Canadian criminal justice system in reducing the use of incarceration, and increasing the use of restorative justice. Three main provisions make up the new sentencing regime, and interact to provide several avenues for the application of restorative justice principles. They are described in some detail below.

A. Section 718: The Purposes and Principles of Sentencing

Section 718 outlines the purposes and principles of sentencing that apply to the interpretation of all sentencing provisions, including sections 717 and 742 discussed below. The purposes and principles encode the balancing act between often-conflicting social interests that must be performed when an offender is sentenced. These include (in the order they are found in the legislation): denouncing unlawful conduct, specific and general deterrence, separation of offenders from society where necessary, the rehabilitation of offenders, reparation of harm to the victim or community and the promotion of a sense of responsibility in offenders, and acknowledgement of harm done to victims and the community.

⁷⁰ Minister of Justice Allan Rock, House of Commons Debates, vol. IV, 1st Sess., 35th Parl. At 5873.

Separately section 718.1 lists proportionality as the “Fundamental Principle” of sentencing. This principle dictates that “ a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.” Section 718.2 (b) also emphasizes that similar sentences should be imposed upon similar offenders for similar offences, although this is not included as a ‘fundamental’ principle. As some commentators have observed, there is a tension between the restorative justice principle of flexibility, and individualized justice and the fundamental *Criminal Code* sentencing principle of proportionality.⁷¹ Specifically the ability of diverse restorative justice projects to impose variable sentences may result in disparate penalties for similar crimes from one community to the next. In my opinion this tension is sometimes resolved in favour of the restorative justice principle of flexibility, with similar crimes being dealt with in very different ways in different communities.

Section 718.2 discusses “Other Sentencing Principles” and mandates that aggravating or mitigating factors be taken into account in reducing or increasing a sentence. Aggravating factors include: crimes committed out of bias or hatred based on sex, race, religion, age, sexual orientation etc., evidence of spousal or child abuse, and evidence of an abuse of authority or trust. This provision clearly highlights the criminal nature of intimate violence, and is a strong public statement that it is considered morally and socially reprehensible. By including intimate violence alongside grounds that are protected in the *Charter* and federal and provincial human rights legislation, Parliament has underlined

⁷¹ See B. Archibald, “ Fault, Penalty and Proportionality: Connecting Sentencing to Subjective and Objective Standards of Criminal Liability (With Ruminations on Restorative Justice) [1998] 40 *Crim. L.Q.* 263.

intimate violence as a particularly serious criminal behavior, and that states that such behavior makes any offence more serious ('aggravating').

Sections 718.2 (c) through (e) seek to provide principles which may, on the other hand, mitigate a sentence. 718.2 (d) specifies that incarceration should be used only if "less restrictive sanctions" are inappropriate. Section 718.2 (e) goes further to state that:

(e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with *particular attention to the circumstances of aboriginal offenders*. [Emphasis added].

These provisions regarding aggravating and mitigating factors espouse internally conflicting goals. On one hand Parliament is condemning intimate violence alongside hate crimes and human rights violations, yet in section 718.2 (e) certain offenders, regardless of their crime, are to be considered for less punitive sanctions. Gary Ferguson, a Canadian legal academic, sees little guidance in the *Criminal Code* itself as to how to rank these conflicting goals.

The inclusion of principles and objectives of sentencing is laudable as an attempt to move towards transparency and consistency in sentencing. However, ss 718-718.2 provide such a vast constellation of objectives and principles that, in absence of any legislative prioritizing, problems of disparity...are bound to continue...(D) enunciation, deterrence, rehabilitation and restoration are all retained as legitimate sentencing goals with no legislative direction as to when or how one or the other prevails.⁷²

Of particular importance to this thesis, the *Criminal Code* gives us very little guidance on how to reconcile considering intimate violence as an aggravating factor in sentencing, with special consideration for Aboriginal offenders in circumstances where Aboriginal

⁷² Gary Ferguson, "Recent Developments in Canadian Criminal Law and Sentencing" (2001) 25 *Crim. L.Q.* 151 at 153. See also Dawn North, "The 'Catch 22' of Conditional Sentencing" (2001) 44 *Crim. L.Q.* 342 at 343-4.

offenders have committed crimes involving intimate violence.⁷³ In Chapter Five I will propose possible amendments to the *Criminal Code* sentencing principles that may alleviate this tension.

B. Section 717: Alternative Measures

Section 717 allows for “Alternative Measures”⁷⁴ for all offenders who meet the criteria as set out in those provisions. Alternative measures are defined in section 716 as “...measures other than judicial proceedings under this *Act* used to deal with a person who is eighteen years of age or over and alleged to have committed an offence.” This definition is very broad, and encompasses many models and initiatives that function outside of judicial proceedings; including sentencing circles and diversion programs. Some restrictions are placed upon the use of alternative measures, and these are listed in sections 717 (1), (2) and (3). Specifically these include that:

(a) the measures are part of a program of alternative measures authorized by the Attorney General or the Attorney General’s delegate...

(b) the person who is considering whether to use the measures is satisfied that they would be appropriate, having regard to the needs of the person alleged to have committed the offence and *the interests of society and of the victim*; (emphasis added)

...

(e) the person accepts responsibility for the act or omission that forms the basis of the offence that the person is alleged to have committed;

...

⁷³ See discussion of case law below for judicial interpretation of this conflict.

⁷⁴ For the purposes of this discussion ‘alternative measures’ is presumed to include both Aboriginal and Western restorative justice models. See: T. Quigley, “Are We Doing Anything about the Disproportionate Jailing of Aboriginal People?” [1999] 42 *Crim.L.Q.* 129.

Pursuant to provincial constitutional jurisdiction over the administration of justice, each province or territory designs and administers their own alternative measures program. Each province or territory maintains its own policies regarding the use of alternative measures in cases of intimate violence, designates funds to support the programs, and chooses the model to be employed.⁷⁵ The manner in which a particular province or territory administers, and funds such programs will dictate the experience of victims of intimate violence in that particular program. British Columbia's alternative measures program is described in some detail below.⁷⁶

Section 717 (4) contains provisions for charging, and for breaches of alternative measures. The police and prosecutor may choose to lay charges, and have them remain in place pending completion of an alternative measures program. If the accused successfully completes the program the court must dismiss the charge, effectively erasing any record of the offence. Some restorative justice initiatives also provide pre-charge diversion, thereby creating no record whatsoever. If the accused partially completes the program the court may dismiss the charges, should the presiding judge be convinced that it would be "unfair, having regard to the circumstances and that person's performance with respect to the alternative measures." The court may also choose to go ahead with the charges as originally laid.

⁷⁵ Many provinces have officially 'adopted' restorative justice as their primary criminal justice foundation. See Chapter Two.

⁷⁶ At the time of writing, British Columbia's policy on the use of Alternative Measures in cases of intimate violence was in flux. The following discussion in the text captures indicators of the direction in which the provincial government is moving. However, despite announcing an upcoming change, no concrete policy had yet been released to the public.

These provisions, and others that either avoid or expunge charges, may have an adverse impact on victims of intimate violence. As we have seen laying charges, and maintaining a record of them, does not prevent an offender from participating in an alternative measures program, and it does not mean time in custody. However, the decision to lay and record charges has important implications for protecting victims of intimate violence.

First, either by failing to lay charges in the first place, as in pre-charge diversion, or by expunging the record upon (partial) completion of alternative measures, any subsequent charges of intimate abuse become the 'first' charge. When there is no public record of previous criminal charges for intimate violence it may become difficult for a victim of intimate abuse who experiences another incident of abuse at the hands of the same offender to show a sufficient pattern to obtain a civil or criminal restraining order. This places her in a position of being vulnerable to intimate violence without the protection provided by a formal order.

Secondly, creating a permanent record of charges of intimate violence performs both a specific and general deterrence function. It sends a message to the specific abuser, and the public that intimate violence is, in fact, criminal, and will be treated seriously.

Intimate violence in Canadian society is an ongoing, chronic problem, meaning that in some segments of society assaulting a spouse or intimate is still seen as acceptable. Laying charges and demonstrating that police and courts treat intimate violence seriously are still necessary tools in combating the normalisation of intimate violence. In Chapter Five I will propose measures that will redress these potential difficulties.

Sections 717.1 through 717.4 deal with the creation, disclosure and retention of records generated in any alternative measures process.⁷⁷ Generally, police, government department or agencies, individual persons or organizations may keep records. Records *may* be disclosed to a wide variety of persons for reasons varying from law enforcement to evaluation of alternative measures initiatives.

The discretionary nature of record keeping creates a number of difficulties for victims of intimate violence and those who advocate on their behalf. First, unlike criminal trials there may be no public record of the offence; this not only erases the crime in the event of future abuse, it makes access to records for research and advocacy purposes extremely difficult. The Alternative Measures Programs in British Columbia, for instance, are run by private organizations, some of them for-profit corporations. In order for victim advocates and researchers on intimate violence to access such statistics as rates of diversion of intimate abusers, and frequency of breaches, they will now have to approach the organization responsible for administering the program. Those who administer programs are not mandated to retain records, so such efforts may yield nothing.

Second, public accountability for the diversion of those who commit crimes of intimate violence is undermined by the discretionary, partly privatized, and virtually unregulated

⁷⁷ Court cases are not the only, or sometimes the most publicly accessible, way to study criminal justice trends. Unreported cases are not easily accessible to the public and, courtroom transcripts are expensive to obtain. Court cases (reported and unreported) do, however, provide valuable research material and evidence of gender inequality in the criminal justice system to feminist researchers and anti-violence advocates. Basic data such as the approximate number of intimate violence cases, the types of violence and the disposition of these cases are some of the basic tools that are used to determine if criminal justice models are helping or hurting victims of intimate violence.

collection of data.⁷⁸ Creating such significant barriers to continued research prevents an honest evaluation of whether alternative measures is an effective way of dealing with the crime of intimate violence, both for victims and abusers. These types of evaluations are integral to ensure public accountability and transparency. In Chapter Five I will also propose measures that will redress these potential difficulties.

C. Provincial Administration of Alternative Measures: British Columbia

A specific discussion of alternative measures in British Columbia will provide examples of some of the concerns expressed above regarding victims of intimate violence as they have manifested themselves in an array of programs.

In British Columbia restorative justice initiatives were introduced under the auspices of alternative measures by the New Democratic Party's (NDP) government in early 1998. These reforms began in 1997 with a series of documents released for public perusal and feedback. These include: "*Safer Communities for British Columbia*",⁷⁹ "*Strategic Reforms of BC's Justice System*", and "*A Restorative Justice Framework*".⁸⁰ The first two introduced the basic concepts behind restorative justice as interpreted by the

⁷⁸ Collection of and access to such data is regulated by ever-changing provincial policies. In British Columbia feminist and victim's advocates organizations continue to lobby for regular access to provincial government statistics and raw data on those diverted to Alternative Measures for intimate violence and sexual assault.

⁷⁹ British Columbia "Safer Communities for British Columbia: A Report to British Columbians from Attorney General Ujjal Dosanjh" (Victoria: Ministry of the Attorney General, Sept. 1997).

⁸⁰ British Columbia "A Restorative Justice Framework: British Columbia Justice Reform" (Victoria: Ministry of the Attorney General, January 1998) online: <<http://www.ag.gov.bc.ca/public/98001.htm>> (date accessed: January 2001), and British Columbia, Ministry of the Attorney General, News Release, "Family Justice Initiatives and Legal Changes Announced" (February 6, 1997) online <<http://www.ag.gov.bc.ca/media/9702feb/06lssja.htm>> (date accessed: October, 2000).

government of the day, and announced that these principals were to be integrated into the justice system in British Columbia. The latter outlines the values, frameworks and specific policies to be used in implementing restorative justice.

The reforms to British Columbia's justice system were introduced simultaneously with family and civil law reform that employed mandatory "collaborative dispute resolution" and mediation techniques.⁸¹ The criminal, family and civil reforms were all administered by The Dispute Resolution Office of British Columbia.⁸² In 1998 the provincial NDP government set up two restorative justice streams to begin implementing their criminal justice initiatives: community accountability programs (CAPs) and alternative measures programs.⁸³

CAPs were introduced as a method of "increasing community involvement" in the justice system. CAPs are run by "citizens groups" who are supplied with funding, a CAP Information Binder and access to a team of community advisors.⁸⁴ The programs are monitored by the Attorney General's office of British Columbia,⁸⁵ via regional advisors who are trained in alternative dispute resolution techniques.⁸⁶ CAPs provide pre-charge

⁸¹ See <<http://www.ag.gov.bc.ca/dro/index.htm>> (date accessed: October 2001.)

⁸² *Ibid.*

⁸³ British Columbia, Ministry of the Attorney General, News Release, "Community Accountability Programs" (11 November, 1999), online: <http://www.ag.gov.bc.ca/media/9911nov/community_accountability.htm> (date accessed: October 2000.)

⁸⁴ British Columbia, Ministry of the Attorney General, News Release Doc. No. 98:17, "Communities get funding, info kit and advisory team for community accountability programs" (Feb. 11, 1998). An example of a CAP currently in existence is the Fraser-Burrard Community Justice Society Community Youth Justice Program.

⁸⁵ Brad Daisley, "1\$ Million for BC's Offender Diversion Program" *The Lawyers Weekly* (February 27, 1998) 31.

⁸⁶ British Columbia, Ministry of the Attorney General, News Release, *Supra* note 84 at 1. There is no gender analysis contained in the training materials.

diversion in cases where "...there is enough evidence for a charge, but where circumstances lead police to believe that an alternative, community-based approach will provide the best resolution."⁸⁷ Because there is no preparation and submission of a Report to Crown Counsel there is no way to trace the act as a *Criminal Code* offence, a clear example of the ways in which restorative justice projects can erase crimes that should be on the public record.⁸⁸

CAPS are a form of "diversion"⁸⁹ for "less serious" offenders at the pre -charge stage.⁹⁰ The four forms of CAPs being run in British Columbia currently include: Family Group Conferencing,⁹¹ Neighborhood Accountability Boards,⁹² Circle Remedies,⁹³ and Victim Offender Reconciliation Programs.⁹⁴ In early 2001 there were 52 CAPs in British Columbia.⁹⁵ CAPs are able to deal with cases of violence against women and children.

⁸⁷ British Columbia, Ministry of the Attorney General, News Release, "Healing the Harm" (March 3, 2000) online: http://www.ag.gov.bc.ca/media/9911nov/healing_the_harm.htm >(date accessed: October 2000).

⁸⁸ Patricia Kachuk, "Violence Against Women in Relationships: An Analysis of Policies and Actions" (Vancouver, the FREDA Centre for Research on Violence Against Women and Children, 1998) at 17.

⁸⁹ "diversion" is defined as: "...practices that employ discretion- police discretion and informal resolution, or Crown discretion utilizing alternative measures- to avoid using the courts to resolve less serious offences." British Columbia, Ministry of the Attorney General, "Community Accountability Handbook: Binder" at 4.

⁹⁰ British Columbia, Ministry of the Attorney General, Fact Sheet on Restorative Justice, February 1998.

⁹¹ "These programs bring the victim, the offender and their respective supporters together with a trained facilitator. The facilitator encourages all parties to express their feelings about the crime, and helps them come to an agreement on what actions are needed to repair the harm." Fact Sheet, *Supra* note 90 at 2.

⁹² "These boards are made up of community volunteers who meet with offenders and victims, and determine how the offender can make amends to the victim and community". Fact Sheet, *Supra* note 90 at 2.

⁹³ "Circle remedies are a First Nations justice method of resolving conflict. The goal of the circle is to restore harmony to the community. All community members are encouraged to participate in expressing their thought and feelings about the offence, and finding a remedy that will promote healing." Fact Sheet, *Supra* note 90 at 2.

⁹⁴ "...bring the victim and the offender together with a trained mediator in a safe, neutral environment to discuss the offending behavior. The mediator has no stake in the conflict. The mediator facilitates the meeting, guiding the participants through the process. The mediator does not impose a solution on the participants but helps them reach a satisfactory agreement to make reparation for the offence." CAP Handbook, *Supra* note 89 at 6.

⁹⁵ See: <http://www.ag.gov.bc.ca/media/community_accountability.htm> (date accessed Jan., 2003).

Outside of the vague guidelines provided in the CAP Handbook individual CAPs are left to develop policy independently.⁹⁶ Despite the fact that these programs were initiated to deal with minor offences, they are an “Alternative Measures” program, the NDP policy on *Alternative Measures and Violence Against Women in Relationships* applies,⁹⁷ allowing intimate violence cases to be diverted to a CAP at the discretion of the police and Crown Attorney under ‘exceptional circumstances’. The police from both municipal and federal levels are currently diverting offenders into the CAPs, and they determine whether the crime is too “serious” to proceed according to the CAP criteria (outlined above). As there are no formal charges laid, no legislated requirement to maintain publicly accessible records, and no criminal sanction for breach, it is difficult to assess whether CAPs have successfully dealt with cases of violence against women and children in the past.⁹⁸ The current policy on the use of alternative measures in cases of violence against women and children is that it will be employed only in “exceptional” or “rare”

⁹⁶ Sandra Goundry, “Restorative Justice and Criminal Justice in British Columbia: Identifying Some Preliminary Questions and Concerns” (Vancouver, BC Association of Specialized Victim Assistance and Counseling Programs, 1998) at 20.

⁹⁷ So long as it remains in place under the current Liberal provincial government.

⁹⁸ There have been a number of cases involving violence against women diverted into this pre-charge diversion program. The cases are not traceable through public records, but revealed at conferences by women’s anti-violence workers who have first hand experience with the victims. This illustrates the effects of allowing charges to go unrecorded, and diversion programs to operate outside of public scrutiny. Kachuk, *Supra* note 88 at 17. Prior to the 1996 *Criminal Code* amendments British Columbia conducted an evaluation of its existing diversion programs. (Bud Long and Associates, “Evaluation of the Alternative Measures/Diversion Program of the Ministry of the Attorney General of British Columbia” (Victoria: Bud Long and Associates, 1997)). This report collected sample data from 1992-93, using the data collection system then available. At the time these records were mandatorily kept by police and Crown Counsel. Long notes (at p. 57) that despite the existence of these records, and the fact that his firm had a mandate from the government to collect the data, he still had a very difficult time obtaining the material. This was due to lack of response from busy police and Crown Attorneys, and to the highly inadequate data collection system then in place. Even these systems, which Long noted were inadequate for his research purposes, have been replaced by optional data collection by Alternative Measures programs. It should also be noted that a number of criminal justice agents (police, Crown Attorney, etc.) who were interviewed for the evaluation indicated that ‘spousal assaults’ should not be diverted. (at 6).

circumstances.⁹⁹ Even if that unknown number is small, the suggested Liberal policy change, discussed later in this chapter, points to an increased use of Alternative Measures in cases of intimate violence.

The second stream of restorative justice in British Columbia is “alternative measures”. These initiatives also fall under the jurisdiction of section 717 of the *Criminal Code*. Alternative measures will divert only “low-risk, less serious” offenders who will be subject to guidelines for admission to the programs available. These guidelines are drafted by the office of the Attorney General, and are outlined in *Restorative Justice: A Framework for the Ministry*. Alternative measures will be used where “...the charge meets the province’s standard for prosecution...”¹⁰⁰ However pursuant to section 717 charges will not be formally laid except at the discretion of a judge in the case of a breach, a clear example of a program that may routinely avoid laying or recording charges of intimate violence.

These programs are administered by organizations such as the Elizabeth Fry Society and the John Howard Society, through probation officers.¹⁰¹ For-profit contractors also extensively administer alternative measures in British Columbia. These organizations use primarily non-restorative approaches such as letters of apology and community service orders.¹⁰² Both the Elizabeth Fry Society and the John Howard Society perform

⁹⁹ Letter from Austin Cullen, Assistant Deputy Attorney General, British Columbia to the FREDA Centre for Research on Violence Against Women and Children (1 November, 2000).

¹⁰⁰ Fact Sheet, *Supra* note 90 at 2.

¹⁰¹ *Ibid.* at 2.

¹⁰² Kachuk, *Supra* note 88 at 14. Companies such as Transformative Justice Australia provide facilitator training and contractors to administer the alternative measure programs in British Columbia.

excellent, non-profit community services for men and women in conflict with the law and their families. My concern arises, however, in examining the historical mandate of these organizations, which extends back more than eighty years. For decades both of these organizations have been focussed on the needs as interests of offenders, and the ways in which the criminal justice system revictimises them. In order to ensure that the same focus and resources are in place regarding victims of violence alternative measures legislation and policy should contain specific measures and safeguards.¹⁰³ In Chapter Five I will suggest specific measures to this effect.

As regards the role of private, for-profit corporations in the administration of justice, a full exploration of the implications of this move are beyond the scope of this thesis. However, in the context of intimate violence the use of for-profit corporations may mean that, in the interests of economic gain, some of the discretionary provisions such as record keeping may be done poorly, or not undertaken at all. It may also mean that limited resources are to be employed in the disposition of each case, and in the absence of policy or legislative safeguards marginalized groups (such as women) may not receive their 'fair share' of these resources.

Private contractors often interview offenders and determine if they are suitable for alternative measures. They also interview victims to determine the victim's opinion regarding alternative measures, and to encourage their participation where possible and

¹⁰³ Although no current information is available a study concluded in 1997 (Long, *Supra* note 98) shows that prior to the 1996 implementation of this form of Alternative Measures, there were problems with attention to victims concerns in previous diversion programs. Long notes that a tiny proportion of victims participated in any way (at iii), and that in almost all cases victims were not notified that diversion had taken place, despite a policy directive to do so (at 34).

appropriate. “(T)here is no explicit indication (in the policies) that the victim can demand that the case be prosecuted rather than diverted.”¹⁰⁴ Although this is far from a clear indication of victim coercion, it is an example of how the dynamics of intimate abuse¹⁰⁵ are not being explicitly taken into account in provincially administered programs. In order to make an informed, uncoerced choice a victim of intimate violence must have a clear description of her options, and the possible consequences, and should receive this information from someone trained to recognize and understand the psychology of battering.

In May of 2001 the British Columbia Liberal party won the provincial election, defeating the NDP. Many significant policy changes followed, and at the time of the writing of this thesis the government is considering significant changes to the administration of justice in British Columbia, particularly in relation to the use of Alternative Measures in cases of intimate violence and sexual assault.¹⁰⁶

The Attorney General acknowledges that “(t)he criminal justice branch is indeed looking at policy around the criminal practice of British Columbia...”¹⁰⁷ and maintains that this is merely a policy review. In fact he “...welcom(es) the suggestions ...of all British Columbians.”¹⁰⁸ Despite calling for public consultation on diversion in cases of intimate violence, the Attorney General has already ordered Crown prosecutors to increase their use of alternative measures, indicating that he “...no longer expects crown prosecutors to

¹⁰⁴ Kachuk, *Supra* note 88 at 15.

