

ARTICLE

RESTORATIVE JUSTICE PRACTICES FOR ABORIGINAL OFFENDERS: DEVELOPING AN EXPECTATION-LED DEFINITION FOR REFORM

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CITED: (2016) 21 Appeal 3

INTRODUCTION

Anyone in the justice system knows that lady justice is not blind in the case of Aboriginal people. She has one eye open. She has one eye open for us and dispenses justice unevenly and often very harshly. Her garment is rent. She does not give us equality. She gives us subjugation. She makes us second-class citizens in our own land.¹

— Chief Allan Ross, Norway House, Cree Nation

Restorative Justice (“RJ”) practices for Aboriginal offenders within the Canadian criminal justice system have made a valiant attempt at addressing the ‘harsh and uneven’ distribution of justice by targeting the alarming² over-incarceration of Aboriginal peoples.³ However, RJ practices are not sufficiently used, and in some cases, are implemented inappropriately. Restorative Justice sits in a limbo between overwhelming theoretical support and disappointingly inconsistent practical implementation. There

* Meagan Berlin wrote this paper for the course *Aboriginal Law* at Queen’s University’s Faculty of Law in the second year of her JD program. Meagan would like to thank Professor Hugo Choquette for his assistance and research guidance. She wishes to thank various staff of the Edmonton Institution for Women for their informative contributions and to the Four Directions Aboriginal Student Centre at Queen’s University for facilitating various informative conversations.

1 Aboriginal Justice Inquiry of Manitoba, *Report of the Aboriginal Justice Inquiry of Manitoba, Vol 1: The Justice System and Aboriginal People* (Winnipeg: Aboriginal Justice Inquiry, 1991) at 6 [AJIM]. Quoted in Royal Commission on Aboriginal Peoples (RCAP), *Bridging the Cultural Divide: A report on Aboriginal People and the Criminal Justice in Canada* (Ottawa: Minister of Supply and Services Canada, 1996) [RCAP] at 2.

2 A current statistic referenced by Valerie Gow, acting Manager of Restorative Justice Programs of the Edmonton Institution for Women (“EIFW”), a federal institution of Correctional Service Canada. Gow provides a glimpse into the reality and imminence of this concern, stating “with respect to women’s corrections, sadly, it has continued to blossom, even though there is consideration of the *Gladue* factors and Bill C-41. Over-representation is growing at a steady pace in the prairie provinces. The maximum security unit of the *EIFW* has been hovering at a rate of 100% Aboriginal offenders or just below for two years now.” Interview of Valerie Gow by Meagan Berlin (23 March 2015).

3 A definition of over-incarceration by Dickson-Gilmore and La Prairie succinctly outlines the issues: “when the proportion of members of a particular group found in a given institutional setting, such as the correctional system, disproportionately exceeds that group’s share of the overall population.” Jane Dickson-Gilmore & Carol La Prairie, *Will the Circle Be Unbroken? Aboriginal Communities, Restorative Justice, and the Challenges of Conflict and Change* (Toronto: University of Toronto Press, 2005) at 29 [Dickson-Gilmore].

exist insufficiencies and—in some cases—inappropriate forms of RJ for Aboriginal offenders, their communities, and the victims that their crimes impact. There needs to be a forward push to continue developing RJ practices. This paper proposes a structural definition that captures a threshold for measurable success or failure of RJ practice. This definition would include the incorporation of relevant barriers to successful iterations of RJ in different cases, so as to promote more appropriate use of such practices into programs that are practically and sustainably sound.

Prior to beginning this discussion on the status of RJ within Canada as applied to Aboriginal peoples, it is important to note the assumption that it is built upon: RJ is inherently good, when viewed relatively in contrast to punitive measures prioritizing incarceration. Nonetheless, this assumption is also built upon the premise of the Canadian criminal justice system being a system that is “perfect, but just needs tweaking.”⁴ Ovide Mercredi, former National Chief of the Assembly of First Nations, spoke to the frustration of dealing with the dominant view of assumption that the criminal justice system in Canada is characterized as such, but that even with RJ measures and consideration, that “as long as we stay in this criminal justice system, the judges do not have options outside of the *Criminal Code*. Even with special rules [as outlined in *Gladue*], the jails are filling up.”⁵ This is an issue of contention in and of itself; this discussion does not aim to undermine voices of opposition to this dialogue.

Val Napoleon, noted Indigenous law researcher and Law Foundation Professor of Aboriginal Justice and Governance⁶ refines this issue to the particular context of restorative justice⁷ stating that “the rhetoric of restorative justice usually obscures forms of local law.”⁸ Additionally, she points out the potentially damaging reasoning behind its use for Indigenous law. Napoleon posits that the reasoning for using RJ is not “a jurisdictional one,” but “explicitly ameliorative,” based on addressing over-representation of Aboriginal offenders in the criminal justice and correctional system and the premise of this resulting from cultural differences.⁹ Napoleon notes that RJ as it stands, extending even to the linguistic representation of RJ “practices” delegitimizes Indigenous legal traditions and law.¹⁰ This paper is written with hope that the proposed structural definition will enable opportunity for increased legitimacy, political and practical space, and ability for Aboriginal communities to define Indigenous law and legal traditions. However, it remains that this discussion centres on the state of the criminal justice system in Canada as it stands, and the recommended structural definition fits within the current framework.