¹⁰⁵ See Chapter One.

¹⁰⁶ See “Spousal Abuse: How Best to Arrest?” *The Province* (June 6, 2002) A20.

¹⁰⁷ British Columbia, Legislative Assembly, *House of Commons Debates* (30 May, 2002) at 1425.

¹⁰⁸ *Ibid.*

proactively charge in cases of spousal abuse and spousal assault.”¹⁰⁹ This not only places restorative justice as the preferred option for dealing with intimate violence,¹¹⁰ it undermines British Columbia’s decade old pro-charge policy in such cases. British Columbia women’s anti-violence groups are speaking out against the lack of public consultation, and the potential dangers of such a policy shift to victims of intimate violence.¹¹¹

Although the policy change is unofficial, and in fact the policy on *Alternative Measures and Violence Against Women in Relationships* still stands, this is clear evidence of a move towards increased use of alternative measures specifically in cases of intimate violence. The process by which this significant policy change is being made; that is without consulting or involving women’s anti-violence advocates, brings to life feminist critiques of public accountability, and women’s participation in restorative justice initiatives. The fears expressed by British Columbia’s women’s groups are many. They fear a lack of accountability, the revictimization of women by abusers who are given community sentences, a lack of public record keeping, and the decriminalization and privatization of intimate abuse in restorative justice programs. These fears are only exacerbated by the government’s imposition of this policy without sufficient and serious consultation.

¹⁰⁹ Interview by CBC Victoria with Diane Turner, Victoria Lawyer (June 6, 2002, 7:14 am) Transcript at 1. See also Press Release: BC Coalition of Women’s Centres, News Release “Gordon Campbell, Geoff Plant in Breach of Public Trust” (May 30, 2002) at 1.

¹¹⁰ Alongside doing nothing.

¹¹¹ BC Coalition of Women’s Centres, *Supra* note 109.

D. Section 742: Conditional Sentences

Section 742 provides for the imposition of a conditional sentence. A conditional sentence differs from alternative measures in that it is the result of a judicial process. A conditional sentence of imprisonment must be for a term of less than two years, and it is served in the community under conditions imposed by the sentencing court. The Supreme Court of Canada has asserted that the conditional sentencing regime calls for a rebalancing of the purposes and principals of sentencing, towards a more 'restorative' result. In the cases of *R v. R (RA)*¹¹² the Supreme Court stated:

The amendments to the *Criminal Code* entitled the Court of Appeal to re-weigh the objectives of denunciation, deterrence and rehabilitation in light of the new emphasis on restorative objectives, and to consider the possibility of imposing a conditional sentence.

I include conditional sentencing as a restorative justice model for this, and other reasons.¹¹³

¹¹² [2000] 140 C.C.C. (3d) 523 (S.C.C.). See also *R v. S (RV)* [2000] 140 C.C.C. (3d) 553 (S.C.C.).

¹¹³ I include conditional sentencing as a form of restorative justice for a number of reasons. First, it was included in Bill C-41 as part of the federal government's restorative approach to reducing the perceived harmful effects of incarceration as enumerated in several previous government reports. Carol LaPrairie and Julian Roberts, "Conditional Sentencing in Canada: An Overview of Research Findings" (Ottawa: Solicitor General Canada, 2000) at 1-2. Second, conditions imposed, particularly on Aboriginal offenders are of a restorative nature as described by restorative justice advocates. Third, Canadian case law such as *Gladue*, *Supra* note 69 discusses conditional sentencing in the context of restorative justice principles. Finally it is regularly used to deal with extremely serious cases of intimate violence involving both women and children. From 1996 to 1999 national statistics show that conditional sentences were used in 1870 cases of sexual assault and 239 cases of 'family violence'. LaPrairie and Roberts, *Supra* at 21. For examples of particularly serious cases see: *R v. Belrose* [2001] B.C.J. No. 1310 (B.C.C.A.) online: QL (B.C.J.), *R v. Brenton* [2001] N.W.T.J. No. 48 (N.W.T.S.C.) online: QL (N.W.T.J.), *R v Lake* [2000] O.J. No. 5082 (Ont. Sup. Ct. (T.D.)) online: QL (O.J.), *R v Platonov* [2001] O.J. no. 5156 (Ont. Sup.Ct. Just.) online: QL (O.J.), *R v Beleutz* (2000) O.J. No. 4220 (Ont.Ct. Just.) online: QL (O.J.), *R v MIP* (1998) N.B.J. No. 424 (N.B.Ct. Q.B. (T.D.)) online: QL (O.J.).

Section 742.3 outlines a number of conditions which are compulsory, however the sentencing judge may add additional conditions that specifically address the offence or the needs of the offender. Such additional conditions may include alcohol and drug counseling, community service or traditional Aboriginal justice or spiritual practices.¹¹⁴

Section 742.6 (9) deals extensively with the procedure to be followed on a breach of the conditions of a conditional sentence.¹¹⁵ The victim, police or probation officer must bring a complaint forward to Crown counsel who then decides whether to pursue the breach application. Should the application be made, the provision then provides the court with a number of options. The court may take no action, change the conditions, or suspend the conditional sentence order and send the offender to prison for a portion of, or the entirety of the unexpired sentence. This places vast discretion in the hands of the judge hearing the breach application.

Conditional sentencing and the breach provisions are an area of concern for victims of intimate violence in a number of ways. First, the fact that the abuser is not incarcerated provides potential physical access to the victim, while an incarceral sentence, despite other shortcomings, would provide a guaranteed period of no contact. This may mean that conditional sentences are particularly dangerous for victims of repeated violence,¹¹⁶ or where drug or alcohol abuse is a factor in the offender's abuse. Second, if a breach

¹¹⁴ These latter types of provisions are generally imposed only with the support and/or at the suggestion of an Aboriginal offender's community.

¹¹⁵ The provisions dealing with a breach of conditional sentence were amended in 1999 to expedite the hearing of such an allegation.

¹¹⁶ As noted above this may be difficult to demonstrate if previous offences are dealt with under alternative measures.

occurs the onus will lie with the victim to complain to the police or probation officer, an intimidating proposition considering the physical liberty of the abuser, and the revictimization of the breach. Third, there is preliminary evidence of both a high overall breach rate of conditions, and an exercise of discretion on the part of overworked police, probation officers and Crown in not pursuing breach applications. There is some preliminary evidence, particularly in British Columbia that "...conditions are not rigorously monitored..." and that there is extensive discretion exercised in enforcing breaches. Overall the estimates on breach rates in Vancouver range from 40.6% to 52.8%.¹¹⁷ National data indicate that over half of the mandatory conditions associated with conditional sentences are breached.¹¹⁸ Finally, in the event that a breach application is brought, the presiding judge has the discretion to take no action against the abuser.¹¹⁹ These concerns are played out in the case of *R v Steele*, a Vancouver case in which an abuser who twice breached his conditional sentence for intimate abuse was left in the community to complete his conditional sentence, with no judicial action taken. The accused attended at the home of the victim, his former partner, and engaged in unspecified "threatening behavior" towards her, as well as repeatedly breaching a no contact order with this young daughter.¹²⁰

¹¹⁷ North, *Supra* note 72 at 355 and 365. See also *R v Bailey* unreported, October 16, 2000, BC Provincial Ct. (Port Coquitlam) at 4 as cited in North, *Supra* at 355.

¹¹⁸ Roberts and LaPrairie, *Supra* note 113 at 24.

¹¹⁹ Preliminary evidence is contradictory. In a Vancouver study 13.5% of breaches resulted in no action, and 4.3% were dismissed (North, *Supra* note 72 at 366). Of the initial offences examined in the Vancouver study 14.0% of the initial offences were 'persons offences', and 1.8% were described as "other". No separate data on intimate violence cases was examined. (North, *Supra* note 72 at 359). A recent government study however, showed the conditional sentencing rate for 'persons' offences in British Columbia to be a much more significant 28%, with no action taken by judiciary in 28% of breaches. (Roberts and LaPrairie, *Supra* note 113 at 20 and 24).

¹²⁰ *R v Steele*, Doc. Vancouver Cao26921, April 20, 2000, Rowles, Hall and MacKenzie JJ.A.

Despite legislative intent for conditional sentences to be a restorative but fair and safe approach, preliminary results on conditional sentences may be sending the wrong message to convicted abusers. Intimate violence is not condemned, despite being an aggravating factor in sentencing when, following a conviction, repeated patterns of abuse can receive relatively light, or no further sanction. In Chapter Five I propose measures that may eliminate these problems.

(v) Conditional Sentencing, Intimate Violence, and Aboriginal Offenders

The effect of judicial interpretation of the conflicting provisions of the *Criminal Code* discussed here has been to balance those competing objectives in favour of the Aboriginal accused receiving a conditional sentence, even in cases of intimate violence. This starting point is a crucial one in the examination of restorative justice and intimate violence; it indicates an increased likelihood that intimate violence by Aboriginal offenders will be dealt with in the community instead of inside prison walls. This trend, in and of itself, is not necessarily dangerous to victims of intimate violence. As we have seen from discussions above regarding conditional sentences, the danger to victims of intimate violence lies in inadequate resources, supervisions mechanisms, victim support services and in a lack of public accountability.

There are several ways in which sections 718, 171 and 742 of the *Criminal Code* have interacted to change sentencing practices, and recent case law has gone some distance in

interpreting this interplay. The application of section 718.2 (d) and (e)¹²¹ to the conditional sentencing provisions of section 742 has produced a significant change in the sentencing of Aboriginal offenders, including the sentencing of intimate violence. The recent case of *R v Gladue*¹²² has made conditional sentencing an important option in sentencing Aboriginal people.¹²³ *Gladue* specifically discusses conditional sentencing provisions as they should be applied to Aboriginal offenders.

In *Gladue* the Supreme Court of Canada has read section 718.2(e) to be remedial, aimed at healing some of the harm done to Aboriginal peoples by both colonial policies and the criminal justice system throughout history. The effects of colonialism on an individual offender will be considered a mitigating factor.¹²⁴ The Supreme Court of Canada takes aim at Canada's over-use of incarceration generally and, in the context of Aboriginal accused, explicitly acknowledges the legacy of colonial repression and its ugly consequences such as poverty and racism on offenders. *Gladue* tells us that, for Aboriginal offenders,¹²⁵ judges *must* at least consider alternatives to incarceration. Judges must also hear evidence during a sentencing hearing which speaks to the experience of the accused as an Aboriginal person, including the effects of colonialism in their particular lives. This analysis increases the probability that an Aboriginal offender will

¹²¹ These provisions speak to the use of alternatives to incarceration as a goal of sentencing, with particular attention to the circumstances of Aboriginal offenders.

¹²² *Supra*, note 69.

¹²³ See: M.E. Turpel-Lafond, "Sentencing within a Restorative Justice Paradigm: Procedural Implications of *R.v.Gladue*" (1999) 43 *Crim. L.Q.* 34, and Jonathan Rudin, "*R v Gladue*: A Step Forward in the Sentencing of Aboriginal Offenders" *Aboriginal Justice Bulletin* Summer 1999, Native Programs, Legal Services Society BC at 4.

¹²⁴ The *Gladue* court, associated with Aboriginal Legal Services of Toronto, provides assistance to Aboriginal offenders in sentencing in the form of extensive pre-sentencing reports documenting the effects of colonialism on an individual accused, and community-based treatment during the trial and sentencing process.

¹²⁵ And all other offenders.

receive a conditional sentence, rather than a prison term should they meet the statutory requirements.

The decision of *R v. Wells*¹²⁶ further explains the *Gladue* decision, giving lower court judges a specific methodology for applying the seemingly contradictory goals of restoration, deterrence and denunciation in the case of Aboriginal offenders. It could be said that *Wells* dilutes the Supreme Court of Canada's strong stance on restorative justice, by de-emphasizing section 718.2 (e), and placing it as one of many equal objectives within the *Criminal Code*. The Court also emphasizes that while the methodology may vary in situations of serious or violent crime, the outcome for Aboriginal and non-Aboriginal offenders will most likely be the same.¹²⁷

The Court, however, offsets this by adding that certain circumstances may mitigate in favor of the Aboriginal accused, allowing a sentencing judge to weigh restorative justice objectives ahead of all others, even in a case involving a serious crime. Specifically the Court names a community's willingness to address social problems such as sexual assault in their own right.¹²⁸ In other words the existence of a restorative justice program within an Aboriginal community is a strong factor in favor of conditional sentencing, even in cases such as sexual assault, or intimate violence.

¹²⁶ [2000] 1 S.C.R. 207 [hereinafter *Wells*].

¹²⁷ For an in-depth examination of the methodology laid out in *Wells* see: Allan Manson, "The Conditional Sentence: A Canadian Approach to Sentencing Reform or Doing the Time Warp Again" [2001] 44 *Crim. L. Q.* 390.

¹²⁸ *Wells*, *Supra* note 126 at par. 50-51.

Further, the Supreme Court of Canada in *Proulx*¹²⁹ has noted that "...a conditional sentence may be imposed even in circumstances where there are aggravating circumstances relating to the offence or the offender." As described above aggravating factors in the *Criminal Code* include crimes of intimate violence. The court creates a strong case for conditional sentencing in cases of crimes of intimate violence committed by an Aboriginal abuser, in a community that supports a restorative justice initiative. A number of cases involving intimate violence by male Aboriginal accused have, in fact, followed the reasoning in *Gladue* and *Wells*, and the result has been a conditional sentence in circumstances where an accused would have previously been given a jail sentence.¹³⁰

One effect of the interaction of section 718 and the conditional sentencing regime for Aboriginal offenders is a reduction in the length of (non-conditional) incarceral sentences. While the remedial purposes of *Gladue* and *Wells* may not go so far as to warrant a conditional sentence, they may be sufficient mitigating factors to shorten a

¹²⁹ [2000] 1 S.C.R. 61 at par 115.

¹³⁰ See for instance: *R v. LeFebvre*, [1999] A.J. No. 801 online: QL (A.J.), *R v. Norris* [2000] B.C.J. No. 1422 online: QL (B.C.J.), *R v. AJ* [2000] YJ No. 151 (Yuk. Terr. Ct.), *R v. JCT* [1998] 124 CCC (3d) 385 (Ont. CA), *R v Sam* [1997] YJ No. 100 (Yuk. Terr. Ct.), *R v. Belrose* [2001] BCJ No. 1310 (BCCA). See also the case of Calvin Nettagog, 'Man's Aboriginal Heritage Results in Lighter Sentence' *Globe and Mail* (August 3, 2002) A7. Compare for instance the cases of *R v S.E.H.* [1993] B.C.J. No. 2967 ((B.C. Prov.Ct. (Crim. Div.)) online: QL (B.C.J.) and *R v P.H.* (21 February, 2003), Victoria 118152-1-D (B.C.Prov.Ct. (T.D.)). In each case a stepfather sexually abused their two stepdaughters, of similar ages in each case. Although in the *P.H.* case the abuse was more persistent and serious (including photographing of sexual activity), the abuse in the *S.E.H.* case was extremely serious, and included alleged sexual intercourse with one stepdaughter. The accused in the *P.H.* case was sentenced to fourteen years incarceration (two consecutive seven year sentences), while the accused in the *S.E.H.* case, an Aboriginal man, was sentenced to a suspended sentence and three years probation with strict conditions. The judge in the *S.E.H.* case cited the accused's own sexual abuse, his alcohol abuse, debilitating motor vehicle accident, and his Aboriginal ancestry as reasons for the sentence. Even with the relative difference in seriousness of abuse between the cases, this discrepancy is a clear example of how these sentencing provisions can function to significantly mitigate a serious offence for an Aboriginal offender who would otherwise have been sentenced to time in prison.

sentence.¹³¹ In reducing a sentence for aggravated sexual assault and aggravated assault from nine and a half years to six the Ontario Court of Appeal in *R v. Sackanay*¹³² explicitly took into account *Gladue* and *Wells*, and the impact these cases have had on sentencing Aboriginal offenders:

Admittedly, both *Gladue* and the later Supreme Court of Canada decision in *R v Wells*... acknowledges that sentences should not be automatically reduced for aboriginal offenders, and that for more serious and violent offences sentences are likely to be similar whether the offender is aboriginal or not. Still *Gladue* mandates a different approach to sentencing aboriginals because of systematic or background factors that play a part in bringing them before the court... Although the appellant's crimes warrant a jail sentence, the hardships he has suffered should be taken into account in determining a fit sentence. In our view, the sentencing judge did not do so.

As previously discussed in relation to restorative justice this same principle of flexibility ought to be extended to the circumstances of the victim, who is considered integral to the holistic healing process in restorative justice discourse. This position is supported by the fact that 'acknowledgement of harm done to victims and the community' and 'reparation of harm to the victim or community' are also listed as sentencing principles in this section of the *Criminal Code*.

These trends in sentencing have particular relevance to Aboriginal victims of intimate violence, particularly considering that any negative effects may be compounded by their marginalized social location. The increased likelihood of having abusers in the

¹³¹ See below for discussion of *Gladue* and *Wells*. See for instance: *R v. Innes* Doc. Vancouver CA027073, June 30, 2000 (B.C. Prov. Ct. (Crim.Div.)), *R v. JEA* [1999] B.C.J. No. 1661 (B.C.C.A.) online: QI (B.C.J.), *R v Kelly* [1999] N.W.T.J. No. 122 (N.W.Terr. Ct.) online: QI (N.W.T.J.), *R v AJJ* [1999] S.J. No. 917 (Sask. Prov. Ct. (Crim.Div.)) online: QI (S.J.) (*Gladue* is applied to young offenders), *R v. Sackanay* [2000] O.J. No. 885 (Ont. C.A.) online: QL (O.J.), See also *R v Moyan* [1999] A.J. No. 1458 (Alta Prov Crt (Crim Div.)) online: QL (A.J.), *R v. Hunter* [1999] S.J. No. 335 (Sask. C.A.) online: QL (S.J.) and *R v Fudge* [2000] O.J. No. 312 (Ont. Sup.Ct.) online: QL (O.J.) (the fact that the accused was Aboriginal did not function to reduce the sentence given, despite the consideration of *Gladue* or *Wells*).

¹³² [2000] O.J. No. 885 (Ont. C.A.) online: QL (O.J.) at par 11.

community means an increased likelihood of being victimized. As mentioned above, in many cases the mere presence of the offender in the community is not, in and of itself, a danger to the victim. It is the lack of resources, supervision and breach mechanisms, the normalisation of intimate violence and other factors that make the circumstances potentially dangerous or undermine the dignity of the victim. In Chapter Five I will suggest mechanisms which may help to address these issues.

The conditional sentencing regime also applies to non-Aboriginal offenders who meet the statutory requirements.¹³³ It is notable, however, that section 718.2 (e) does demand that the court give “particular attention” to the circumstances of Aboriginal offenders. At this point there is no recent research that breaks down conditional sentences by Aboriginal and non-Aboriginal offenders, making it difficult to assess whether this provision is resulting in more conditional sentences for Aboriginal offenders.

The Supreme Court of Canada case *R v Proulx*¹³⁴ extensively discusses the application of conditional sentencing principles, with no differentiation between Aboriginal offenders and non-Aboriginal offenders. The Court once again reiterates that:

Parliament has mandated that expanded use be made of restorative principles in sentencing as a result of the general failure of incarceration to rehabilitate offenders and reintegrate them into society.¹³⁵

¹³³ See for instance: *R v Hargreaves* [1999] O.J. No. 5171 (Ont. Sup. Ct. of Justice) online: Q1 (O.J.), (applies *Gladue*), *R v Patterson* [2000] O.J. No. 736 (Ont. Ct. of Justice) online: Q1 (O.J.) (applies *Gladue* and *Proulx*), *R v Froeblich* [1999] O.J. No. 1556 (Ont. Ct. of Justice) online: QL (O.J.) (cites *Gladue*)

¹³⁴ *Supra* note 128.

¹³⁵ *Proulx*, *Supra* note 129 at par. 20.

This type of reasoning has also resulted in a change in sentencing practices for non-Aboriginal offenders.¹³⁶ There are similar concerns regarding the adequacy of breach protections to protect victims of violence, and the importance of the role victims and victim's advocates in light of increased use of conditional sentencing for non-aboriginal offenders.

¹³⁶ See for example: *R v. Brenton* [2001] N.W.T.J. No. 48 (N.W.T.S.C. (A.D.)) online: QL (N.W.T.J.), and *R v Lake* [2000] O.J. No. 5082 (Ont. Sup. Ct. of Justice) online: QL (O.J.), *R v Platonov* [2001] O.J. no 5156 (Ont. Sup. Ct. Just.) online: QL (O.J.), *R v Beleutz* [2000] O.J. No. 4220 (Ont. Ct. Just.) online: QL (O.J.), *R v MIP* [1998] N.B.J. No. 424 (N.B.Ct. Q.B. (T.D.)) online: QL (N.B.J.). (These cases deal with intimate violence against adult women). *R v LFW* [2000] S.C.J. No. 7 (S.C.C.), *R v. DWC* [2000] O.J. No. 3759 (Ont. C.A.) (Ont.C.A.) online: QL (O.J.), *R v CT* [2000] OJ No. 3759 (Ont. Sup. Ct of Justice), *R v. RLH* [2000], B.C.J. no. 441 (BCCA), *R v JWD* [2001] B.C.J. No. 793 (BC Prov. Ct), *R v. Bremner* [2000] B.C.J. No. 1096 (B.C.C.A.) online: QL (B.C.J.) (these cases deal with sexual violence against young people and children in positions of trust.).

CHAPTER FOUR: FEMINIST SUPPORT AND FEMINIST CRITIQUES: A LITERATURE REVIEW

As we have seen in Chapters Two and Three, there are diverse legal, social, historical, cultural and political foundations for building and understanding restorative justice projects in Canada. There is a similar diversity within feminist¹ scholarship on restorative justice. The following chapter will outline some of the basic schools of thought within such bodies of scholarship on restorative justice, in order to place my critiques in a feminist theoretical and practical context.

(a) Shades of Grey: In Support of Restorative Justice

There are a number of arenas of feminist support for restorative justice, and they fall along a spectrum. The first is unequivocal and strong, basing its insistence on prison abolition and the use of restorative justice in a gendered analysis of the mainstream criminal justice system in relation to women in conflict with the law. The second comes from prison abolitionists who believe that prioritizing a feminist ethic of caring in the community will go further to rehabilitate those who abuse women and children than incarceration and should be used in most, if not all crimes. The third comes from within the women's Aboriginal community, and is based on an analysis that sees an emphasis on culture, rather than gender, as the primary path to end colonial oppression. The final analysis is comprised of Aboriginal and non-Aboriginal feminists who have grave

¹ In this section I also refer to work by women who may not necessarily self-define as "feminist". They fall into this section of the paper because they reflect women-centered approaches to restorative justice rather than the label "feminist".

reservations regarding the use of restorative justice in cases of intimate abuse, but do support its limited use under certain, ideal conditions.²

(i) Restorative Justice and Women in Conflict with the Law

There is a significant body of international feminist scholarship on prison abolition in the context of women in conflict with the law. This movement is put into practice within such organizations as the Canadian Association of Elizabeth Fry Societies, which hopes to use restorative justice to keep women in conflict with the law out of prisons.

Feminists who work with and lobby for women in conflict with the law have adopted this approach worldwide. Their basic argument is that women who spend time in our prisons are usually non-violent, victims of sexual or physical abuse, and have suffered injustice at the hands of a male-dominated society and again at the hands of a male-dominated justice system. They argue that most women are criminalised for stepping outside of gender roles, for being poor, for being sexualized and for being abused.³ Their assertion is that these women are, in fact, victims of society, not predators upon it and should be given resources and support to build the non-violent lives they want, rather than being incarcerated and re-victimized further. Restorative justice offers an excellent solution, as

² This is a difficult distinction to make, and I have likely included some writers here who have spent more energy critiquing restorative justice than supporting it. I base this fairly arbitrary categorization on their final statements about restorative justice: if, given certain well defined, clearly laid out, ideal conditions, they would support it, I have included them here.

³ See for example: Anne Worrall, *Punishment in the Community: the Future of Criminal Justice* (London: Longman, 1997), H. Boritch, *Fallen Women: Female Crime and Criminal Justice In Canada* (Ontario: International Thompson Publishing, 1997) at 258, E. Comack, *Women In Trouble* (Halifax: Fernwood Publishing, 1996) at 126, P. Carlen, *Alternatives to Women's Imprisonment* (Buckingham: Open University Press, 1990), R. Immarigeon and M. Chesney-Lind, "Women's Prisons: Overcrowded and Overused" in R. Muraskin and T. Alleman eds. *It's a Crime: Women and Justice* (New Jersey: Prentice Hall, 1993) at 242.

due to the non- violent nature of the majority of the crimes committed by women⁴ many of the concerns around balancing community safety with restoration, which exist for male offenders, are significantly reduced. Serious questions of victim safety and dignity arise only in extremely rare cases.

(ii) Restorative Justice for All Offenders in All Cases

While most enthusiastic advocates of restorative justice, particularly Western models of restorative justice, do not claim to be feminists,⁵ there is a small body of scholarship within those social, political, religious and historical traditions that does claim the label feminist. They seek to support the use of restorative justice in all cases through the use of feminist theory and practice.

Both Aboriginal and Western models of restorative justice are unequivocally and enthusiastically supported in this manner, albeit with differing feminist arguments.

Feminist theory is used explicitly to support the use of sentencing circles in the Canadian context by Maureen Linker, an American feminist scholar, in her article, "Sentencing Circles and the Dilemma of Difference"⁶ Linker argues that "...sentencing circles, rather than compromising justice, actually correspond with a view of justice that is more

⁴ In 1996, men committed 86% of violent crime in Canada. Holly Johnson, *Dangerous Domains, Violence Against Women in Canada* (Toronto: Nelson Canada, 1996).

⁵ One of the most vocal and prolific scholars supporting restorative justice in cases of domestic violence is not a feminist. Helene Carbonatto is a New Zealand criminologist. See: Helene Carbonatto, "Expanding Intervention Options for Spousal Abuse: The Use of Restorative Justice" *Occasional Papers in Criminology New Series No. 4* Wellington, New Zealand, Institute of Criminology, Victoria University of Wellington (1998) and "The Criminal Justice Response to Domestic Violence in New Zealand" *Criminology Aotearoa/New Zealand: A Newsletter from the Institute of Criminology, Victoria University of Wellington*, No 10, 7-8.

⁶ Maureen Linker, "Sentencing Circles and the Dilemma of Difference" (1999) 42 *Crim. L. Q.* 116.

contextualised and egalitarian.”⁷ She applies Martha Minow’s premise of the “dilemmas of difference” to sentencing circles. Minow, an American feminist scholar suggests that within the legal system it is important to introduce “...the matter of social difference...”,⁸ allowing the unique and specific experiences of marginalized groups such as women and people of colour to be an important part of the decision-making process. By using this theory, Linker asserts, the outcome may not always be perfectly proportional to other, similar crimes, but it will be ‘fair’ within the experience of those involved. Linker applies this idea to sentencing circles, as a particular model of justice that can more fairly represent the experiences of the Aboriginal community. “ In the case of sentencing circles, the particular experiences of aboriginal people and their unique history with the legal system can assist in determining what perspectives should count and which proposals would be significant.”⁹

Although Linker makes an excellent point about the importance of the experiences of marginalized groups within the criminal justice system, she fails to make one important feminist connection. She views the Aboriginal ‘community’ as a homogenous whole who hold uniform views and will gain uniform benefit from restorative justice models. There is absolutely no reference to gendered issues within the Aboriginal community itself, and there is no mention whatsoever of Aboriginal women and *their* “ unique history with the legal system”. Aboriginal sentencing circles are simply set against the conventional justice system in a dichotomized way, with the ‘community’ approach of the sentencing circle being drawn as superior due to its cultural content.

⁷ *Ibid.* at 117.

⁸ *Ibid.* at 122.

⁹ Linker, *Supra* note 6 at 124.

The desire to see conventional and restorative justice models as dichotomous opposites is carried into the literature of other feminist restorative justice enthusiasts. Both M. Kay Harris, an American prison abolitionist, in her work “Moving into a New Millennium: Toward a Feminist Vision of Justice”,¹⁰ and Guy Masters and David Smith, American criminologists, in “Portia and Persephone: Thinking About Feeling in Criminal Justice”¹¹ rely heavily on gendered comparisons between conventional and restorative justice models.

Masters and Smith set up the contrast between restorative and conventional justice models in an explicitly gendered way, claiming that restorative justice represents feminist ethics¹² by being more ‘feminine’, maternal, soft and caring (represented by the mythical figure of Persephone); while conventional justice is more masculine, hard, and rational (Personified by Portia). They focus on victims, and the tendency of the ‘hard, masculine’ conventional justice system to revictimize them in the justice process.

Harris echoes these feminine and masculine personifications in her work. She asserts that “In the feminist view, felicity and harmony are regarded as the highest values.”¹³ She also relies on the feminist theories of Carol Gilligan to support the idea that even those

¹⁰ In H. Pepinsky, “Peacemaking in Criminology and Criminal Justice” in Pepinsky and Quinney eds., *Criminology as Peacemaking* (Indiana: Indiana University Press, 1991) at 83.

¹¹ (1998) 2 *Theoretical Criminology* 5.

¹² Specifically the feminist theories of Carol Gilligan in her book *In a Different Voice* (Cambridge: Harvard University Press, 1982). Gilligan conducted interview-based research showing that in making moral decisions men and women use different approaches. She concludes that although most people use a combination of both, men primarily employ a ‘justice orientation’, while women employ a ‘responsibility orientation’. F. Heidensohn, “Models of Justice: Portia or Persephone? Some Thoughts on Equality, Fairness and Gender in the Field of Criminal Justice” (1986) 14 *International Journal of the Sociology of Law* 287.

¹³ Harris, *Supra* note 10 at 88.

who commit violence against women and children should be cared for in a 'feminine', restorative way, not punished in the 'masculine' pattern by incarcerating them. Gilligan conducted feminist research to discern the ways in which men and women make moral or ethical choices, and concluded that women make these choices or relations in ways that differ from men. Harris describes these differences:

In a rights/justice orientation (male), morality is conceived as being tied to respect for rules. It is a mode of reasoning that reflects the imagery of hierarchy...It assumes a world comprised of separate individuals whose claims and interests fundamentally conflict and in which infringements on an individuals' rights can be controlled or redressed through rational and objective means deductible from logic and rules.

...

In a Care/response orientation (female) morality is conceived contextually and in terms of a network of interpersonal relationships and connection. This mode of reasoning reflects the imagery of a web, a non-hierarchical network of affiliation and mutuality. It assumes a world of interdependence and care among people...¹⁴

In the pieces by Harris and Masters and Smith, restorative justice practices are associated with the care/response orientation, and therefore with a feminist ethical response to social conflict. There are a number of problems with this direct association. First is a definitional issue. Both Harris and Masters and Smith seem to be using Gilligan's theories to indicate that the care/response orientation is superior to the rights/justice response, rather than different. The care/response orientation is further translated into a list of essentialised 'feminine' characteristics that are seen as 'better' than the masculine characteristics listed. These feminine characteristics are labeled, "maternal thinking",¹⁵

¹⁴ *Ibid.* at 89.

¹⁵ Masters and Smith, *Supra* note 11 at 7.

“humanitarian”,¹⁶ “distinctly feminine”,¹⁷ “loving justice”,¹⁸ and as being concerned with “empathy, compassion and loving.”¹⁹

In my opinion this erroneously translates Gilligan’s theory to mean that a ‘feminine’ way of resolving conflict is better because it is primarily defined by stereotypically ‘feminine’ notions of loving, nurturing, forgiving, while putting as aside as inferior (and ‘masculine’) notions of objectivity, fairness, rules or justice. While reconciliation and healing are important values in restorative justice, I think it is misleading to characterize criminal justice interventions between victims of intimate violence and their abusers as ‘loving’, or as requiring any party to demonstrate ‘maternal justice’. The values of justice and rights, vilified here as ‘masculine’ and inferior are important ingredients in restorative justice, particularly in cases that involve serious crimes or power imbalances. Healing and ‘maternal’ loving and caring for the offender must be balanced with a sense of justice and fairness for the victim.

From a feminist theory point of view the use of masculine and feminine stereotypes (here in the misapplication of Gilligan’s theory) is essentialising and, in my view, an unproductive way of understanding justice models. These characterizations rely on dangerous stereotypes about women, and ‘feminine’ behavior. A ‘model’ woman, for instance may be expected to fulfill her ‘feminine’ role by staying with and healing /caring for an abusive partner. To claim that women are ‘better’ because they are inherently more

¹⁶ *Ibid.* at 8.

¹⁷ *Ibid.* at 13.

¹⁸ *Ibid.* at 16.

¹⁹ Harris, *Supra* note 10 at 88.

caring and ethical becomes a double-edged sword: the reverse, of course, is that women are irrational and overly emotional, incapable of reasoned thought and moved by 'hysterical' forces beyond their control.

Second, the focus in these two articles on victims of crime and feminist theory is not played out in the reality of many restorative justice practices. Victims, in my opinion, are not the central concern of most restorative justice programs (although this concern varies from project to project) and the influence of feminist theory on restorative justice practice has been very minimal.

(iii) Culture and Gender: Aboriginal Women in Support of Restorative Justice

The Aboriginal women scholars and activists discussed in this segment have much in common culturally, theoretically and politically with the Aboriginal women discussed below who offer vocal critiques of restorative justice. The fundamental difference between these two groups is the primary lens through which they discuss Aboriginal justice initiatives. The Aboriginal women discussed here begin their journey towards justice on the path of culture, with the political, cultural and economic self-determination of Aboriginal peoples as their primary goal; and the role of women in that journey as an important consideration. Aboriginal culture (and sovereignty) is the primary tool to be used against colonialism. As discussed in Chapter Three the quest to incorporate an appropriate cultural *and* gender perspective into the debate about restorative justice is a difficult one. The scholars discussed in this segment, in many cases, prioritize a cultural

agenda over an agenda that incorporates gender equality *and* culture in the context of intimate violence.

Patricia Monture-Okanee and Mary Ellen Turpel have written extensively on the role of culture, community and Aboriginal women in criminal justice and self-government models. Both Turpel and Monture begin with a wholehearted rejection of the conventional justice system, carefully and informatively laying out the ongoing abuses against Aboriginal peoples within it.²⁰ Many of the abuses they list are the main motivating factors behind the inception of restorative justice models: over-incarceration of Aboriginal peoples, a racist justice system, and the overall devastating effects of colonialism. Monture and Turpel also strongly emphasize the fact that the conventional justice system is “completely alien”²¹ to Aboriginal peoples, in that it is based upon cultural, legal and moral understandings that are foreign to Aboriginal peoples. For these scholars and activists criminal justice reform is one small, but integral piece, of Aboriginal cultural, political and economic self-determination.²²

From a gendered perspective Turpel and Monture assert that prior to European contact and colonization, there was gender equality within Aboriginal communities, and that

²⁰ See for instance: Patricia Monture-Okanee and Mary Ellen Turpel, “Aboriginal Peoples and Canadian Criminal Law: Rethinking Justice” (1992) *U.B.C.L. Rev.* Special Edition 240 at 243-245. [hereinafter ‘Rethinking Justice’], and Mary Ellen Turpel, “Reflections on Thinking Concretely about Criminal Justice Reform” in Richard Gosse, James Youngblood Henderson and Roger Carter eds. *Continuing Poundmaker and Riel’s Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice* (Saskatoon: Purich, 1994) 207 at 211 [hereinafter “Thinking Concretely”], and Patricia Monture-Okanee, “Thinking About Aboriginal Justice: Myths and Revolution” in Richard Gosse, James Youngblood Henderson and Roger Carter eds., *Continuing Poundmaker and Riel’s Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice* (Saskatoon: Purich, 1994) 222 at 223 [hereinafter ‘Myths and Revolution’].

²¹ “Rethinking Justice”, *Supra* note 20 at 244 and “Myths and Revolution”, *Supra* note 20 at 223.

²² See for instance: “Rethinking Justice”, *Supra* note 20 at 263.

there was no intimate violence.²³ Both feel very certainly that European laws and abuses forced sexism, as a form of colonialism through the *Indian Act*, upon Aboriginal communities.²⁴ They feel that the equality Aboriginal women will re-obtain following Aboriginal sovereignty will be different in that it will be based upon pre-contact gender roles and contemporary manifestations of Aboriginal culture, not the Western models of equality sought by feminists.²⁵

In the contemporary context both Turpel and Monture express anger, and some confusion, regarding intimate violence in their communities, the role of women in self-government and justice initiatives, and the role of Aboriginal men in oppressing Aboriginal women. Their solutions to these problems are what differentiate them from the Aboriginal women discussed below.

Monture asserts that there is, indeed, a problem within Aboriginal communities with intimate violence, however it is no better or no worse than any other community.²⁶ Turpel recognizes also that there has been a "...devastation of the family unit".²⁷ Both scholars recognize that sexism has become a reality within Aboriginal communities, due to several

²³ "Rethinking Justice", *Supra* note 20 at 256, "Myths and Revolution", *Supra* note 20 at 227.

²⁴ "Rethinking Justice", *Supra* note 20 at 266.

²⁵ Patricia Monture- Angus, *Thunder in My Soul: a Mohawk Woman Speaks* (Halifax: Fernwood, 1995) at 229-230.

²⁶ "Myths and Revolution", *Supra* note 20 at 230, and Mary Ellen Turpel-Lafond, "Patriarchy and Paternalism: The Legacy of the Canadian State for First Nations Women" in Caroline Andrew and Sanda Rogers, *Women and the Canadian State* (Montreal and Kingston: McGill-Queen's University Press, 1997) 64 at 69-70. [hereinafter "Patriarchy and Paternalism"].

²⁷ "Rethinking Justice", *Supra* note 20 at 266.

hundred years of colonial oppression.²⁸ “ We must accept that in some circumstances it is no longer the descendants of the European settlers that oppress us, but it is Aboriginal men in our communities that now fulfill that role”.²⁹

In the context of justice initiatives both Turpel and Monture feel that women must fulfill their traditional roles, as teachers and leaders, and particularly that they must include men in this healing.³⁰ There is an emphasis on the importance of women’s role in building, administering and running justice initiatives.

“ Women’s involvement in justice work is not just a measure or standard of the success of justice initiatives, the Aboriginal women’s role is much more central and essential...When talks occur Among political leaders about the administration of justice or constitutional rights for self-government, you are not talking to the right people because you are not talking to the women. It was the women who had a fundamental role in making laws in our communities.”³¹

However, what happens when women, because of sexism within Aboriginal communities, are not given the opportunity to lead justice initiatives, but are sometimes revictimised by restorative justice initiatives? Turpel and Monture state that

“ No victim’s rights movement is necessary in an aboriginal system of justice because the victim would never be forgotten in the first place if the system was operating according to custom.”³² Despite the fact that Turpel warns us to “... be aware of contemporary

²⁸ See: Mary Ellen Turpel, “ Aboriginal People and the Canadian Charter of Rights and Freedoms; Contradictions and Challenges” (1989) 10 *Canadian Woman Studies* 49 at 51, and “ Patriarchy and Paternalism”, *Supra* note 26 at 69-71.

²⁹ “Thunder in My Soul”, *Supra* note 25 at 229.

³⁰ *Ibid.* at 240.

³¹ “Myths and Revolution”, *Supra* note 20 at 230. See also Canada, *Report of the Royal Commission on Aboriginal Peoples*, “ Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada” (Ottawa: Canada Communication Group, 1996) at 269 [hereinafter “Bridging the Cultural Divide”].

³² “Rethinking Justice”, *Supra* note 20 at 258.

realities when implementing aboriginal justice...”,³³ and to avoid romanticized ideas of “perfect cultural regimes”,³⁴ neither Monture nor Turpel offer any solutions for the current problems of some restorative justice programs that do not operate in a traditional way, with women and victims being excluded and undervalued. The Aboriginal women discussed below have researched examples of Aboriginal run and designed initiatives that have seen women and children re-victimised, they have become ‘invisible’ within their own communities.

In fact other Aboriginal women scholars have noted with concern some of the ways in which Monture comments on the dynamics of violence within Aboriginal communities. The Aboriginal Women’s Action Network points to the following quote by Monture as problematic stating that “ (t)his example does not in any way represent a critical analysis of the dynamics of violence and abuse and fails to account for victim safety.”³⁵

Remember our law is family law. Exercise your responsibilities. Do not trust colonial justice systems to solve those problems. Escaping the Canadian criminal justice system is as simple as *not* picking up the telephone to call the police if some harm has been done to you. This option involves thinking through what are good Aboriginal responses at the community level to wrongdoing.³⁶

Turpel and Monture’s primary goal is self-determination, and the ability of Aboriginal peoples to re-establish their own justice systems and gender equality within that context. The emphasis is on what *will* be the norm once those goals are established. It is incredibly important, of course, to allow Aboriginal communities to make their own

³³ “Thinking Concretely”, *Supra* note 20 at 209.

³⁴ *Ibid.* at 210.

³⁵ Kelly MacDonald, *Literature Review: Implications of Restorative Justice in Cases of Violence Against Aboriginal Women and Children* (Vancouver: AWAN, 2001) [hereinafter “Literature Review”] at 41.

³⁶ “Thunder in My Soul”, *Supra* note 25 at 260.

mistakes, to try new things, to be self-determined. It is also important, however, to support those groups within Aboriginal communities who have become marginalized due to the devastating effects of colonialism. It is dangerous, and naïve to believe that the power imbalances currently at play within these communities will 'go away' without a concerted effort in the context of self-government or an independent justice initiative. The current structures, funding, regulation and administration of some restorative justice programs are not providing the support necessary for vulnerable groups within the community, and it is imperative that this be recognized and dealt with openly and explicitly within the context of contemporary reality, not an imagined future.

(iv) Ambivalent Support

The following feminists are non-Aboriginal scholars and activists who have a keen sense of the racism and failure of the criminal justice system as discussed by Turpel and Monture. They express the tension between alleviating the oppression of the conventional justice system, particularly against marginalized groups such as Aboriginal men, and the need to protect women from violence in those same groups. Many of them share the visions of prison abolitionists, and desire to see a reduction in the use of incarceration which they view as a failure in almost every respect. All of these writers express some support for restorative justice in circumstances of intimate violence, but with *extreme caution*, a lengthy list of criteria and guidelines, and an emphasis on the varied forms of restorative justice, only a few of which are acceptable in cases of intimate violence. I will draw on these criteria in my own set of recommendations in Chapter Five.

The emphasis on prison abolition is clear in the work of Barbara Hudson,³⁷ a British criminologist, and Fay Honey Knopp,³⁸ an American and self-described Quaker abolitionist feminist. Both writers begin their discussion of restorative justice and intimate violence by emphasizing the futility, expense and overall failure of the conventional justice system, and incarceration particularly for offenders who come from marginalized groups.³⁹ They openly declare themselves to be prison abolitionists, with a goal of reducing the use of incarceration for every crime. Both scholars also have a clear understanding of the dynamics of intimate abuse, including how gendered power imbalances work within personal relationships, and the structural inequality that supports those gendered relationships.⁴⁰ They clearly state the difficulties associated with reconciling these two situations in a way that protects women, condemns intimate violence and yet avoids the use of incarceration wherever possible.⁴¹ Hudson ultimately supports diversion initiatives:

Whatever the difficulties, however, the core principles of abolitionism hold true: the punitive power of the state needs to be curbed not expanded; penal strategies will be directed predominantly at those who are powerless and marginalised in the wider society, even if they are more powerful than their victims in the individual crime relationship; and punishment is more likely to reinforce racism, sexism and other anti-social attitudes than to produce the chastened anti-racist and anti-sexist good citizen.⁴²

³⁷ Barbara Hudson, "Restorative Justice: the Challenge of Sexual and Racial Violence" (1998) 25 *Journal of Law and Society* 237.

³⁸ Fay Honey Knopp, "Community Solutions to Sexual Violence: Feminist/Abolitionist Perspectives" in H. Pepinsky, "Peacemaking in Criminology and Criminal Justice" in Pepinsky and Quinney, eds. *Criminology as Peacemaking* (Indiana: Indiana University Press, 1991) at 181.

³⁹ Hudson, *Supra* note 37 at 239-244, Knopp, *Supra* note 38 at 182-187.

⁴⁰ Hudson, *Supra* note 37 at 245-253, Knopp, *Supra* note 38 at 185.

⁴¹ Hudson, *Supra* note 37 at 254, Knopp, *Supra* note 38 at 185.

⁴² *Ibid.* at 255.

Knopp states that, "...some persons' behaviors would still present a threat to public and personal safety..."⁴³ and that she therefore advocates incarceration (or 'restraint') while such offenders are being treated. She also provides a list of criteria that restorative justice initiatives must meet including placing the safety of victims as the first priority (even over rehabilitation).⁴⁴

Carol LaPrairie, a Canadian criminologist who has conducted extensive research for the Department of Justice, and Kathleen Daly, an American feminist criminologist, have also set a list of safeguards and criteria that must be in place before they would endorse the use of certain restorative justice models. LaPrairie has written extensively on restorative justice, mainly in the context of Canada's Aboriginal peoples. In two recent works, "The 'New' Justice': Some Implications for Aboriginal Communities"⁴⁵ and "Altering Course: New Directions in Criminal Justice"⁴⁶ LaPrairie levels intelligent and well thought out criticisms at the use of sentencing circles, and other forms of 'community justice', and includes a focus on the vulnerability of marginalized victims. In the final analysis however, LaPrairie concludes that "...the benefits of community as a voluntary organization of individuals mobilized in their own interests in a mutually beneficial fashion, where empowered individuals can pursue their interests and practice independence are considerable."⁴⁷ She also, however, provides a full-page list of safeguards and criteria that would have to be met, with particular focus on supporting and protecting the interests of vulnerable victims. In the specific context of sentencing circles,

⁴³ Knopp, *Supra* note 38 at 185.

⁴⁴ *Ibid.*

⁴⁵ (1998) 1 *Can. J. Crim.* 1.

⁴⁶ (1995) 28 *Australia and New Zealand Journal of Criminology* 78.

⁴⁷ *Infra*, note 48 at 12.

she states that a lack of guidelines and protections are a serious detractor, and that these must be in place and functioning to ensure safe and participatory models.

In a later paper, “ Understanding Restorative Justice”,⁴⁸ she directly addresses the use of restorative justice in intimate violence cases, “ Given that the majority of victims of domestic violence do not want to go to court, and the primary objective of restorative justice is the restoration of relationships, it would seem eminently sensible to use restorative practices in cases of domestic violence.”⁴⁹ However she again notes that until “ greater assurances of victim treatment, protection and redressing of power imbalances between offender and victim have occurred it is unlikely to garner widespread support.”⁵⁰ Significantly she also points out that the model of restorative justice is an important factor, for instance a model that does not use face-to-face meetings between victim and offender may be less harmful, and more likely to meet her criteria.

Kathleen Daly shares this view. In her recent article “ Sexual Assault and Restorative Justice”⁵¹ she also addresses the potential use of various models of restorative justice, including those that limit or eliminate direct contact between victim and offender.

Although Daly states “ ...any crime may be amenable to a restorative justice process...”⁵² she qualifies this by saying that the model used is crucial, and that “ ...some harms will be less and more amenable to restorative justice processes.”⁵³ Daly also insists

⁴⁸ [Unpublished] 2001 archived with author.

⁴⁹ *Ibid.* at 19.

⁵⁰ *Ibid.* at 20.

⁵¹ In Heather Strang and John Braithwaite, eds. *Restorative Justice and Family Violence* (Oxford: Cambridge University Press, 2002) at 62.

⁵² *Ibid.* at 77.

⁵³ *Ibid.*

that for a face-to-face initiative to truly protect and support women victims "...feminists needed to be involved in the conferencing themselves, and in the training of coordinators to ensure that conference scenarios were subject to feminist interpretation."⁵⁴

Interestingly Daly has also co-written an article with John Braithwaite, one of the pioneers of Western restorative justice theory and practice that addresses intimate violence. "Masculinities, Violence and Communitarian Control"⁵⁵ constructs a pyramid design, representing the stages through which an abuser might pass in an idealized restorative justice regime. The plan is designed so that only the worst repeat offenders would receive a sentence of incarceration, and only after restorative justice measures had been taken.⁵⁶ Braithwaite and Daly also emphasize program criteria such as a recognition of the patterns and dangers of intimate violence, and the need to put in place resources for victims.⁵⁷ Although this earlier work shows a sensitivity to gender and violence issues, there are a number of flaws with the actual 'pyramid plan', including the fact that numerous offences may be required before the victim is physically protected from the abuser, and the proposal that the offender not be forced to enter a guilty plea in order to participate in the restorative portions of the program.

The scholars mentioned in the section above have a number of points in common. First they possess an academic and practical knowledge of the impact of intimate violence on the lives of women who experience it, and attempt to set parameters and rules that would compensate for those power imbalances. Second they share a desire to reduce the use of

⁵⁴ *Ibid* at 76.

⁵⁵ In Tim Newborn and Elizabeth Stanks, eds., *Just Boys Doing Business? Men, Masculinities and Crime* (London: Routledge, 1994) at 189.

⁵⁶ *Ibid* at 196.

⁵⁷ *Ibid* at 190-191.

incarceration. This cautious, measured, and race and gender-sensitive approach is promising, and represents a step forward from other, race and gender-neutral writing about restorative justice.

What I will demonstrate in Chapter Five, however, is that the ideal circumstances under which these cautiously optimistic writers would allow restorative justice do not, in some cases, exist in current Canadian restorative justice initiatives. I will also demonstrate that the Canadian government, and Canadians have not undertaken sufficient evaluations of those programs that do exist to ensure that these safeguards are, in fact, in place.

(b) No Safe Place: Feminist Critiques of Restorative Justice

As we have seen demonstrated above, there is a spectrum of support for restorative justice amongst feminists. Several of the writers included below categorically deny the usefulness of restorative justice in cases of crimes of intimate violence. Most of them, like their slightly more supportive counterparts discussed in the section immediately above, take issue not with the idea of restorative justice, but with the current manifestations of that theory in Canada.⁵⁸ In every case these writers feel that the conventional justice system has failed to address the needs of Aboriginal peoples (victims and offenders), and victims of intimate violence of every culture. Their particular concerns express, in some cases, a deeper cynicism than their contemporaries above

⁵⁸ Indeed, similar to the writers noted above, some of them would support restorative justice if it were more closely modeled on feminist theories and practices.

regarding the possibilities of restorative justice, and its ability to overcome the cycle of violence against women.

(i) Aboriginal Women and Restorative Justice: Gender Matters

The writers included in this section have much in common with other Aboriginal scholars such as Turpel and Monture. They all recognize the devastating role of colonization in the lives of Aboriginal peoples everywhere, they all recognize (to varying extents) the problem of intimate violence within their communities, and they all recognize that the conventional justice system has been a failure at every level for Aboriginal offenders and victims alike. What are different are the solutions these writers propose for these issues. Monture and Turpel emphasize self-determination as the key to ending the oppression of all Aboriginal peoples (including women). Writers such as Turpel and Monture have incorporated an important gender analysis to the extent that they remind us of a number of important gendered cultural differences that matter to all Aboriginal women. The first is that gender equality within Aboriginal communities will be distinct from that in mainstream society in that it must be based upon the true traditional roles of women as teachers and leaders. They remind us also that Aboriginal visions of equality may not exactly match those of anti-violence feminists, or feminist legal scholars, and that there must be Aboriginal autonomy and economic resources to pursue these distinct models. This is discussed, however, within the broader context of self-determination. They also, to a lesser extent, have discussed the unique types of discrimination and violence faced by Aboriginal women within and outside of their communities.

Writers such as Emma LaRoque and Fay Blaney (of the Aboriginal Women's Actions Network (AWAN)) see Aboriginal women's issues as distinct, and in need of distinct solutions that actively incorporate gender equality from every starting point. For them the goal of culturally distinct gender equality is a serious one, but must take second place to ensuring the immediate safety and dignity of Aboriginal women who are the victims of intimate violence.

For the most part they accept (with some reservations) the label feminist, and actively employ feminist theory and methodology alongside traditional cultural notions of gender roles and equality. Their work is much more focused on the particular oppressions suffered by Aboriginal women, and their analysis of restorative justice includes an in-depth gendered perspective as well as a cultural perspective. They are painfully aware of the colonial and patriarchal oppression of the Canadian State; but speak also of the oppression of the powerful male elite within their own communities.

Teresa Anne Nahanee, an Aboriginal legal scholar, sums up this sense of a dual struggle in her article, "Indian Women, Sex Equality and the Charter".⁵⁹

Some legal writers contend that it was the federal government alone, not First Nations governments, that discriminated against women. I would argue that as Indian women we need to remember our struggle, to document it, and to be conscious of our desire for sex equality under the rule of First Nations law developed for our communities.⁶⁰

⁵⁹ Teresa Anne Nahanee, "Indian Women, Sex Equality and the Charter" in Caroline Andrew and Sanda Rogers, *Women and the Canadian State* (Montreal and Kingston: McGill-Queen's University Press, 1997) 89.

⁶⁰ *Ibid.* at 90-91.

As discussed in Chapter Three Aboriginal women have written extensively about the need for a complex analysis of colonialism that responds not only to the oppression of the Canadian state, and Aboriginal women's desire to end that oppression, but to the current gendered power imbalances within their own communities. Nahanee, like many of the scholars discussed below, is fearful that an unexamined and singular emphasis on culture will result in criminal justice models that do not take into account gendered power imbalances. Instead she fears that this will privilege models that purport to be based on tradition merely because they have *some* cultural content, at the expense of marginalized members of the Aboriginal community. In her 1994 article, "Sexual Assault of Inuit Females: A Comment on 'Cultural Bias'" Nahanee reviews the sentencing judgments of numerous sexual assault cases in the Northwest Territories.⁶¹ Each of these cases involved Inuit men who used a 'cultural defense' (including the effects of colonialism in their lives), and had their sentence mitigated in crimes of sexual assault against Inuit women.⁶² Nahanee argues that using such cultural defenses to mitigate sentences makes the unacceptable suggestion that the sexual exploitation of young Inuit women is a cultural practice, and may be acceptable to the Inuit community. Nahanee suggests that such 'cultural defenses' should be set aside in favor of a more complex analysis, informed by a gender perspective, and that sexual assault be treated as the serious crime

⁶¹ In Julian Roberts and Renate Mohr eds. *Confronting Sexual Assault: A Decade of Legal and Social Change* (Toronto: University of Toronto Press, 1994) at 192. These were judgments of courts, and represent early exercise of judicial activism by white judiciary in introducing restorative justice concepts through common law. See Chapter Two for more details.

⁶² Another Aboriginal woman contemporaneously conducted a similar study with strikingly similar conclusions. See Margo Nightingale, "Judicial Attitudes and Differential Treatment: Native Women in Sexual Assault Cases." (1991) 23 *Ottawa L. Rev.* 71.

that it is, in any community.⁶³ Importantly Nahanee notes that Inuit women are entitled to equal protection and benefit of the law that protects all women against sexual assault. Emma LaRoque shares Nahanee's fears about the misuse of culture in cases of intimate violence and sexual assault. She refers to particular cases which she thinks demonstrate instances where Aboriginal men received mitigated sentences due to "...tortured and distorted notions of Aboriginal culture."⁶⁴ Emma LaRoque has written a number of scholarly works on Aboriginal justice initiatives.⁶⁵ In her work "Violence in Aboriginal Communities", LaRoque considers colonial oppression to be the cause of violence against women in Aboriginal communities,⁶⁶ and acknowledges the failures of the conventional justice system for both victims and offenders.⁶⁷ However, her emphasis, in discussing solutions is on the unique vulnerability and gendered oppression suffered by Aboriginal women within that context, and in mainstream society.⁶⁸

⁶³ Sherene Razack, a Canadian legal scholar and woman of color who writes extensively about race and gender issues sums up their analysis this way: "Both Nightingale and Nahanee write about cases in which cultural sensitivity relied on a highly gendered, unsophisticated view of culture." and, I would add, on an offender-centred view of the impact of colonization. Sherene Razack, *Looking White People in the Eye: Gender, Race and Culture in the Courtrooms and Classrooms* (Toronto: University of Toronto Press, 1999) at 72.

⁶⁴ Emma LaRoque, "Violence in Aboriginal Communities" in Mariana Valverde, Linda MacLeod, Kirsten Johnson, *Wife Assault and the Canadian Criminal Justice System: Issues and Policies* (Toronto: Centre of Criminology, 1995) 104 at 108.

⁶⁵ These include: "Violence in the Aboriginal Communities", *Supra* note 64, Royal Commission on Aboriginal Peoples, "Violence in Aboriginal Communities" in *National Roundtable on Aboriginal Health and Social Issues* (1994) at 73, and "Re-Examining Culturally Appropriate Models of Criminal Justice Applications" in M. Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect of Difference* (Vancouver: UBC Press, 1997) at 73.

⁶⁶ Notably she blames not only the historic oppression of the *Indian Act* and internalized Western social structures, but also the spread of pornography (at 111). She disagrees with Monture, stating that there was, in fact, pre-contact intimate abuse in Aboriginal communities (at 107). She also feels, unlike Monture and Turpel, that governments and powerful non-Aboriginal people must be involved in the solution to these problems, as they helped to create them. (at 108).

⁶⁷ "Violence in Aboriginal Communities" *Supra* note 64 at 105.

⁶⁸ *Ibid* at 109-110.

LaRoque believes that while Aboriginal men have certainly suffered as victims under colonial oppression, they must also take individual responsibility for their abusive actions.

Equally troubling is the...notion that men rape or assault because they were abused or are victims of society themselves. The implication is that as “victims” rapists and child molesters are not responsible for their actions and that therefore they should not be punished—or, if punished, ‘rehabilitation’ and their ‘victimization’ must take precedence over any consideration of the suffering or devastation they wreak with the real victims!⁶⁹

She recognizes the effects of colonialism, but wants assurances that, due to gendered power imbalances within Aboriginal communities, these problems are not being ‘solved’ at the expense of Aboriginal women and children. “ In my community we were all victims of colonization but we did not all turn to violence. Further, why should Aboriginal victims of Aboriginal violence bear the ultimate brunt of colonization/racism and negligence of the criminal justice system?”⁷⁰

LaRoque’s suggestions for reform are clear: they must include education and prevention, more support and treatment for ‘real’ victims, as well as harsher sentences and carceral rehabilitation for serious offences.⁷¹ She takes a hard line on punishment stating that short, lenient sentences “...make a mockery of all women...Those involved in gross and willful crimes should receive a lengthy jail sentence, and in specific cases, should be removed permanently from the community.”⁷² As for the use of restorative justice specifically (including conditional sentencing), she feels that it is appropriate only for

⁶⁹ *Ibid.* at 109.

⁷⁰ *Ibid.* at 122-23.

⁷¹ *Ibid.* at 118.

⁷² *Ibid.* at 116-17.

minor crimes, and that its use in cases of intimate violence is dangerous given the context of gendered power imbalances within Aboriginal communities, and a lack of guidelines.⁷³

The Aboriginal Women's Action Network (AWAN), a feminist Aboriginal women's group based in Vancouver, echoes LaRoque's rejection of restorative justice in crimes of intimate violence. AWAN has written extensively on restorative justice,⁷⁴ and has completed three parts of a five-part participatory action research project on restorative justice funded by the Law Foundation of British Columbia.⁷⁵ They have called for a moratorium on the use of restorative justice in cases of intimate violence, sexual assault and child abuse in British Columbia, and support such a moratorium nation wide.

AWAN, like other Aboriginal scholars and commentators discussed above, begin their analysis of restorative justice by discussing the impacts of colonialism on Aboriginal communities, with a focus on the specific impacts on Aboriginal women.⁷⁶ They emphasize the failure of the conventional justice system for all Aboriginal peoples, and for victims of violence particularly.⁷⁷ Like many Aboriginal scholars and activists they feel that a 'new justice' system of some description is necessary to ensure the survival

⁷³ *Ibid.* at 117. LaRoque provides specific examples of restorative justice interventions that she disagrees with, including an incest case dealt with by the Hollow Water Healing Circle. "Re-Examining Culturally appropriate Models", *Supra* note 65 at 75.

⁷⁴ McDonald, Literature Review, *Supra* note 35, and Wendy Stewart, Audrey Huntley and Fay Blaney, *The Implications of Restorative Justice for Aboriginal Women and Children Survivors of Violence: A Comparative overview of Five Communities in British Columbia* by (Vancouver: AWAN, 2001)[hereinafter "Journey for Justice"].

⁷⁵ AWAN has completed the literature review noted above, and as part of the World March of Women 2000 AWAN rafted the Fraser River from Prince George to Vancouver, BC, passing through nine Aboriginal communities. They held focus groups and rallies on the subject of restorative justice and intimate violence. The Journey for Justice Report is a written account and analysis of the journey. They have also held a provincial consultation for Aboriginal women on the subject of restorative justice, the results of which are contained in the Journey for Justice Report.

⁷⁶ "Literature Review", *Supra* note 35 at 14-18, and "Journey for Justice", *Supra* note 74 at 33-35.

⁷⁷ "Literature Review", *Supra* note 35 at 10-14.

and healing of Aboriginal communities, however it must be a model that puts the safety and empowerment of women and children as the first priority.⁷⁸

In her work Patricia Monture-Okanee refers to the Canadian Human Rights Commission findings that it is more likely for a First Nations person growing up in this country to go to jail than to University. Certainly for Aboriginal peoples, this is alarming, and thus alternatives to a system so obviously failing us are much needed. Whether Restorative Justice measures address such concerns in a safe way for all members of community, particularly those most marginalized within is, is certainly an open question.⁷⁹

It is imperative that on behalf of our children and future generations, solutions are sought which address the epidemic of violence. Aboriginal peoples and communities can no longer afford the loss of successive generations of children to dislocation, trauma and loss. AWAN members argue that solutions must be derived with the full participation of Aboriginal women and with paramount consideration given to the safety of women and children who are victims of violence.⁸⁰

AWAN's literature review and first hand research lead them to conclude that

"...restorative justice should not be used in cases of violence against women and children."⁸¹ AWAN's research shows a lack of safeguards for victims of intimate violence, and insufficient evaluation of current initiatives.⁸² They are also concerned about sexism and gendered power imbalances within Aboriginal communities,⁸³ victim's fears of retaliation from within their communities, and a lack of accountability and

⁷⁸ "Literature Review", *Supra* note 35 at 17-18, and "Journey for Justice", *Supra* note 74 at 15. Unlike Monture and Turpel, AWAN feels that there is a particular prevalence of violence against women in Aboriginal communities. "Literature Review", *Supra* note 35 at 16.

⁷⁹ "Journey for Justice", *Supra* note 74 at 15.

⁸⁰ "Literature Review", *Supra* note 35 at 18.

⁸¹ "Journey for Justice", *Supra* note 74 at 60.

⁸² "Literature Review", *Supra* note 35 at 23.

⁸³ "Journey for Justice", *Supra* note 74 at 46.

transparency within programs.⁸⁴ They provide evidence from their research of victim coercion, and specific instances of failed initiatives that have re-victimised women.⁸⁵

Pauktuutit, an organization representing Inuit women in Canada has written several pieces that reflect their concerns about restorative justice practices in their communities. These include a 1995 report for the federal government entitled “Setting Standards First. Community-based Justice and Corrections in Inuit Canada”,⁸⁶ an open letter to the legislature of Nunavut,⁸⁷ and several pieces prepared for scholarly conferences and publication by their staff lawyer, Mary Crnkovich.⁸⁸ This organization has also launched a constitutional challenge to ‘traditional sentencing practices’ that result in lenient sentences for those who commit crimes of intimate abuse and sexual assault in Aboriginal communities.⁸⁹

Similar to AWAN, Pauktuutit’s concerns about restorative justice begin from the perspective of victims of intimate violence in their communities. “Issues related to violence against women and children have repeatedly been identified as among the most

⁸⁴ *Ibid.* at 47-48.

⁸⁵ AWAN’s finding will be discussed more extensively in Chapter Five.

⁸⁶ (Ottawa: Pauktuutit, 1995) [hereinafter “Setting Standards”].

⁸⁷ Veronica Dewar, President of Pauktuutit Inuit Women’s Association of Canada, Letter to Premier Okalik of Nunavut, (2000) 20 *Canadian Woman Studies* 191. This letter was in response to a charge of sexual assault against a government Minister who was later given a standing ovation in the legislature, and received what they perceived to be a lenient sentence.

⁸⁸ Mary Crnkovich, “The Role of the Victim in the Criminal Justice System- Circle Sentencing in Inuit Communities” (Canadian Institute for the Administration of Justice Conference, Banff Alberta, October 11-14, 1995)[unpublished][hereinafter “The Role of the Victim in the Criminal Justice System”], M. Crnkovich, “Report on the Circle Sentencing in Kangiqsujuaq” Prepared for Pauktuutit and Department of Justice, Canada, 1993 [hereinafter “Kangiqsujuaq”], and M. Crnkovich, “A Sentencing Circle” (1996) 36 *Journal of Legal Pluralism* 159.

⁸⁹ Nahanee, “Sexual Assault of Inuit Females”, *Supra* note 61 at 195. See also “Setting Standards”, *Supra* note 86 at 1.

serious problems in contemporary Inuit families and communities...”⁹⁰ They also recognize however that “ Inuit women have long argued that the (conventional justice system) not only fails them, it causes them harm.”⁹¹ Their major concerns stem from setting standards of safety in the community *before* community justice initiatives are embraced to ensure that all members of the community benefit from them.

This is due to a number of concerns expressed by other Aboriginal women and groups. Pauktuutit feels that, amongst the male leadership of their communities, the biggest impact of colonialism has been internalized sexism and corruption.⁹² They fear that ‘community’ treatment is dominated by those who have taken an active role in normalizing violence against women within their communities, and that generally there is insufficient understanding of the dynamics of intimate abuse within Inuit communities.⁹³ They provide a lengthy, well-documented example of a restorative justice intervention which failed an Inuit woman victim of intimate violence,⁹⁴ and overall indicate that the current manifestations of restorative justice in their communities favour the rehabilitation of the offender over the safety and dignity of the victim.⁹⁵ Much like their Aboriginal counterparts in British Columbia, Pauktuutit wants to see an end to restorative justice in their communities until there is full community participation (including women), full support for the victims of violence, sufficient resources and adequate infrastructure.⁹⁶

⁹⁰ Letter, *Supra* note 87 at 192.

⁹¹ “Setting Standards”, *Supra* note 86 at 2.

⁹² “ The Role of the Victim in the Criminal Justice System”, *Supra* note 88 at 17.

⁹³ “Kangijsujaq”, *Supra* note 88 at 15.

⁹⁴ “A Sentencing Circle”, *Supra* note 88.

⁹⁵ Letter, *Supra* note 87 at 192.

⁹⁶ “ The Role of the Victim in the Criminal Justice System”, *Supra* note 88 at 24, and “ Setting Standards” *Supra* note 86 at 5-7.

Until then they feel that their communities are not yet equipped or ready to provide safe restorative justice interventions.⁹⁷

Vancouver Island's Naukana Native Women's Association, representing Saanich Peninsula Aboriginal women, has also rejected a particular local restorative justice project that deals with intimate violence. They fear for their safety and the safety of their children as "...aboriginal male sex offenders are roaming free of punishment in aboriginal communities after being charged and convicted for violent offences against women and children".⁹⁸ This Aboriginal women's group went public with their concerns, which include the exclusion of Aboriginal women from the design and implementation of the project, unsafe treatment programs that place women and children at risk within their communities, the involvement of Aboriginal men who do not belong to their community and a lack of expertise in dealing with intimate violence.⁹⁹ The operation of this Vancouver Island restorative justice project was eventually suspended. A review report of the project following its suspension indicated that it failed because of a serious lack of community consultation prior to its inception. The report suggests that this should have taken place, involving a broad range of stakeholders such as Aboriginal women, victims, offenders, advocacy groups and service providers.¹⁰⁰

⁹⁷ "Kangijsujuaq", *Supra* note 88 at 15.

⁹⁸ Holly Nathan, "Native Women Demand End to Justice Project" *Times Colonist* (January 11, 1993) A1/A2 at A1.

⁹⁹ Other Aboriginal groups that are not woman-centred or feminist have also rejected restorative justice initiatives on similar grounds. See: Robert Matas, "Send Native to Jail, Chief Says" *Globe and Mail* (March 17, 2001) A15.

¹⁰⁰ Sheila Clarke and Associates, *Building the Bridge, A Review of the South Vancouver Island Justice Education Project* (Vancouver: February, 1995).

(ii) The Feminist Anti-Violence Movement and Restorative Justice: Distrust

Even Rupert Ross, one of Canada's most vocal and oft quoted advocates for restorative justice admits "...you can't bring together people from situations of long-term power imbalances, as in domestic violence, without major separate therapy beforehand."¹⁰¹ It is this long-term power imbalance that many anti-violence feminist scholars and advocates cite as a major concern in allowing cases of intimate violence to be dealt with by restorative justice models. These concerns are particularly applicable to models that allow for face-to-face, mediation type interaction (such as victim-offender mediation) and those that require the victim to voice her opinion in the presence of her abuser, especially about sentencing (such as sentencing circles).

The scholars, groups and advocates discussed below are non-Aboriginal feminists who have dedicated their academic and professional lives to the eradication of all forms of violence against women.¹⁰² Their study of restorative justice is through this lens, and prioritizes above all else the safety and dignity of women victims. All aspects of restorative justice policy and practice are examined, in the first instance, from the point of view of the victim. Like their counterparts discussed above many of these self-described feminists have an excellent understanding of the impacts of racism and colonialism in the

¹⁰¹ Ellie Teshner, "The Case for Sentencing Circles" *The Toronto Star* (Sept. 19, 1996) A2.

¹⁰² Not all feminist anti-violence organizations are against the use of restorative justice in cases of intimate violence. For instance the Victoria Family Violence Prevention Society released daft guidelines in January of 1997 that supported the use of restorative justice in such cases. The guidelines were, however, based upon the assumption that the provincial government, the Crown Attorney's office and Probation services would allow women's advocates to have significant input into the criteria and screening processes for these programs, a prerequisite which has not come to pass. See Chapter Three.

lives of Aboriginal peoples, such as over representation in Canada's prisons. They also have a firm grasp on the ways in which the criminal justice system has failed by alienating and victimizing both Aboriginal peoples and victims of intimate violence from all cultures.

There are a number of feminist anti-violence groups in British Columbia and across Canada who have written scholarly and advocacy materials concerning the use of restorative justice in crimes of intimate violence. These include The BC/ Yukon Society of Transition Houses,¹⁰³ The Newfoundland and Labrador Provincial Association Against Family Violence¹⁰⁴ the National Action Committee on the Status of Women and their extensive allies¹⁰⁵ and the BC Association of Specialized Victim Assistance and Counseling Programs.¹⁰⁶ All of these groups have concluded either that "Under no circumstances should restorative justice and alternative measures be applied to offences involving violence against women and children",¹⁰⁷ or that it should proceed in rare cases only under the most rigorous scrutiny, and after meeting extensive criteria. Among the numerous reasons given for this position¹⁰⁸ concerns regarding gendered power imbalances (and restorative justice program's inability to recognize and mitigate them)

¹⁰³ Valerie Oglov, "Restorative Justice Reforms to the Criminal Justice System" (Vancouver: BC/Yukon Society of Transition Houses, Sept. 1997).

¹⁰⁴ "Making it Safe: Women, Restorative Justice and Alternative Dispute Resolution" (St John's: NLPAAFV, 2000), and Newfoundland and Labrador Provincial Association Against Family Violence, "Keeping and Open Mind: A Look at Gender Inclusive Analysis, Restorative Justice and Alternative Dispute Resolution" (St. John's: Provincial Association Against Family Violence, 1999).

¹⁰⁵ Letter to the Honorable Ujjal Doosanjh from Harjit Kaur, Chair, BC-NAC Anti-Violence Subcommittee, June 18, 1997. The letter is co-signed by the following groups in British Columbia: AWAN, Abbotsford Transition House, Battered Women's Support Services, Carnegie Center, FREDA Center for Research on Violence against Women and Children, Vancouver Rape Relief and Women's Shelter, Vancouver Status of Women, WAVAW/Rape Crisis Centre.

¹⁰⁶ Sandra Goundry, "Restorative Justice and Criminal Justice Reform in British Columbia: Identifying some Preliminary Questions and Concerns" (Vancouver: BCASVACP, 1998).

¹⁰⁷ Oglov, *Supra* note 103 at 4.

¹⁰⁸ Most of which will be discussed in detail in Chapter Five.

within abusive intimate relationships take priority. The BC/Yukon Association of Transition Houses fears that many restorative justice models may "...require women to negotiate for their safety."¹⁰⁹

Other concerns include an overall lack of consultation with women and women's groups in planning and implementing initiatives,¹¹⁰ a general lack of gender and diversity analysis in planning and evaluating initiatives,¹¹¹ a perception that in many cases restorative justice is culturally inappropriate,¹¹² that overall there is a serious lack of transparency and accountability in the planning and execution of restorative justice programs¹¹³ and that there is a serious lack of research, resources, proper training and funding.¹¹⁴

Individual scholars have also concluded that restorative justice is inappropriate in almost all cases of intimate violence. Ruth Busch, a New Zealand feminist legal scholar and experienced mediator and Stephen Hooper, a New Zealand feminist legal scholar and experienced mediator, feel that restorative justice is unsuitable for almost all cases of domestic violence because of so many models' inability to address gendered power imbalances.¹¹⁵ They fear that restorative justice

¹⁰⁹ Oglov, *Supra* note 103 at 6.

¹¹⁰ Oglov, *Supra* note 103 at 8, Goundry, *Supra* note 106 at 2, and NAC, *Supra* note 105 at 1.

¹¹¹ Newfoundland and Labrador, *Supra* note 104 at 11 and 6 respectively, and Goundry, *Supra* note 106 at 2.

¹¹² Oglov, *Supra* note 106 at 10, and NAC, *Supra* note 105 at 2.

¹¹³ Goundry, *Supra* note 106 at 14, and Oglov, *Supra* note 103 at 11.

¹¹⁴ Goundry, *Supra* note 106 at 12, NAC, *Supra* note 105 at 3, Newfoundland and Labrador, *Supra* note 104 at 19, and Oglov, *Supra* note 103 at 9.

¹¹⁵ In both articles they provide numerous examples of initiatives and individual cases that have failed to adequately address this issue. Ruth Busch and Stephen Hooper, "Domestic Violence and the Restorative Justice Initiatives: the Risks of a New Panacea" (1996) 4 *Waikato Law Review* 188, and Ruth Busch,

...carried out against a backdrop of domestic violence ...requires the victim to negotiate effectively on her own behalf although her experiences have in all likelihood led her to renounce or adapt her needs in an attempt to avoid repetitions of past violence. There is a strong likelihood, therefore, that a battered woman will negotiate for what she thinks she can get, rather than press for more major changes on the part of the offender.¹¹⁶

Busch and Hooper also fear that alternatives to the conventional court process is a step towards privatizing abuse that feminists have fought long and hard to have brought into the public sphere, and that by ghettoizing this crime as a 'family matter' once again, it decriminalizes and de-emphasizes the criminal nature and seriousness of the intimate violence.¹¹⁷

Julie Stubbs, an Australian feminist legal scholar, shares many of the concerns expressed by Busch and Hooper. In her work " 'Communitarian' Conferencing and Violence Against Women: A Cautionary Note"¹¹⁸ Stubbs cites the immense influence of gendered power imbalances to silence a victim of intimate violence, even in models where support is available. "A woman who has been living in a violent relationship may well become very practiced at 'not saying too much' ...feminist critiques of mediation have drawn attention to the dangers of assuming that a woman who had been the target of violence is able to assert her own needs, and promote her own interests in the presence of the person

"Domestic Violence and Restorative Justice initiatives: Who Pays if We Get it Wrong?" in Heather Strang and John Braithwaite, eds. *Restorative Justice and Family Violence* (Oxford: Cambridge University Press, 2002) at 223.

¹¹⁶ Busch and Hooper, *Ibid.* at 106, and Busch, *Ibid.* at 225.

¹¹⁷ Busch and Hooper, *Ibid.* at 111. Elizabeth Sheehy, a Canadian feminist legal scholar and anti-violence advocate agrees. Although she appears ambivalent regarding restorative justice per se, she feels that the adjudication of intimate violence offences is necessary. Elizabeth Sheehy, "Legal Responses to Violence Against Women in Canada" (1999) 19 *Canadian Woman Studies* 65 at 68.

¹¹⁸ In Mariana Valverde, Linda MacLeod, Kirsten Johnson, *Wife Assault and the Canadian Criminal Justice System: Issues and Policies* (Toronto: Centre of Criminology, 1995) at 260.

who has perpetrated that violence.”¹¹⁹ In the broader picture, Stubbs expresses concern over the discretionary role of the police in charging or diverting cases of intimate violence, and the fact that some restorative justice models may assume a consensus of values and level of knowledge between participants, and amongst the larger community (including the police) around intimate violence that does not exist.¹²⁰

The final two writers that I will include here are first and foremost feminist community activists, and share a serious desire to end violence against women. They also share a common vision of the underlying causes of violence against women: the social, economic and political inequality of women. They wish to see restorative justice initiatives that can address these issues for victims of violence, however they do not feel that contemporary manifestations of restorative justice accomplish this.

Kim Pate, Executive Director of the Canadian Association of Elizabeth Fry Societies is a feminist lawyer and prisoners rights activist. Her concerns about restorative justice go to the foundations of any justice model. In her piece “ This Woman’s Perspective on Justice. Restorative? Retributive? How About Redistributive?” she prioritizes the systemic problems of racism, sexism, poverty and discrimination.¹²¹ Pate asserts that although prisons are repressive and damaging “...most alternatives are built upon male-based

¹¹⁹ *Ibid.* at 281.

¹²⁰ *Ibid.* at 278.

¹²¹ Kim Pate, “ This Woman’s Perspective on Justice. Restorative? Retributive? How About Redistributive?” (1994) 5 *Journal of Prisoners on Prisons* 60 at 60.

norms and rules which ignore women's realities. Instead, they tend to systematically reinforce women's dependence on and subjugation by men."¹²²

Pate emphasizes that the structural inequities that exist in society, and are reflected in the conventional justice system must not be replicated in a "new" justice model.

I have come to ever more seriously question the validity of merely removing our current criminal justice system, only to replace it with other models, particularly models that do not address the sorts of systematic biases highlighted earlier. New models with old philosophical roots will not a just society create, nor justice restore... If we merely impose our values and expectations on others, we run the risk of imposing, albeit unintentionally or out of ignorance, further punitive approaches.¹²³

Lee Lakeman, in her article "Why Law and Order Cannot End Violence Against Women and Why the Development of Women's (Social, Economic, Political and Civil) Rights Might"¹²⁴ also emphasizes the inability of the current 'law and order' criminal justice system to end violence against women. Instead it is used to perpetuate "the patriarchal order in which rich dominates poor and white dominates non-white and men dominates women."¹²⁵ She also feels that restorative justice, as it is currently manifested, is an insufficient response. Although initially the idea of restorative justice seemed an appealing one that feminists could agree with, in practice "none of these programs deal positively with the systematic nature or impact of violence...usually one woman or child is left to negotiate what they can from get from each attacking man. The imbalance would be corrupt even if no violence were involved."¹²⁶

¹²² *Ibid.* at 61.

¹²³ *Ibid.* at 63.

¹²⁴ (2000) 20 *Canadian Woman Studies* 24.

¹²⁵ *Ibid.* at 28.

¹²⁶ *Ibid.* at 33.

My own observations and recommendations in Chapter Five are informed by the feminist critiques of both Aboriginal women, and the women's anti-violence movement. Their emphasis on gender, in any cultural context, is the most sound theoretical approach to take in order to ensure the safety and dignity of victims of intimate violence in restorative justice projects.

CHAPTER FIVE: THE CONSEQUENCES OF GETTING IT WRONG: RESTORATIVE JUSTICE AND INTIMATE VIOLENCE

The primary reason for paying attention to, and in some cases prioritizing, victims of intimate violence in this thesis is that there is so much at stake if their needs are marginalized or ignored. Women who are victims of intimate violence and remain unprotected are vulnerable to being battered, sexually assaulted, and killed.¹ It is not the offender or the community who pay the price if restorative justice fails, it is the individual victim, and women as a marginalized group. Aside from physical injury victims may suffer humiliation, economic loss, and emotional harm from unchecked abuse. If women are revictimised in restorative justice initiatives, those initiatives will have failed, leaving victims without even the minimal protection provided for them by the conventional justice system.

Overall the literature on restorative justice² discusses the problems and promise of these models in gender-neutral terms. In my opinion there is little or no recognition or discussion of the systemic discrimination and disadvantage faced by all women, and serious lack of analysis of the circumstances of more marginalized women. The gendered analysis which follows in this chapter seeks to fill some of the gaps in the literature. Restorative justice principles are presumed to apply to everyone in an equal way, providing equal benefit and advantage to all who participate. The reality of the position of Canadian women in the home, social, economic, and political spheres belies this formal equality approach. In order for restorative justice to effectively address and

¹ See for instance: Pauktuutit Inuit Women's Association, "Report on the Death of Deidre Michelin" in Pauktuutit, *Inuit Women and Justice: Progress Report Number One* (Ottawa: Pauktuutit, 1994) 32.

² Excluding the relatively small body of feminist literature mentioned in the previous chapter.

eliminate systematic gender inequality as it manifests itself in practice, this inequality must be explicitly acknowledged, and strategies developed with diverse women to create models that move progressively towards substantive equality. Intimate violence is a gendered issue, and requires a consciously gendered approach to solutions in any criminal justice model. The following chapter draws attention to concerns, and some potential solutions to these concerns that address the needs of victims of intimate violence generally. This chapter is also intended in part to provide guidance on how Aboriginal justice models can provide sufficient consideration to Aboriginal victims of intimate violence in relation to *their* experiences with colonialism, gender, race, and cultural oppression, as mandated by the Supreme Court of Canada for Aboriginal offenders in the *Gladue* case.

This chapter consists of three parts. The first is a brief re-examination of the goals and claims of restorative justice rhetoric, and the promise that this may have for some victims of intimate violence. The second is an examination of some of the problems with restorative justice initiatives in relation to victims of intimate violence as I see them, which have not been explored in previous chapters. This work is based on the work of feminist researchers and activists, and from my own observations and research. The third is my conclusions regarding the use of restorative justice in cases of intimate violence. The section includes a set of recommendations for reform for some existing restorative justice models. In each section the needs and experiences of victims of intimate violence, as informed by their social location, will be taken into account as the primary tool of evaluation and discussion.

(a) The Promises and Promise of Restorative Justice

As we have seen in Chapter Two, both schools of restorative justice in use in Canada promise to accomplish many things for victims of crime. Restorative justice rhetoric emphasizes equally the importance of healing the victim, the offender and the community, and confidently states that this is achievable. Some restorative justice discourse, in fact, focuses on victims as the most important element of the process, and promises to provide them with participation, empowerment and healing that the conventional system cannot.

An overarching goal of both schools of restorative justice is to end social injustices as they are perpetuated or created by the conventional justice system. This is to be accomplished, in part, by reducing the use of incarceration which is viewed in most (if not all) cases as more harmful than helpful. A guiding principle in crafting restorative justice models that can help end social injustice is flexibility. This means that for each victim, offender and community there may be a different, more individualized solution to a problem that takes into account the experiences and needs of these participants.

For Aboriginal women restorative justice approaches purport to provide a culturally appropriate, traditional response to crime, and a way of starting the healing following decades of colonialism. Aboriginal justice initiatives promise to heal the victim, the offender and the community in a holistic way, meeting needs that the conventional

criminal justice system has not been able to. In fact, the conventional criminal justice system is seen as damaging to Aboriginal victims due to its systemic racism, and disregard for their safety. Aboriginal justice is also seen as an important aspect of Aboriginal self-determination.

Restorative justice, in theory, sounds like an excellent alternative to the conventional criminal justice system for victims of intimate violence. The goals espoused by restorative justice advocates also fall squarely within my feminist agenda of addressing the needs of victims of intimate violence. The conventional criminal justice system, by its very construct holds very little for such victims beyond the satisfaction of punishment, specific and general deterrence, and a hope of treatment for abusers while incarcerated. Victim impact statements³ and criminal victim compensation⁴ offer some added level of satisfaction, however the difficulties faced by victims of intimate violence in the conventional justice system are well documented.⁵

The promise of restorative justice in some cases, if it is executed carefully, is that it may provide opportunities for input, safety, resources and healing for victims of intimate violence that the conventional justice system does not. In Canada, however, as outlined in Chapter Three, restorative justice is not a hypothetical proposition, nor is the role of

³ Pauktuutit Inuit Women's Association, "Victim Impact Statements and the Role of Inuit Women in the NWT Justice System" in Pauktuutit, *Inuit Women and Justice: Progress Report Number One* (Ottawa: Pauktuutit, 1994) 32

⁴ Wanda Weigers, "Compensation for Wife Abuse: Empowering Victims?" (1994) 28 *U.B.C.L.Rev.* 274.

⁵ See for instance: Annalise Acorn, *Domestic Abuse: Toward an Effective Response- Report for Discussion No. 15* (Edmonton: Alberta Law Reform Commission, 1995), Dawn Currie and Brian MacLean, "Women, Men, and Police: Losing the Fight Against Wife Battery in Canada" in Dawn Currie and Brian MacLean, eds., *Re-Thinking the Administration of Justice* (Halifax, Fernwood Press, 1992) 251, and Raminder Dosanjh, Surinder Deo, and Surjeet Sidhu, "Spousal Abuse: Experiences of Fifteen South Asian Canadian Women" in Mary Russel and Jill Hightower, eds., *Stopping the Violence: Changing Families, Changing Futures* (Vancouver: BC Institute of Family Violence, 1996) 32.

victims of intimate violence. Against the failures of the conventional justice system "...there is a strong temptation to look on any change as an improvement."⁶ When the consequences of failure are so high, it is imperative that these new models provide not only the promises outlined above, but basic levels of safety and dignity. The following segment will examine some of the real problems that have been associated with restorative justice initiatives in Canada which undermine more idealized notions of what restorative justice can do for victims of intimate violence.

(b) The Problems with Restorative Justice

(i) Systemic Barriers

A. Normalised violence

As outlined in Chapter One the women's anti-violence movement has been active for over twenty years in ensuring that intimate violence is taken seriously as a crime, and not considered a non-criminal, 'private' family dispute. High rates of intimate violence in Canada indicate that, in some quarters, woman abuse is still considered acceptable, or at least non-criminal behavior. When such anti-social behavior becomes part of the fabric of society, it can become 'normalized', meaning that except in extreme cases intimate violence is regarded as a fact of life, something that happens to everyone, something that isn't a 'big deal'. In such circumstances the gendered aspect of the crime is also submerged, making it a 'family' problem that the couple must work out in 'private',

⁶ Pauktuutit, "Setting Standards First: Community-based Justice and Corrections in Inuit Canada" (Ottawa: Pauktuutit, 1995) at 5.

rather than a criminal offence most often perpetrated against women as a means of social control by men.⁷

Several Aboriginal and non-Aboriginal scholars⁸ have identified normalizing intimate violence as a particular problem in some Aboriginal communities, where rates of abuse are exceptionally high and the effects of colonialism particularly devastating. Kelly MacDonald, an Aboriginal lawyer and legal scholar says this may result “...in a lack of seriousness being attributed to crimes of violence which in turn is a major impediment to addressing the social consequences of violence in Aboriginal communities.”⁹ One particularly striking and well-documented example is from a recent case study by Joan Ryan and Brian Calliou entitled “ Aboriginal Restorative Justice Alternatives: Two Case Studies”. In the community described below there has been some attempt to begin a restorative justice initiative, but it has not yet become a reality. The difficulties Ryan outlines in the following quote are manifested in the community during the regular court process.

⁷ Feminist researchers Anne McGillivray and Brenda Comasky capture the numbing effects on communities where intimate violence is normalized in their book *Black Eyes all of the Time Intimate Violence, Aboriginal Women and the Justice System* (Toronto: University of Toronto Press, 1999). They include, as the frontispiece the following quote from an Aboriginal woman: “ I just think it’s a normal life to live like that, black eyes, all of the time. I go out in the store like that. I didn’t care-it’s a life...I was just black and blue, all the time.”

⁸ See: Ruth Busch and Stephen Hooper, “ Domestic Violence and the Restorative Justice Initiatives: the Risks of a New Panacea.”(1996) 4 *Waikato Law Review* 188 at 189, McGillivray and Comasky, *Ibid.* at 8, Jocelyn Proulx and Sharon Perrault, *No Place for Violence: Canadian Aboriginal Alternatives* (Halifax, Fernwood, 2000) at 122, Canada, *Report of the Royal Commission on Aboriginal Peoples*, “ Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada” (Ottawa: Canada Communication Group, 1996)[hereinafter “Bridging the Cultural Divide”] at 269 and 274, and T. Nahanee, “ Gorilla in Our Midst: Aboriginal Women and the Inhumanity of the Canadian Criminal Justice System” (1995)(Masters in Law Thesis) at 63.

⁹ Kelly MacDonald, “ Literature Review: Implications of Restorative Justice in Cases of Violence Against Aboriginal Women and Children” (Vancouver: Aboriginal Women’s Action Network, 2001) at 36 [hereinafter “Literature Review”]. The differences in opinion regarding intimate violence between generations is also a potential problem in community projects involving Elders. See: “Bridging the Cultural Divide”, *Supra* note 8 at 272.

“...some community values re-victimize women in cases where abuse of women is seen as normative. No Dogrib man has ever been convicted on sexual assault by a Dogrib jury. In Wha Ti, even sexual assaults against female children have not resulted in convictions. The reasons for this are not clear. It seems contradictory that a society that in traditional times protected women and young girls from rape, sexual assault and incest by banishing offenders from the community provides no protection to them whatever. Informal discussion in Wha Ti on the topic indicate that some sexual assaults and incest happen because the men were abused themselves in residential school. Older women suggest that sometimes younger women “ask for it” while others say that young women don’t respect or ‘follow’ the men properly and thus get into trouble. Others say men are entitled to sex and some say such assaults only take place when men and boys are abusing alcohol.

During the time I was in Wha Ti in the 1990’s I found myself compelled to leave the community twice; the first occasion was at the time of the winter festival when the community was full of alcohol and I knew there would be sexual assaults and that I could offer no protection to young women. The second time was during the trial of a young 14 year old girl¹⁰ and her father on a charge of incest. I knew both well and I could not handle the gossip and discussion that was on going in the community blaming the girl. I knew the girl had disclosed in order to protect her younger sister. The father was acquitted. Both men and women were his character witnesses.¹¹

As we have seen in Chapter Two, community standards and participation are the fundamental building blocks of restorative justice theory. Part of the intended effectiveness of restorative justice is that an offender will feel shame and remorse when a community of those who care about him make him accountable for his behavior, and show him support in ending those behaviors. Community consensus on what constitutes anti-social behavior, then, is integral to success. I believe that community standards regarding the seriousness, and gendered nature of intimate violence are far from universal. There is still a tendency, across cultures, to minimize or normalize intimate

¹⁰ Note the interesting choice of words here: the victim was ‘on trial’.

¹¹ Joan Ryan and Brian Calliou, “ Aboriginal Restorative Justice Alternatives: Two Case Studies” ((Ottawa: Law Commission of Canada, 2002) at 9. Ryan, who conducted the case study of the Dogrib community, is supportive of a restorative justice initiative in the community. She cites empowering the people in the community (at 14), re-establishing harmony in relationships (at 16) and keeping Aboriginal people out of prisons (at 49). She also asks whether there should be a “Dogrib charter’ to ensure the safety of women and children in the community (at 49).

violence, or to deny that it exists. Community standards regarding intimate violence in communities where intimate violence has been normalized may cause an underestimation or community denial of the seriousness of intimate abuse.

Another aspect of this is decriminalization. Decriminalization makes reference to the important feminist struggles, both historic and contemporary, to have intimate violence recognized as a serious, gendered crime, and not dismissed as an inconsequential 'private' affair to be dealt with within families. Decriminalization occurs when intimate violence is no longer seen as a criminal, public concern, but is once again relegated to private, closed settings. Major concerns with decriminalization include a reduction or elimination of general and specific deterrence to crimes of intimate violence, normalizing intimate violence within particular communities, and jeopardizing the safety of victims.

Restorative justice has the potential to decriminalize intimate violence in a number of ways. Due to the fact that crimes of intimate violence may be dealt with completely outside of the judicial system, and/or with limited or public record, there is the potential for these crimes to 'disappear' into insular communities. The values and dynamics of the community itself will determine if the crime is taken seriously (or not), and appropriate shaming, punitive and safety measures are taken to ensure individual and general deterrence.

For example in British Columbia The Violence Against Women In Relationships (VAWIR) policy represents twenty years of women's activism and work to have violence

against women taken seriously by the courts and legal system. This includes the pro-arrest and prosecution portions of VAWIR that send a clear message: “violence against women will be taken seriously as a crime and prosecuted.” The proposed increase in the use of Alternative Measures, while simultaneously watering down the pro-arrest and charging policy has the potential to decriminalize intimate violence in some cases.¹²

The dynamics of some forms of restorative justice support this type of privatization. Those which rely on ‘mediation’ style participation, closed community participation, or have a lack of public reporting mechanisms, make this sense of privacy even more of a reality. In this environment it is easy for the “paradigms of secrecy and marital privacy”¹³ to reassert themselves, making a criminal act once again into a private ‘problem’ shared by both the abused and the abuser.

B. Christian Influences

As discussed in Chapter Two many of the pioneers of Western restorative justice, such as Braithwaite, Hudson, Strang and Galaway are white, Christian criminologists and legal scholars who rely on Christian values such as forgiveness to inform and shape their ideas of restorative justice.¹⁴ Many current manifestations of Western restorative justice are found within the Mennonite and Quaker churches, and Christian values underlie much of

¹² See Chapter Three.

¹³ Hooper and Busch, *Supra* note 8 at 111.

¹⁴ Although as mentioned in Chapter Two homogenized versions of Aboriginal spirituality are also often incorporated in Christian based models.

the writing, practice and rhetoric in this area.¹⁵ There are a large number of such restorative justice models at work in Canada, and several in the Lower Mainland.¹⁶ I recognize that Christians across the world have long been involved in social justice work, and have done excellent work on behalf of some marginalized groups in some instances.

However, Christianity and Christian involvement in criminal justice initiatives is potentially a problem for the participation of victims of intimate violence in a number of ways. As with the normalization of intimate violence, my concern speaks to underlying social discourses about women and their 'naturally' subordinate place in society that perpetuates gender inequality. An important tool in uncovering these damaging gendered assumptions is to openly and frankly discuss the existence and effects of these discourses on women. There is no analysis in restorative justice literature of Christianity's historical (or continued) role in the oppression of gays and lesbians, women, Aboriginal peoples and people of color; all groups that are marginalized members of any community.

Although the intentions and practices of a particular model may not actively perpetuate these oppressions it is imperative that they openly recognize and discuss these issues, and make clear any safeguards in place to protect marginalized persons participating in their programs. Simply saying 'we will not discriminate' is insufficient given the history (and contemporary manifestations) of these forms of oppression in many parts of the Christian religion.

¹⁵ In fact the Mennonite church established the first restorative justice project in Canada, in Ontario in the 1970's. See Chapter Two.

¹⁶ The Fraser Region Community Justice Initiatives Association is a Mennonite run restorative justice program which offers Victim Offender Reconciliation, and does accept cases of intimate violence. See Chapter Three.

Second, the role of some Christian values is a troubling one. The rhetoric supporting much of Western restorative justice is that of the 'pious forgiver'. Mennonite and Quaker literature on restorative justice refers not only to healing and rehabilitation, but also to forgiveness and rebuilding relationships. There is little or no gender analysis, and that which does appear is set against a backdrop supporting the continued hegemony of the heterosexual, nuclear family.¹⁷ In the context of relationships characterized by intimate violence forgiveness and rebuilding relationships are inappropriate goals. The safety and needs of the victim should have priority over an agenda of forgiveness and relationship rebuilding. In a situation where a victim may be unable, due to fear or other forms of silencing, to advocate for her own interests and desires, guiding principles of reconciliation and forgiveness may be misplaced and dangerous.

C. The Rhetoric of 'Community'

The term "community" is sometimes used to submerge the interests of dissident or marginalized groups within a geographic or political arena, including the interests of victims of intimate violence. This is done, in part by masking the interests of marginalized groups behind a presumed consensus of values, morals, and beliefs.¹⁸ The normalization of intimate violence is an excellent example of this, where community 'consensus' on the seriousness of intimate violence dictates the response for victims.

¹⁷ The strength of idealized heterosexual, nuclear family relationships are often seen as primary tools in helping an offender rebuild their lives, especially for young and first time offenders. For commentary on the dangers of 'reconciliation' based approaches in cases of intimate violence see: "Bridging the Cultural Divide" at 272.

¹⁸ Robert C. Depew, "Popular Justice and Aboriginal Communities: Some Preliminary Considerations" (1996) 36 *Journal of Legal Pluralism* 52.

This happens in a number of ways. First, The concept of 'community' has taken on a set of complex meanings in the rhetoric, theory and practice of both Western and Aboriginal restorative justice. Any initiative that claims to be 'community' driven is immediately viewed as superior to the conventional justice system. It is assumed that any 'community' driven project will automatically be able to avoid the sexism and racism that the conventional justice system holds for victims of violence.

Much of the debate for and against restorative justice is constructed in a polarized, dichotomous way. Restorative justice systems are often constructed as 'good': based in community, traditional, non-adversarial customs, healing for the offender, and culturally appropriate in the face of a racist criminal justice system. The mainstream justice system, on the other hand, is universally constructed as 'bad'; based in the adversarial system that revictimizes victims and offenders alike, brutal carceral programs that breed more serious offenders, and part of a racist criminal justice system that perpetuates colonialism against vulnerable Aboriginal people. By placing the 'good' model of restorative justice within a culturally superior discourse, it becomes a politically unassailable model that cannot be challenged or complicated without fear of being labeled insensitive to Aboriginal cultural concerns. When juxtaposed against its inferior partner, the mainstream justice system, restorative justice becomes the only 'humane' choice left to progressive scholars and activists.

Secondly, idealized notions of tradition serve to perpetuate notions that 'communities' are monolithic, sharing values and traditions across the board. When set up in

contradistinction to the mainstream justice system, all Aboriginal peoples, regardless of social location are seen to share values, and therefore benefit equally from a diversion away from the racist, oppressive mainstream justice system. This is not the case. A community of *any* description is not homogenous. It will contain power imbalances informed by gender, race, age, sexual orientation and economics. Who defines the 'community' for the purposes of decision- making?¹⁹ To simply speak of the "traditional community" erases the role that these complex power imbalances play, and minimizes the very real potential for forced consensus or lack of real consultation with marginalized groups.

(ii) Practical Considerations

A. Revictimisation

Throughout this thesis I have referred to difficulties with particular models of restorative justice including administrative problems, problems with public accountability, and loosely enforced breach mechanisms. Below I will discuss what I consider to be the most serious and overarching problem: revictimisation. Other practical problems such as weak breach provisions may contribute to or cause revictimisation.

¹⁹ Feminist researchers and scholars have noted circumstances where those who are chosen (or self-selected) to represent the 'community' in restorative justice initiatives are those who already hold power and have vested interests in the outcome. In these cases they neither represented the diversity of the actual community or the interests of the victims. M. Crnkovich, "A Sentencing Circle" (1996) 36 *Journal of Legal Pluralism* 159 at 168, Holly Nathan, "Native Women Demand End to Justice Project" *Times Colonist* (January 11, 1993) A1/A2. A number of other Canadian restorative justice projects have failed (ceased to function) in part due to similar concerns expressed by women in the community. These include the South Island Tribal Council in British Columbia, the Shubenacadie Band Diversion Program and diversion programs in Sandy Lake and Attawapiskat. See: "Literature Review", *Supra* note 9 at 21.

Revictimisation refers to instances where victims of intimate violence are physically or psychologically harmed or threatened by restorative justice processes. For instance a situation where an offender remains in the community after receiving a restorative sentence, and re-assaults their victim, or a circumstance where the power imbalances in a personal or community relationship prevents a victim of intimate abuse from speaking to her own interests or desires before, during or after a restorative justice intervention. Any attempts at restorative justice in circumstances of domestic violence or sexual assault must prioritize the safety and support of the victims. In the examples discussed below this is not the case, and women or girls were revictimised because of these oversights.

I think that there are a number of possible explanations for the small number of recorded examples of revictimisation. The first is that restorative justice programs that deal with intimate violence are functioning well, and there are, in fact, very few instances of revictimisation. I am not satisfied, however, with speculation given the vulnerable social location of victims of intimate violence and the awful consequences for them if this is incorrect. The Canadian government, Aboriginal peoples and Canadians generally must feel *assured* that our most vulnerable citizens are not suffering violence or revictimisation in silence.

A second set of reasons also exists which are closely connected to other problems with restorative justice discussed in this thesis. Due to the serious lack of evaluations that deal specifically with victims of intimate violence, and inaccessible records of restorative

justice interventions it is nearly impossible to track whether victims who have participated have been revictimised. In most instances this would require a personal interview with the victim in a context where they felt they could speak out against their particular restorative justice experience. That research has not yet been conducted in Canada.

The examples provided below do not necessarily indicate a pattern or systemic problem, but do provide a body of preliminary evidence that women are sometimes being revictimised. The power imbalances between victim and offender, and within Aboriginal communities as described in Chapter One may be effective barriers to such disclosures in all but the most ideal circumstances.

Many scholars, activists and victims of intimate violence, Aboriginal and Non-Aboriginal have expressed fears and concerns about revictimisation in restorative justice programs.²⁰ The dynamics of a sentencing circle, family conferences, victim –offender mediation, and sentencing panels increases pressure on victims to ‘speak up’ for themselves. In circles and other mediation type models this is extremely difficult, and may affect the outcome or sentence. It completely ignores the psychology of battering and how it may effectively prevent an abused woman from speaking up against her abuser. “...the power imbalances and dynamics of control which characterize many domestic violence relationships

²⁰ See for example: Emma LaRoque, “Re-Examining Culturally Appropriate Models of Criminal justice Applications” in M. Asch, ed., *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect of Difference* (Vancouver: UBC Press, 1997) 73 at 86, Jennifer Koshan, “Aboriginal Justice and the Charter: Bridging the Divide?” (1998) 1 *U.B.C.L.Rev.* 23 at 42, S. Coward, *Restorative Justice in Domestic and Sexual Violence: Healing Justice?* (December 2000) Directed Interdisciplinary Studies, Carleton University, Carol LaPrairie, *The ‘New’ Justice: Some Implications for Aboriginal Communities* (1998) 1 *Can. J. Crim.* at 7. These are but a few examples.

suggest that, in most instances, the victims of violence do not have the capacity to negotiate freely and fairly with their abusers.”²¹

In Aboriginal communities the dynamics of on-reserve power, the desire to keep Aboriginal men out of ‘white’ jails, and the impetus behind self-determination and control over a (successful) alternative justice system place pressure from both the community and the abuser to participate.²² There is also serious concern within Aboriginal communities of retaliation for those who report breaches or disclose abuse.²³ Two particular problems in substantiating this are that breach provisions are at times inadequate, ensuring that women who speak out may become be the subject of more violence with relative impunity for the abuser. Secondly, once retaliation occurs a revictimised woman is extremely unlikely to cause any more ‘trouble’ for herself by reporting the retaliation. This is particularly true in circumstances where the victim is of low income, with few escape resources, where there have been multiple, unpunished breaches, or where vulnerable children are involved.

Mary Crnkovich, a feminist Canadian lawyer living and working in the North has been actively involved in criticizing the use of sentencing circles in cases of domestic violence

²¹ Hooper and Busch, *Supra* note 8 at 105.

²² See Crnkovich, *Supra* note 19. For reports of victim coercion see Bob Beaty, “Victims Don’t Want Sentencing Circle” *The Calgary Herald* (October 4, 1996) B5, and “A Year at the Lake” 21 *Western Report* (June 19, 1995) at 32.

²³ This concern is expressed in: C. LaPrairie, *Supra* note 20. See also Crnkovich, *Supra* note 19, and The Transition House Association of Nova Scotia, “Abused Women in Family Mediation: A Nova Scotia Snapshot” (Halifax: The Transition House Association of Nova Scotia, 2000). For numerous first hand commentaries from Aboriginal women on the impact of retaliation see: Aboriginal Women’s Action Network, *The Implications of Restorative Justice for Aboriginal Women and Children Survivors of Violence: A Comparative overview of Five Communities in British Columbia* by Wendy Stewart, Audrey Huntley and Fay Blaney (Vancouver: AWAN, 2001) at 46-47.

and sexual assault. She is one of a few feminist, anti-violence advocates who have had the opportunity to observe and write about sentencing circles. She has observed a number of sentencing circles in order to provide a feminist, anti-violence critique of the proceedings. It is significant to note that the sentencing circle that she describes, and critiques in her 1996 piece "A Sentencing Circle" is also a reported decision, written by the white judge presiding over the circle.²⁴ The accounts could not be more different. The judicial decision speaks glowingly of the circle process, a community-based solution to violence, and the over representation of Aboriginal peoples in Canada's prisons; and of the victim states only that she was practically silent. Crnkovich's piece strongly criticizes the planning, process, and outcome of the circle from a feminist anti-violence perspective.

Some of her most striking observations in relation to revictimisation are listed below, and paint a picture of a woman who has been revictimised in several ways. First, Crnkovich notes that despite the numerous instances of escalating violence against the victim that brought the abuser before the circle he was seated next to her in the circle, and no support person was seated close to her. The offender was also staying in her home, as he had traveled from out of town to attend the circle. The victim was nervous and frightened. There was no victim preparation for the circle, no counseling and very limited victim support services outside of her own family members, who were fully aware of the years of abuse she had already suffered. The judge was informed that the victim was reluctant to participate, and frightened by the process, yet he proceeded anyway. The focus was on healing and helping the accused. "There was virtually no discussion about the harm

²⁴ *R v. Naappaluk* [1994] 2 *C.N.L.R.* 143 (Q.C. (Crim Div.)).

suffered by the offender's wife, children and family relations because of his actions."²⁵

As the circle progressed the violence that had initially been discussed as his problem began to be discussed as "their problem". " At no time during the circle discussion did the offender or others hear from the victim, in her own words, what the impact of the accused's actions had been on her or her family."²⁶ There was no censure for the abuse from the community, and no acknowledgment of the gendered aspect of the crime. The goal of preserving the family unit intact was stated as the paramount goal.

The case of *R v Taylor*²⁷ also provides an interesting commentary on the dynamics of revictimisation. In this case an Aboriginal accused was found guilty of a violent sexual assault against his estranged partner. He was found guilty following a trial where he claimed that the sexual activity was consensual. He had been found guilty of previous assaults against other women and a child in the community. Neither the victim, nor a number of local women's service providing organizations, wanted the case to go to a sentencing circle, yet the judge in this case considered it appropriate. It was later reported by the Court of Appeal of Saskatchewan that, following initial reluctance she attended and participated in the circle.²⁸ This initial refusal, in my opinion, should have indicated that the sentencing circle should not go ahead. Despite the positive outcome, as will be discussed below, this was a form of coercion, and revictimisation, especially considering her previous participation in a full trial during which the accused denied the offence.

²⁵ Crnkovich, *Supra* note 19 at 167.

²⁶ *Ibid.* at 168.

²⁷ *R v. Taylor* [1995] 104 C.C.C. (3d) 346 (Sask. C.A.).

²⁸ Given the disparity between Crnkovich's account in the example above, and that of the court I express cynicism regarding the 'full' and 'voluntary' participation of the victim.

It was during the circle, with the participation of the women's service providers, and the larger community that the split in the community was resolved. The resolution was precipitated by a suggestion that the offender be banished from the community, and effectively prevented from being in physical contact with others. There was also much emphasis on the criminal nature of violence against women. Although these outcomes were good for the victim, the judge in this case gambled with her safety, taking a chance that the right dynamics, resources and support existed in the community. The Court of Appeal notes that 'but for' the right combination of participants and ideas, which the judge did not ensure existed beforehand; the circle might have been a failure.

Although the circle members started out divided, the discussions ultimately produced a united community willing and apparently capable of assuming the obligation of helping to restore the offender to his place in the community as a law-abiding citizen. This ultimate response cured the judge's error in failing to consult with the community before proceeding with the sentencing circle. The trial judge also erred in omitting to obtain confirmation from the victim of her willingness to participate in a sentencing circle. However, although the victim at first did not want to participate in the circle proceedings, she continued to participate after she learned that she was not compellable, and became a willing participant.²⁹

In this community, at this time these resources happened to exist and come together in a fortuitous way. Without this happenstance the victim here would likely have suffered more serious revictimisation. In models like these, restorative justice is not being practiced in the cautious, careful way advocated by its progressive supporters.³⁰

²⁹ *Taylor, Supra* note 27 at 3.

³⁰ See for instance: D. Van Ness, 'New Wine and Old Wineskins: Four Challenges of Restorative Justice' (1993) 4 *Crim. L.F.* at 260. Here Van Ness counsels restorative justice practitioners to approach new endeavors with "analytic precision". See also "Bridging the Cultural Divide", *Supra* note 8 at 169 where the emphasis is on the development phase of restorative justice projects.

B. Evaluations

I turn now to the question of evaluations. The phenomenon of revictimiation is poorly documented. The main example I have provided above is anecdotal. In the other the effects of revictimisation were reduced by fortuitous circumstances within the community, and by the physical removal of the offender without incarceration. In my opinion, however, the concerns of women regarding the potential for revictimisation is well founded. One serious problem in providing examples of revictimisation is that there is a serious lack of research on programs, besides Hollow Water, that deal with intimate abuse. There is a particular lack of feminist-based research that inquires particularly into the needs, expectations and outcomes for victims of intimate violence.

There is a serious lack of systematic or thorough evaluation of both Western and Aboriginal Restorative Justice nation-wide. This severe shortcoming is widely noted by government and academic sources.³¹ There have been very few Canadian evaluations at all that systematically evaluate such factors as recidivism rates and cost, and there is no systematic evaluation that I am aware of that includes a gendered perspective, or an anti-violence perspective. In fact, overall there are only five major evaluations of Canadian restorative justice practices, and none of these is complete or adequate in either qualitative or gender analysis. Until we have well researched evidence that restorative justice *works for victims* in cases of intimate violence there must be steps taken to protect

³¹ See for instance: Ryan and Calliou, *Supra* note 11 at 2, Don Clairemont and Rick Linden, "Developing and Evaluating Justice Projects in Aboriginal Communities: A Review of the Literature" (Ottawa: Solicitor General 1998), Kathleen Daly, "Restorative Justice; The Real Story"(2002) 4 *Punishment and Society* 55, and Busch and Hooper, *Supra* note 8.

victims from revictimisation. To do otherwise is to knowingly place some women in danger, in violation of their legally protected rights, in order to conduct what amounts to a social and legal experiment.

In a number of important evaluations completed in other jurisdictions success rates are sometimes statistically overblown and exaggerated, with samples using small numbers, subjective criteria, and anecdotal testimony from selected participants.³²

These same concerns are echoed in the results of Canadian evaluations. Not only is there a shortage of serious, thorough evaluation overall, there are a number of concerns around the evaluations that have been completed.³³ “ We have barely scratched the surface in the research to date on restorative justice and have just begun to conceptualize research questions in this field.”³⁴ Canadian evaluations do not separate out intimate violence victims, they do not ask these victims questions that will truly probe their satisfaction and safety, and they do not employ a gendered or feminist perspective in any aspect of their evaluation.

³² For a critique of some prominent and much relied upon evaluations see: Busch and Hooper, *Supra* note 8.

³³ See: Robert B. Cormier, “ Restorative Justice: Directions and Principles-Developments in Canada” (Ottawa: Department of the Solicitor general of Canada, 2002) at 6 and 11, J. Nuffield, “ Evaluation of Adult-Victim-Offender Mediations Program, Saskatoon Community Mediation Services” (Regina, Sask: Department of Justice, Sask) 1997, L. Presser and P. Van Voorhis, “ Values and Evaluation: Assessing Processes and Outcome of Restorative Justice Programs”(2002) 48 *Crime and Delinquency*162.

³⁴ Cormier, *Supra* note 33 at 11, Clairemont and Linden, *Supra* note 31 (in particular reference to Aboriginal justice initiatives), Jeff Latimer, “ The Effects of Restorative Justice Programming: A review of the Empirical” (Ottawa: Department of Justice, 2000) at 17-21.

In 1997 Joan Nuffield, a Canadian statistician, conducted a study for Public Works and Government Services Canada.³⁵ The research reviews evaluated diversion programs for adults, a category that covers very broad ground. Despite her broad mandate she was forced to include some youth program evaluations, due to the lack of adult evaluations and the poor quality of those that do exist. Nuffield examines not only the 'official' evaluations such as those discussed above but also the much larger body of unpublished agency and government reports. She concludes that overall:

“There are only a handful of rigorous, comprehensive evaluations in the field of adult (or even juvenile) diversion programs which address the key questions of interest to policy-makers and program specialists...Most “evaluations” are merely descriptions of the process and the flow of cases through the program. These kinds of studies do not...have a control group or some other method for comparing what happened in the diversion program with what would have happened without it. [She notes that this methodological error is especially damaging where claims of low recidivism rates are reported.]

Other evaluations address the 'key questions of diversion' but fail to describe the diversion program itself in sufficient detail to give us a picture of what really occurred in the program.

Many evaluations follow only those offenders who successfully completed the diversion program. While this is useful information, it is also important to know how many of the offenders accepted into the program actually completed it...a similar deficiency in many evaluations is in giving an imperfect understanding of the proportion of the total crime caseload and the eligible caseload who were accepted into the program, and the reasons why some were rejected.³⁶

Nuffield's criticisms do not even touch upon the concerns about the exclusion of a feminist, gendered or anti-violence approach to evaluations.

³⁵ Joan Nuffield, "Diversion Programs for Adults" (Ottawa: Public Works and Government Services Canada, 1997).

³⁶ *Ibid.* at Part 1.

Other Canadian academics have noted with frustration a general lack of sound evaluations. “Overall there is a serious need for solid research and planning, not *ad hoc*, project funding and short-term projects.”³⁷ Ryan and Calliou³⁸ note in their conclusion that “ Evaluation of current restorative justice initiatives is clearly needed...”³⁹ and that “(s)urprisingly, only four evaluation studies have been done in Canada on the effectiveness of such alternatives, their outcomes and changes in recidivism rates and victim/offender satisfaction.”⁴⁰ They also note that many of the conclusions from those evaluations in existence are ‘impressionistic’.⁴¹

These are the five main, comprehensive Canadian evaluations currently in existence and each study lacks the information which could tell us if restorative justice models are safe to deal with intimate abuse.

First is a study by Avery Calhoun, “ Evaluation Report: Calgary Community Conferencing- An Innovative Pilot Project of the Youth Justice Renewal Initiative”.⁴²

This is a youth project, and does not provide data on adult male assaults on adult women, which is the focus of this paper.

The second is by J. Latimer, C. Dowden and D. Muise, “ The Effectiveness of Restorative Justice Practices: a Meta-Analysis”.⁴³ Although this report concluded that

³⁷ LaPrairie, *Supra* note 20.

³⁸ *Supra* note 11.

³⁹ *Ibid.* at 47, and 16.

⁴⁰ *Ibid.* at 4.

⁴¹ *Ibid.* at 4.

⁴² (Ottawa: Justice Canada, 2001).

⁴³ *Supra* note 34.

overall, restorative justice in Canada is “working”, the criteria and methodology used to measure this success are far from satisfactory. First, Latimer notes an overall dearth of complete, methodologically sound evaluation of restorative justice,⁴⁴ and the fact that the evaluations included in the meta analysis used different criteria or measured different areas of ‘success’. The four variables used by Latimer (very few evaluations contained in the meta analysis used all four) were victim and offender satisfaction, compliance with restitution and recidivism. Latimer shows an overall higher rate of victim satisfaction than similar analyses of the mainstream criminal justice system.⁴⁵ However, in the context of intimate violence the data employed in making this determination is unhelpful in showing whether restorative justice is safe for victims. None of the data provided deal specifically with victims of intimate violence, or their unique needs as participants in restorative justice initiatives or evaluations. In fact it is unclear whether any of the initiatives evaluated dealt with cases of intimate violence at all, as both the data and analysis overlook this issue completely. The data and analysis are completely gender neutral, making it impossible to judge if women victims overall showed higher or lower levels of satisfaction with the programs evaluated.

The third evaluation is by J. Bonta, J. Rooney, and S. Wallace-Capretta,

“Restorative Justice: An Evaluation of the Restorative Resolutions Project”⁴⁶ This study is an evaluation of a Winnipeg based restorative justice program for Aboriginal and Metis

⁴⁴ Latimer, *Supra* note 34 at 21. Latimer also notes other extensive shortcomings with the data and evaluations included in the meta-analysis (at 17-21).

⁴⁵ *Ibid* at 9.

⁴⁶ (Ottawa: Solicitor General Canada, 1998).

people. The initiative did not accept cases of sexual assault or domestic violence at the time the evaluation was completed.

The fourth evaluation is by Don Clairemont, and R. Linden, “Developing and Evaluating Justice Projects in Aboriginal Communities: A review of the Literature”⁴⁷ This study is basically a literature review, consisting of a brief introduction and an annotated bibliography.

The final evaluation is by Tara Lajeunesse, “Community Holistic Circle Healing: Hollow Water First Nation”.⁴⁸ This contains the most comprehensive evaluation of restorative justice in relation to intimate violence. The project deals almost exclusively with intergenerational sexual assault. There are serious considerations of the victim’s safety and support, as well as evaluation of how these mechanisms worked. It is significant to note that there are very little data produced, making a secondary evaluation of the material virtually impossible, and a methodological critique difficult. Finally, the methodology for obtaining victim satisfaction is not revealed, there is no discussion of what, if any, measures were taken to ensure victim safety, comfort or confidentiality. There is little gender analysis, despite the fact that the overwhelming majority of victims were women or girls, and the overwhelming majority of offenders were men.⁴⁹

⁴⁷ *Supra* note 31.

⁴⁸ (Ottawa: Solicitor General, 1993).

⁴⁹ Dr. Joe Couture et al, “A Cost-Benefit Analysis of Hollow Water’s Community Holistic Circle Healing Process” (Ottawa: Solicitor General, 2001) at 70, Table B. This cost-benefit analysis is mainly designed to gauge the monetary efficiency of the Hollow Water project. In doing so Dr. Couture also discusses what he calls ‘value-added’ benefits for the community, or non-monetary gains. This is not an evaluation per se.

There has been some critique of this evaluation from several quarters. Ryan and Caillou in their 2002 case study of two Canadian restorative justice initiatives note that “

Evaluation of current restorative justice initiatives is clearly needed. Hollow Water cost-benefit analysis indicates their program has saved the correctional system millions of dollars over ten years but that analysis does not tell us what human costs have been.”⁵⁰

Jennifer Koshan, a legal scholar, and Emma LaRoque both question whether this evaluation gives us a full picture of whether “...victims are truly free to participate, or must bow to community pressure and the lack of meaningful alternatives.”⁵¹

There is an urgent need for evaluations of restorative justice projects that deal with intimate violence. These evaluations must begin from the perspective of the victim, and inquire into whether their needs and interests were addressed. A study that truly measures the success of a restorative justice program for victims of intimate violence must deal with intimate violence victims as a specific group with specific needs. Success rates must be measured by criteria such as whether the victim felt supported and safe, whether the abuse actually stopped, and whether she was able to freely choose whether to participate in the restorative justice intervention, or whether to rebuild her relationship with her partner.

Victims of intimate violence must be supported during research, and methods developed by victim support service experts must be employed to ensure that victims feel safe, and are able to provide uncoerced and truthful responses.

⁵⁰ Ryan and Caillou, *note* 11 at 48.

⁵¹ Koshan, *Supra* note 20 at 42, and Laroque, *Supra* note 19 at 86.

C. Mediation

While we do not have a sufficient body of evidence to turn to in evaluating restorative justice initiatives, there has been significant, methodologically sound research conducted in the field of mediation. Of particular interest is research and scholarship that deals with family mediation where there has been intimate violence within that relationship.⁵² Much of the research and writing in this area deals with mediation that takes place upon the break up of the relationship.

There is a significant body of literature, mostly American, Australian and out of New Zealand, that indicates that women in these circumstances are likely to be re-victimized, intimidated and abused by the men they are in mediation with.⁵³ Although there is a paucity of feminist research in the restorative justice field dealing with the dynamics of abuse in sentencing circles, and family group conferences, it is clear from the research in

⁵² Despite the fact that mediation in family law matters and restorative justice are not identical processes, in cases of intimate violence the dynamics are remarkably similar. In both cases an abused woman is placed in a situation where she must fight for her own interests, in a private forum, against a man who has abused or assaulted her. There is also overlap in the theory and practices used within restorative justice and mediation (also known as Alternative Dispute Resolution or ADR) and in some academic circles restorative justice is considered a subset of ADR.

⁵³ See for instance: Hooper and Busch, *Supra* note 8, Hilary Astor: 'Swimming Against the Tide: Keeping Violent Men out of Mediation' in Julie Stubbs, ed, *Women, Male Violence and the Law* (Sydney: Federation Press, 1994) at 148, Lisa G. Lerman, "Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women" (1984) 7 *Harvard Women's Law Journal* 57, Maria Volpe, "Mediation in the Criminal Justice System: Process, Promises and Problems" in H. Pepinsky and R. Quinney eds., *Criminology as Peacemaking* (Indiana: Indiana University Press, 1991) 195 at 201, Sandra Goundry et al, *Family Mediation in Canada: Implications for Women's Equality. A Review of the Literature and Analysis of Data from Four Publicly Funded Canadian Mediation Programs* (Ottawa: Status of Women Canada, 1998), Nova Scotia Association of Transition Houses, *Supra* note 23, Ruth Busch, Neville Robertson and Hilary Lapsley, "The Gap: Battered Women's Experience of Justice System in New Zealand" (1995) 8 *C.J.W.L.* 190 at 209, Barbara Hart, "Gentle Jeopardy: The Further Endangerment of Battered Women and Children in Custody Mediation" (1990) 7 *Mediation Quarterly* 317, and Linda Perry, "Mediation and Wife Abuse: a Review of the Literature" (1994) 4 *Mediation Quarterly* 313, Martha Shaffer, "The Battered Women Syndrome Revisited" (1994) 47 *U.T.L.J.* 1.

the mediation field that there are serious concerns with using mediation-type techniques in situations of intimate violence. Below I will outline some of this research, in order to emphasize the dangers that are likely facing victims of intimate violence participating in poorly planned and executed restorative justice initiatives.

Stephen Hooper and Ruth Busch, both experienced mediators and legal scholars, in their 1996 article “ Domestic Violence and the Restorative Justice Initiatives: The Risks of a New Panacea” comment on the dangers for victims that exist in both mediation and restorative justice models. They assert essentially that the power imbalances that characterize an abusive relationship will effectively prevent the victim of abuse from negotiating fairly with her abuser, even if she is provided with support and counseling during the process.⁵⁴ They substantiate their claim by citing two recent studies on the effects of mediation techniques in circumstances involving violence.⁵⁵ These studies showed:

When compared to their peers who were not abused, battered women felt less able to assert their interests, they felt that it was more likely that their partners would retaliate against them or their children for asserting themselves.⁵⁶

Compared to non-abused women, battered women felt their ex partners could ‘out talk’ them, and that ex partners had much more decision-making power in regards to finances, child rearing and sexual relationships.

Newark et al concluded that this diminished sense of decision-making ability coupled with an increased fear of harm diminished the women’s ability to participate assertively and effectively in the mediation process.⁵⁷

⁵⁴ *Supra* note 8 at 105.

⁵⁵ L. Newmark, A. Harrell, and P. Salem, *Domestic Violence and Empowerment in Custody and Visitation Cases: An Empirical Study on the Impact of Domestic Abuse* (Paper published by the Association of Family and Conciliation Courts, 1994), and Ruth Busch, N. Robertson, and H. Laspley, *Protection From Family Violence* (New Zealand: Waikato Mediation, 1992).

⁵⁶ Busch and Hooper, *Supra* note 8 at 104.

⁵⁷ Busch and Hooper, *Supra* note 8 at 105.

They also cite a less recent 1985 study,⁵⁸ showing that in mediation situations battered women are:

(m) ore apt to be run down, more suggestible and less able to confront their partners than other disputants in a mediation.

That negotiation is more difficult for a victim of violence because of her fear of her batterer, and that direct and indirect threats of retaliation give the abuser the upper hand in negotiating.⁵⁹

Busch and Hooper found the conclusions of the studies mentioned above have borne out in their own experience and research at the Waitakato Mediation Services, the precursor to the Hamilton Restorative Justice Project.⁶⁰ In their experience:

The mediators were unable to deal with on-going issues, such as distress from 'reliving' the experience of victimization. As well, the mediators were unable to guarantee the ongoing protection of the victims in cases of domestic violence.

Additionally Busch and Hooper found that abusers were apt to "...use mediation as an opportunity for further contact with the victim." and that "...there were often insufficient resources to guarantee the protection of the victim during mediation itself, let alone after the session was completed or after she has returned home."⁶¹

Busch and Hooper go on to discuss New Zealand's "communitarian model", the Family Group Conference (FGC). The critiques they level here have resonance with Canada's

⁵⁸ Rowe, "Comment: The Limits of the Neighborhood Justice Center: Why Domestic Violence Cases Should Not be Mediated." (1985) 34 *Emmory Law Journal* 855 at 863.

⁵⁹ Busch and Hooper, *Supra* note 8 at 105.

⁶⁰ *Ibid.* at 108.

⁶¹ *Ibid.* at 111.

sentencing circles, and other forms of restorative justice that rely on mediation techniques, community consensus and censure.

Busch and Hooper conclude that, although a preferable method to the more 'private' victim-offender mediation, FGC has serious shortcomings in its ability to deal with intimate violence that are rooted in its reliance on community.⁶² They point out that in order for community 'shaming' to change an abuser's behavior, there must be a strong community censure of domestic violence. They assert that in New Zealand no such consensus exists, and that therefore there is "no reason to believe that violent men will readily be shamed into accepting their violent acts are wrong."⁶³ The incidence of domestic violence in Canada, and the socially sanctioned secrecy that surrounds it surely indicates that Canadian communities, on the whole, may not yet be willing to effectively censure abusers in cases of intimate violence.

Hilary Astor, a feminist legal academic working in Australia, speaks to the experience of mediation in family law in Australia in her 1994 piece "Swimming against the Tide: Keeping Violent Men out of Mediation". Astor bases her critiques on an examination of mediation practices used in Australia. She asserts that mediation should not be used in cases involving violence due to the nature of mediation itself. Mediation requires both parties to be able to present their interests, needs and wants in an open and comprehensive way. This requires both parties to feel free to speak to their interests.

⁶² *Ibid.* at 118.

⁶³ *Ibid.* at 118.

“...violence created an extreme imbalance of power between the parties...”⁶⁴ and effectively prevents the abused woman from openly speaking to and representing her own interests out of a well-founded fear of retribution based in the experience of previous violence. Asserting herself will likely have been the cause of abuse in the past.

A recent Canadian study out of Nova Scotia ⁶⁵ has also summarized some alarming Canadian mediation trends. In this study a coalition of transition homes for battered women undertook a province wide consultation and research project. Specifically their goals were to “ ...gather abused women’s experiences with mediation generally...and to collect culture and community-specific input from women.” They then made recommendations based on the women’s experiences. These are a few of the main concerns they outlined:

Ex-partners regularly verbally abused women during mediation; this affected their ability to argue for custody, access, and support. They were intimidated and scared for their physical safety before, during and after mediation.

Mediators are failing to recognize ongoing abuse and harassment during the mediation (both inside and outside of sessions), and are failing to take appropriate action. Women in our study reported harassing phone calls, threats, and stalking during the period of mediation. Women alerted mediators and no action was taken. ⁶⁶

My ex. is very overpowering; he beat my daughter. Before the sessions I would break down. I didn’t sleep. He was calling me everyday and writing

⁶⁴ Astor, *Supra* note 53 at 151. See also: Lisa G. Lerman, “Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women” (1984) 7 *Harvard Women’s Law Journal* 57.

⁶⁵ The Transition House Association of Nova Scotia, *Supra* note 23.

⁶⁶ *Ibid.* at 16.

me letters all through the mediation. I told the mediator about the calls, and she said, 'Yes, but we have to go on.'⁶⁷

Mediators were untrained in the psychology of abuse, were unable to recognize situations where women were being intimidated by their abusive partners, and did not stop the mediation when abusive language or body language (such as banging on the table) was used.

Even conciliators and mediators with mediation training often did not appear to understand the dynamics and cycle of abuse, and seemed unfamiliar with the different forms of abuse (physical, emotional, sexual, financial and psychological). Many mediators minimized the impact of forms of non-physical abuse.⁶⁸

No one knows him like I do what he's capable of. And I never crossed him before. He banged his fingers on the table. That brought back too much...I broke down.⁶⁹

Women were coerced into mediation against their wishes.

Conciliators and mediators may present confusing or incorrect information to parties about the law or their legal rights...Conciliators have given the impression that mediation is a requirement before the court.⁷⁰

Women were urged (subtly and not so subtly) to participate in mediation by conciliators, mediators, lawyers and judges, Children's Aid workers and other justice and social service professionals. Especially when the recommendation is coming from a judge or conciliator, women report feeling coerced.⁷¹

No private mediators and no professionals of the Family Division (Court), including judges, mediators and conciliators, presented any of the possible disadvantages of mediation.⁷²

⁶⁷ *Ibid.* Study Participant at 8.

⁶⁸ *Ibid.* at 15.

⁶⁹ *Ibid.* Study Participant at 7.

⁷⁰ *Ibid.* at 16.

⁷¹ *Ibid.* at 17.

⁷² *Ibid.* at 18.

The conciliator said the judge wouldn't be too pleased to have to deal with my case. She said we should get together up at *my house* and reach an agreement...my ex. is a diagnosed schizophrenic, and at the time he was stalking, calling me constantly.⁷³ [Emphasis added.]

Women found that the power imbalance between them and their abusive ex-spouse resulted in unfair settlements.

I had a very hard time saying 'no' to him. I agreed to things I regret. I was too scared to stand up for myself.⁷⁴

The final recommendation of the report is "...an immediate moratorium on conciliators referrals to mediation assessment for abusers and their former partners, pending more permanent resolution of the issue by policy and legislation."⁷⁵

We do not know enough about how restorative justice works, or does not work to protect victims of intimate violence within these projects. Evidence from research on mediation shows that under similar circumstances women are being revictimised. In my opinion it seems quite reasonable to assume that similar dangers exist for victims of intimate violence in restorative justice projects, and to anticipate this by taking thoughtful, remedial measures. The preliminary evidence shows that in restorative justice interventions gendered power imbalances, coupled with factors such as internalized sexism, normalized violence, lack of support services and resources may create dangerous interventions that revictimise women. It is obvious that more research needs to

⁷³ *Ibid.* Study Participant at 8.

⁷⁴ *Ibid.* Study Participant at 7.

⁷⁵ *Ibid.* at 9.

be done, in the next and final section of this thesis I will outline my suggested course of action until such evidence becomes available.

c) Conclusions and Recommendations

In light of the concerns similar to those outlined in this thesis there have been a range of responses from various quarters. A number of women's anti-violence organizations have proposed a complete moratorium on all restorative justice interventions in cases involving intimate violence.⁷⁶ In New Zealand, 'family violence' has been completely excluded from a new restorative justice initiative.⁷⁷

My own conclusions consist of three parts. First, I support a moratorium on new restorative justice projects dealing with intimate violence until there is clear evidence that women will not be revictimised. Second, I take a somewhat different position regarding restorative justice initiatives already in existence. My reasons are twofold. First, preliminary evidence from some projects, such as Hollow Water indicate that restorative justice, if conducted carefully and with the interests of victims in focus, may be helping some victims of violence. Second, although there is some research that indicates that some victims of intimate violence prefer incarceration to diversion in such

⁷⁶ See Chapter Four.

⁷⁷ *Guardianship Act*, 1968 (N.Z.) (as Amended 1995 c. 63) s. 16(b). This legislation specifically excludes cases of intimate violence from a family mediation restorative justice initiative.

crimes,⁷⁸ there is also an indication that some women may wish to participate in alternatives to the conventional justice system.⁷⁹ Finally, I support the continuation of existing restorative justice initiatives only under the strictest of guidelines, which I will outline below. If restorative justice initiatives, including alternative measures, sentencing circles, and conditional sentencing are not able to meet the criteria outlined below then they too should be subject to a moratorium.

Finally, I believe that there are some cases of intimate violence that should never be dealt with in face to face mediation-type models (such as sentencing circles, or victim – offender mediation) where the interests or safety of the victim are at stake.⁸⁰ This is true even in restorative justice projects that contain many of the safeguards suggested below. These cases might include long term abuse, particularly brutal physical abuse, or cases where it is determined that the power imbalance between the parties cannot be mitigated by mechanisms such as counseling or victim support. Decisions as to which cases are not appropriate for restorative justice in these circumstances should be made by qualified personnel who have training and experience in identifying and dealing with abuse and its psychological effects.

⁷⁸ McGillivray and Comasky, *Supra* note 7 at 140-143. The Aboriginal women who participated in this study were all victims of intimate violence. They indicated that jail and treatment were preferable to diversion, due to the symbolic significance of punishment, the physical safety such removal provided, and the fact that, in their experience, there were some effective treatment programs available. Some also concluded, however, that they *might* support diversion if it were able to accomplish goals for them (such as respect, participation, healing and safety) that the conventional justice system was lacking.

⁷⁹ Joanne Minaker, "Evaluating Criminal Justice Responses to Intimate Abuse Through the Lens of Women's Needs" (2001) 13 *C.J.W.L.* 74 at 100. Minaker found that "(i)n contrast to the findings of Anne McGillivray and Brenda Comasky, the Aboriginal women in this study did not view treatment and jail as most effective."

⁸⁰ This would not apply to a model such as that thought to be in place in the Fraser Region Community Justice Initiatives Association where the victim is not negotiating for her safety, or other interests. (See Chapter Three). Supervised meetings during the incarceration of the offender, at the request of the victim, may be a safe way to practice restorative justice.

(i) Recommendations: Some Guidelines

Restorative justice has the stated goal of providing a more full, holistic approach to anti-social behavior, contextualising an incident within the broader experiences of the offender and victim, and their socio-political context. I propose a series of guidelines which reflect ways in which restorative justice initiatives that deal with cases of intimate violence can provide a holistic response for victims that goes beyond what the conventional court can do, and will help to ensure that restorative justice initiatives do not become tools for revictimising women.

I recommend that all existing restorative justice projects, with the assistance of government funders, comply with guidelines similar to these.⁸¹ New or renewed funding should be connected to compliance.

A. Consultation

There have been several examples discussed of restorative justice projects that have folded, due in part to a lack of consultation with the *whole* community (not just the elite) including women's organizations that later expressed reservations. Comprehensive consultations *before* starting any new restorative justice initiative (including a sentencing circle) will gauge community support, determine the community's reaction to crimes of intimate violence, make space for ideas that may improve or ensure the success of the project, and provide a broad base of support. This should also take place prior to serious

⁸¹ I would actually propose an immediate and well-funded consultation process with women's Aboriginal and anti-violence groups, as well as other stakeholders to draft guidelines.

changes to programs, such as those proposed for the Alternative Measures program in British Columbia.

Aboriginal women feel that they have not been sufficiently consulted or heard in the processes leading to restorative justice projects now in place in British Columbia.⁸² The Royal Commission on Aboriginal Peoples emphasizes the importance of consultation. In fact, they recommend that Aboriginal women's organizations review and approve all programs before they begin. This is an excellent idea.⁸³ The true social location of Aboriginal women (disproportionably abused, disproportionably poor and marginalized within their own communities) requires a special effort on behalf of the government and Aboriginal initiatives to ensure their voices are heard in a safe place, where true misgivings can be openly discussed. Advocates of restorative justice must also understand that, like "communities", Aboriginal women do not speak with a single voice, and many, varied women must be heard to truly inform a "community" based project. This may mean a lengthy process, characterized by debate. Through their participation in a pre-project consultation Aboriginal women can ensure that they occupy a truly traditional role as leaders, teachers and healers within any initiative.

⁸² Letter to the Honorable Ujjal Dosanjh from Harjit Kaur, Chair, BC-NAC Anti-Violence Subcommittee, June 18, 1997. The letter is co-signed by the following groups in British Columbia: AWAN, Abbotsford transition House, Battered Women's Support Services, Carnegie center, FREDA Center for Research on Violence against Women and Children, Vancouver Rape Relief and Women's Shelter, Vancouver Status of Women, WAVAW/Rape Crisis Centre at 4, and Aboriginal Women's Action Network, *The Implications of Restorative Justice for Aboriginal Women and Children Survivors of Violence: A Comparative Overview of Five Communities in British Columbia* by Wendy Stewart, Audrey Huntley and Fay Blaney (Vancouver: AWAN, 2001) at 48.

⁸³ "Bridging the Cultural Divide", *Supra* note 8 at 269 and 244.

B. Evaluations

Those restorative justice initiatives that accept cases of intimate violence must be evaluated as soon as possible. These evaluations should be conducted in a uniform way, using a methodology developed in consultation with victim support experts, women's anti-violence groups, and other stakeholders. The results of these evaluations, including raw qualitative and quantitative data, should be made public as soon as possible after completion. Data should measure such things as the number of cases dealt with, disposition, victim satisfaction, breach rates, recidivism, and a qualitative interview-based assessment of whether the needs of victims of intimate violence were met.

C. Breach Mechanisms

Avoiding the use of incarceration is an important goal for restorative justice, for well-documented reasons. In cases where incarceration is not used, the safety of victims of intimate violence is put in jeopardy simply by virtue of the possibility of physical contact. If incarceration is not used in the first instance, it must become an automatic response for serious breaches.⁸⁴ To do otherwise is to send a clear message to the offender and the community that intimate violence is not a crime, and will be treated leniently. It also clearly jeopardizes the physical safety or life of the victim in the interests of insulating the offender from the lesser harms of incarceration, a compromise which I think is

⁸⁴ Serious breaches would include breaching a no contact order by being physically present with the victim or children, harassing or threatening phone calls, notes or messages, 'stalking' behavior, property damage, or physical assault of the victim.

dangerous and unreasonable. In some cases, as with conditional sentences and alternative measures, this will require an amendment to the *Criminal Code*, reducing judicial discretion in cases of serious breaches, in other cases, such as Hollow Water, strictly enforced policy guidelines must be developed regarding incarceration if conditions are breached.⁸⁵

D. Resources

Unless there are specific, well-established and funded resources and infrastructure present in the community, restorative justice programs should not deal with cases of intimate violence. The potential dangerous consequences for victims of violence are too great. Resources should be able to provide not only supervision and control of the offender, but healing, support, counseling,⁸⁶ participation and safety for the victim. From the perspective of the victim, restorative justice should provide them *more* than the conventional justice system. Even in traditional Aboriginal forums these resources must be based in contemporary reality. Intimate abuse is a contemporary manifestation of colonialism, and requires specialized resources. In every case this should include personnel trained specifically in the dynamics of intimate abuse, and assigned to support the victim and advocate for her if necessary.⁸⁷

⁸⁵ Another option for the Hollow Water Project would be to follow the suggestion of the Toronto Aboriginal Justice Initiative's Family Violence Roundtable and keep the charges pending the successful completion of the entire project.

⁸⁶ In Minaker's study of the needs of victims of intimate violence all of the participants cited a need for counseling. (Minaker, *Supra* note 79 at 88).

⁸⁷ In Minaker, *Ibid* at 88. participants also asked for advocacy and support.

The cases of *Naapaluk*⁸⁸ and *Taylor*⁸⁹ are, in my opinion, examples of initiatives that did not have sufficient resources and infrastructure available to support the victim. It is unreasonable and dangerous to rely on a community with few resources, struggling under the effects of colonialism to protect the victim and support both the victim and the offender with so few resources.

It is a well-recognized principle in mediation that those who are facilitating mediation programs require rigorous training.⁹⁰ Those who are dealing with cases of intimate violence require special training to recognize and properly intervene in situations that are characterized by extreme, gendered power imbalances.

Currently in Canada there is a lack of standardized training for those in both the mediation and the restorative justice areas.⁹¹ Those programs that do require standardized training very infrequently contain a gender analysis, or education and training on how to identify or deal with intimate violence. This makes it extremely difficult for even the best-intentioned restorative justice facilitator to safely deal with intimate violence.

Should the project or individual wish to censure or screen out cases of intimate violence they may be untrained to do so. Spotting and dealing with power imbalances informed by gender must become part of mediation and restorative justice culture.

⁸⁸ *Supra* note 24.

⁸⁹ *Supra* note 27.

⁹⁰ See for instance: Linda K. Girdner, "Mediation Triage: Screening for Spousal Abuse in Divorce Mediation." (1990) 7 *Mediation Quarterly* 365.

⁹¹ See for instance: Cormier, *Supra* note 33 at 9, Volpe, *Supra* note 53 at 201, Sheldon Gordon, "Alternative Dispute Regulation" (2001) 10 *The National* 23, and Cumming, J.A. and McEachern, C.J.Y.T., in the case of *R v Johnson* (1994) 91 C.C.C. (3d) (Y. Terr. Ct. App.) 21 note at page 2 that guidelines for the conduct of sentencing circles would be beneficial for all involved.

Full financial support is also necessary to ensure that restorative justice projects are able to perform all of their functions in an open and accountable manner. The enthusiasm showed by both the provincial and federal governments for restorative justice is not matched by funding.⁹² In most cases funding comes from a patchwork of sources, and is *ad hoc* or project based, instead of steady, core funding from a single, accountable source. Federal and provincial governments are accused of downloading justice services onto already overworked municipalities, volunteer and women's organizations. In order for a restorative justice program to fully support victims of violence it must first undergo vigorous, long-term evaluation and stakeholder input, and this will require a significant financial commitment. Second, following evaluation, input and planning any restorative justice initiative must contain specialized victim counseling and support services, evaluation, and public accountability mechanisms. These are all costly, and currently unavailable in many restorative justice initiatives.⁹³

E. *Accountability*

Accountability in this context will be discussed in two different ways. The first is the accountability of the offender to the community and the victim. The second is the accountability of restorative justice programs to the public.

⁹² Brad Daisley, "1\$ million for BC's offender diversion program" *The Lawyers Weekly* (February 27, 1998) 31, Goundry, *Supra* note 52 at 20, Scott Simpson, "Justice Reforms Bring Alarm, Anger" *Vancouver Sun* (Friday, October 24, 1997) B1.

⁹³ Ruth Busch notes that one Canadian restorative justice project that held real promise for victims of intimate violence (the Pennell/Burford Newfoundland Project) was cancelled as it was found to be very expensive to properly support and counsel and ensure the safety of victims of intimate violence. (Ruth Busch, "Who Pays if we get it Wrong?" in Strang and Braithewaite eds, *Restorative Justice and Family Violence* (New York: Cambridge University Press, 2002), 223 at 246.)

In the case of the offender he must accept responsibility for his actions. This is particularly important in crimes of intimate violence due to the effects of downplaying, decriminalizing and normalizing intimate violence generally. In order to take advantage of restorative justice initiatives all offenders must plead guilty.⁹⁴ Otherwise the victim is revictimised by being forced to face the challenges of both the conventional system through a trial, and the restorative justice option. By not pleading guilty the offender also undermines key aspects of the healing process, namely taking responsibility and being accountable.

There is some debate over whether it is necessary for offenders to serve time in prison in order to be held accountable. Emma LaRoque takes a hard line on punishment stating that short, lenient sentences "...make a mockery of all women...Those involved in gross and willful crimes should receive a lengthy jail sentence, and in specific cases, should be removed permanently from the community."⁹⁵ In contrast Burma Bushie, a key player in the Hollow Water initiative sees the healing process as an arduous one, not as a lenient slap on the wrist. Bushie emphasizes that truly accepting responsibility and facing your community, as a sexual abuser may be more difficult than simply 'disappearing' from the community for a period of time in jail.⁹⁶ As mentioned above, there is conflicting research as to what victims of intimate violence think about accountability.⁹⁷ Some women feel that incarceration is an important symbolic and practical aspect of taking

⁹⁴ This recommendation does not apply in circumstances where an accused, on a first appearance, pleads not guilty on legal advice in order to ensure that proper charges are laid and 'overcharging' does not occur.

⁹⁵ *Ibid.* at 116-17.

⁹⁶ Couture, *Supra* note 49 at 25. See also Rupert Ross, "Duelling Paradigms? Western Criminal Justice Versus Aboriginal Community Healing" in Gosse, Henderson and Carter eds. *Continuing Poundmaker and Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice* (Saskatoon: Purich, 1994) 241 at 245.

⁹⁷ McGillivray and Comasky, and Minaker, *Supra* notes 78 and 79.

responsibility, and others would avoid the conventional justice system, so *long as the alternative was safe*. In my opinion there are circumstances where incarceration is necessary primarily in order to protect the safety of victims. In circumstances of serious, repeat abuse, followed by threats or other forms of criminal harassment, incarceration may be necessary to provide immediate respite for the victim. I also believe, however, that if the victim, and a broad –based community in a particular case feel that alternatives to incarceration are sufficient in terms of accountability, and the safety and support of the victim can be guaranteed, then some restorative options may provide sufficient accountability. An example of this may be the Hollow Water initiative, where there is a broad community consensus, and individual victim agreement that the 13-step program makes abusers accountable. As will be discussed below, I have a number of concerns, however, regarding the administrative mechanisms that ensure the safety of the victims in this project.

As discussed in Chapter Three, there are serious gaps in public accountability for restorative justice projects. It is in the interests of all restorative justice programs to provide a basic level of transparency to groups, such as the women’s anti-violence movement, who have concerns regarding their safety. Providing basic information on projects, such as the number of cases dealt with, the disposition, and breach rates will begin a dialogue that will likely result in improvements to restorative justice projects through the expertise of interested parties. It may also go some distance in allaying some of the fears of the women’s anti violence movement. Provisions of the *Criminal Code*⁹⁸ that allow for discretionary collection and release of data on alternative measures

⁹⁸ See Chapter Three.

programs should be amended to ensure annual collections and timely public release of such data. In programs that function under a negotiated protocol, aside from immediate evaluation, there must be a mandatory record-keeping obligation, and an annual reporting mechanism that will inform the public release of data on crime types, dispositions, and breaches.

*F. Education and Prevention*⁹⁹

In communities where intimate violence cases are being dealt with under the auspices of restorative justice, particularly small, isolated communities, an integral component of the initiative should be education and prevention of violence. This will help to ensure that there is a consensus –building and education on intimate violence, and community-wide understanding that it an unacceptable crime. Education projects that targeted youth and children in the Hollow Water project were reported to have good results, and moved the community towards a broad-based ‘denormalising’ of intergenerational sexual abuse.¹⁰⁰

(ii) A Question of Models

Although the recommendations outlined above are extremely important and should be mandatory in all projects, it is the overall effect of these choices that can ensure the safety of victims of intimate violence. In my opinion, the safety and dignity of victims of intimate violence is primarily ensured through the model employed, not by the mere application of restorative principles. In many cases the use of a sentencing circle in

⁹⁹ I would not attach compliance with this recommendation to continued or renewed funding. It is an important addition, but may not be possible without extensive funding.

¹⁰⁰ Couture, *Supra* note 49 at 45.

communities with few resources will place the victim in danger of being revictimised. Other models, such as Hollow Water, may provide more support and safety. Cases of intimate violence should only be dealt with in models which meet all of the criteria outlined above. Hollow Water has been the subject of much study. I believe that it potentially provides a model that could be used in *some* cases of intimate violence in a safe and supportive manner.¹⁰¹ This model has a number of points that recommend it, and also a number of shortcomings.

There are a number of victim-centred aspects of this program. Hollow Water begins from the core premise that “The key to all interventions is the protection, support and healing of the victim.”¹⁰² Having the abuser plead guilty, as is the practice in Hollow Water, is important to the program as it “...saves the victim the trauma of testifying in court”,¹⁰³ and even in cases where charges are not laid victims are still provided with support and counseling.¹⁰⁴ Those who support the victim have received sexual abuse and family counseling training,¹⁰⁵ and the first step in an intervention following a disclosure is to find the victim and ensure her safety, including removing her from her home if necessary.¹⁰⁶

¹⁰¹ Note, however, as mentioned above, that there may be cases in which even such a supportive face to face model cannot mitigate gendered power imbalances. In those cases restorative models that do not require the participation of the victim, or that allow the victim to choose when (potentially years later) and where she comes in contact with her abuser should be the only restorative options.

¹⁰² “Bridging the Cultural Divide”, *Supra* note 8 at 263.

¹⁰³ *Ibid.* at 266.

¹⁰⁴ *Ibid.* at 268.

¹⁰⁵ Couture, *Supra* note 49 at 77.

¹⁰⁶ *Ibid.* at 92.

The majority of the community is on-side, and accept the program as both traditionally authentic,¹⁰⁷ and sufficient in making the offender accountable.¹⁰⁸ There is evidence of a community-wide consensus built by the program that sexual abuse is wrong.¹⁰⁹ This ‘de-normalization’ of sexual violence is being passed onto future generations through youth and child education, and counseling projects.¹¹⁰

There has been a minimal level of gender analysis around the abuse in the community,¹¹¹ although it has not been sufficiently explored, considering the fact that an overwhelming majority of the offenders are male, and the victims women or girls. There is no discussion of the gendered nature of these crimes, or the gendered aspects of behavior that must be altered in order to end it. Despite the purported focus on the victim, project staff estimate that they spend 60% of their time on offenders, 30% on victims, and 10% on community.¹¹² They point out that the need to be better resourced in order to really fill their mandate in relation to the victim and the community. Of 107 clients, only two have re-offended.¹¹³ However serious questions arise regarding the efficacy of breach mechanisms when it is revealed that no breach charges have been laid in those two cases.¹¹⁴

As discussed above the evaluation of Hollow Water has been criticized by a number of feminist commentators. I also believe that the evaluation was seriously lacking in critical

¹⁰⁷ *Ibid.* at 14

¹⁰⁸ *Ibid.* at 14.

¹⁰⁹ *Ibid.* at 17 and 45.

¹¹⁰ *Ibid.* at 45

¹¹¹ Couture, *Ibid.* at 59, and Lajeunesse, *Supra* note 48 at 11.

¹¹² Couture, *Ibid.* at 17.

¹¹³ *Ibid.* at v.

¹¹⁴ “Bridging the Cultural Divide”, *Supra* note 8 at 270.

perspective, and did not focus on the victims in a methodological way (i.e. interviews in a safe space) that could truly gauge their support for the program, or begin to understand any difficulties they may have experienced. For instance it would be interesting to interview the victims of those offenders who breached their conditions and were not charged.

Models such as Hollow Water provide an excellent starting point for the evaluation of current projects, and the groundwork for future projects. The fact that the project has been studied, and the results made public is an excellent starting point for informed discussion of restorative justice models.

(iii) Recommendations: Changes in Sentencing Provisions

Sentencing principles as outlined in the *Criminal Code*, and the cases interpreting them¹¹⁵ have the potential to adversely impact victims of intimate violence. In my opinion these principles have been interpreted to prioritize the needs and interests of the offender. Sometimes this results in sentencing innovations that provide little or no support for the victim, and may arguably fail to provide general or specific deterrence.¹¹⁶

¹¹⁵ See Chapter Three. These provisions have particular relevance for conditional sentences, alternative measures, and sentencing circles.

¹¹⁶ See for instance: The case of *R v Platonov* [2001] O.J. No 5156 (Ont. Sup. Ct. Just.) online: QL (O.J.) involving a non-Aboriginal man who severely beat his wife about the head with a rock, and locked her terrified in the bathroom overnight. During the attack his daughter phoned the house a number of times requesting to speak to her mother, the offender repeatedly lied to his daughter in a calm, cool manner, returning to terrorize his wife after each phone call. The victim was left with permanent facial and head scarring. The abuser received a conditional sentence due to his exemplary pre-attack conduct as a professor and social activist. *R v Belezut* [2000] O.J. No. 4220 (Ont. Ct. Just.) online: QL (O.J.) involves another non-Aboriginal abuser who attacked his wife with a barbeque fork, inflicting 14 puncture wounds to her head, neck and abdomen. The abuser received a conditional sentence due to stress induced by unhappy conditions at work, and the fact that the marriage was failing. In each of these cases, as they were handled within the criminal justice system there were few supports for the victim, and certainly no 'holistic' approach to her

The *Criminal Code* lists intimate violence as an aggravating factor under sentencing principles. Within the same provision, however, the potentially conflicting goals of reducing incarceration, and taking into account the circumstances of Aboriginal offenders are also listed. In sentencing judges are expected to provide a just sentence by balancing these three principles, among others. There is frequent reference in the cases of intimate violence mentioned in this thesis to the desire to reduce incarceration, and to the particular circumstances of Aboriginal offenders. Although intimate violence is often condemned, it is infrequently considered an aggravating factor, and almost never discussed as a sentencing principle commensurate with the reduction of incarceration, or considering the circumstances of Aboriginal offenders. Despite its equivalent status as a sentencing principle, the presence of intimate violence is infrequently discussed as such.¹¹⁷

In such cases judges must give as much consideration to this parallel sentencing principle as is given to the principle of reducing incarceration or considering the circumstances of Aboriginal offenders. This can be definitively accomplished by providing the judiciary with clear guidance as to how to balance these conflicting sentencing goals within the *Criminal Code* itself. In my opinion the immediate physical safety of all victims of intimate violence must be prioritized, and their dignity and healing a consideration equal

healing. In my opinion these cases represent circumstances where the abuse was so serious, and the mitigating factors so few that these offenders should have been incarcerated.

¹¹⁷ See for example: *R v. Belrose* [2001] B.C.J. No. 1310 (B.C.C.A.), online: QL (B.C.J.), *R v. Beletz* [2000] O.J. No. 4220 (Ont. Ct. Just.) online: QL (O.J.), *R v. Charleyboy* [1993] B.C.J. No. 2854 (B.C. Prov. Ct. (Crim Div.)) online: QL (B.C.J.), *R v. S.E.H.* [1993] B.C.J. No. 2967 (B.C. Prov. Ct. (Crim. Div.)) online: QL (B.C.J.).

to that of the offender. Specifically, as regards the circumstances of Aboriginal offenders, judges should give as much consideration to the circumstances of the Aboriginal victim as the accused in an effort to understand the potential impacts of a sentence on her. This may be through judicial interpretation, or a *Criminal Code* amendment that includes “victims” in Section 718.2 (b) alongside offenders.

The amended provision could read:

718.2 (e) all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to the circumstances of aboriginal offenders.

718.2 (f) In considering options other than imprisonment the physical safety, needs and interests of the victim shall be considered, with particular attention to the circumstances of Aboriginal victims.

(iv) Conclusion

In some cases restorative justice has the potential to meet the needs of victims of intimate violence, in others its very subjective nature makes it highly dangerous. Paying attention to social location reveals several interesting new ways of thinking about restorative justice. First, it is clear that some women would prefer to be able to access an alternative to the conventional justice system. For some it is due to their negative experiences with the conventional justice system, and for some Aboriginal women it is out of a need for culturally appropriate responses to violence in their lives. For others their vulnerability as victims of intimate violence, and the gendered power imbalances that characterise their relationship make restorative justice a revictimising experience. For all women, however, one thing is clear, if they choose to participate in restorative justice initiatives they must be shown to be safe, healing, supportive, and concerned with the interests and needs of the victim as much as those of the offender. Otherwise justice has failed.

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