I. DEFINITIONAL LIMITATIONS OF RESTORATIVE JUSTICE AND CONCEPTIONS OF ITS SUCCESS

Restorative Justice is an evolving concept that has been defined varying in practical and specific programming-based terms. These include a philosophical approach to sentencing, and in sociological contexts, youth-oriented restorative justice, gender-specific

4 Ovide Mercredi, “Aboriginal Treaty Rights” (Lecture delivered at the Faculty of Law, Queen’s University, 31 March 2015) [unpublished].

5 *Ibid.*

6 At the University of Victoria Faculty of Law.

7 Val Napoleon, Angela Cameron, Colette Arcand & Dahti Scott, “Where is the Law in Restorative Justice?” in Yale D Belanger, ed, *Aboriginal Self-Government in Canada - Current Trends and Issues 3rd edition* (Saskatchewan: Purich Publishing, 2008).

8 *Ibid* at 4.

9 Val Napoleon & Hadley Friedland, “Indigenous Legal Traditions: Roots to Renaissance” in Markus D Dubber & Tatjana Hörnle, eds, *The Oxford Handbook of Criminal Law* (Oxford: Oxford University Press, 2014) at 10.

10 *Ibid.*

practices, and culturally specific practices. Great difficulty exists in assessing the success of RJ practices, due to differences in the definitions of ‘what’ RJ constitutes and ‘what’ determines ‘success’ of the perceived goal.

Without clarity and knowledge of the differences in definitions that they each involve, assessments of its success in different populations will consistently be lacking. Criticism will always stick if there is no limitation or ‘box’ surrounding the expectations of a RJ practice. If there is no bar of expectation to measure a practice against, it will always fall short of abstract expectations when seen through a critical lens. The danger that the absence of a concrete threshold of expectation poses is that a promising theoretical structure can be written off as being ineffective or inefficient without empirical evidence of where, if at all, such gaps actually occur. This danger defines the limbo where RJ practices currently sit, as there is no framework of comparison to correctly measure their application against to see where they are and are not falling short.

Restorative Justice is conceived differently in different social contexts, both culturally and geographically. It is necessary to take into account the specific factors relevant to a population, in order to avoid a lack of specificity in what factors RJ practices should include as well as what the measures of success are. Restorative Justice practices used in other Commonwealth countries with colonial history or in the context of the youth criminal justice system will have commonalities with but *will not share* all of the same target factors and measures of success specific to Aboriginal peoples in Canada. This is because of the specific past history and treatment that has shaped the social and legal contemporary reality of this population. Restorative Justice is not a one-size-fits all shirt.

The current approach to RJ practices tries to address this by offering the same shirt in different sizes so as to ‘fit’ the different needs of different populations. Specifically RJ practices are unique for offenders under youth justice, non-Canadian Indigenous offenders, non-Aboriginal offenders, and Aboriginal offenders in Canada. Still, this approach of offering the same shirt in classified sizes ignores the differences of situational factors *within* these populations. In order to address the specific factors for each of these different classifications, RJ practices would need to be individualized at a deeper level to address the different populations within such classifications. Without this approach, the homogenization of Aboriginal peoples into one category of RJ ignores the vast cultural, linguistic, socio-economic, and historic differences between and among the Métis, Inuit, and 634 First Nations bands.¹¹

If the populations to which RJ practices are applied to differ, the measurements of whether they have done what they have set out to achieve must be relational. Thus, different measurements of the threshold for success and these different iterations must be clearly defined and distinguished.

A. Current Definitions of Restorative Justice

Restorative Justice is often defined broadly through the borrowed philosophies it has developed upon. The concept is built upon conceptions of the origin of criminal behaviour common to a number of Indigenous cultures worldwide. Many of these cultures see the nature of criminal behaviour as stemming from a shared responsibility of both the individual and the community, giving legitimization to the understanding that situational factors contribute to and perpetuate the ease and frequency at which crimes are committed by individuals. There is a degree of empathy embedded in this understanding that is not present in non-RJ sentencing or reintegration practices. Though

11 The Assembly of First Nations, “Description of the AFN” (12 April 2015), *Assembly of First Nations* (webpage), online: <<http://www.afn.ca/index.php/en/about-afn/description-of-the-afn>> archived at <<https://perma.cc/B7TQ-8MRU>>.

the responsibility of the individual is not diminished, the inclusion of the community as part of the root cause of crime, and thus, inherently expected to be a part of the healing process, is a perspective that is unique to RJ. Marginalization is a key feature that the healing component of RJ aims to rectify. As it is not within a person's full ability to unalienate themselves within a community context, the community bears some responsibility in this process. After committing a crime, an individual is perceived to be out of balance with his or her potential and with the expectations of the community; it is contingent upon a unified effort of both community members and the offender to participate in a restorative process to return to balance.¹²

Additionally, though the underlying principle is common and borrowed from many Indigenous belief systems, the elements of some RJ practices are built from actual practices of certain Aboriginal communities. The use of these elements is specific to the application of RJ within the context of Aboriginal peoples in the Canadian criminal justice system. Sentencing¹³ or healing circles¹⁴ are embedded as common applications of RJ practices for Aboriginal offenders. The community—represented by affected individuals, elders, the offender, and often the victim(s)—use a healing circle as a forum for understanding and oral representation of the effects of the crime on each of the different individuals represented, on the community as a whole, and on the victim(s). The personal circumstances of the offender and the factors that have contributed to the commission of the crime are discussed and focused on. Each factor is given consideration; factors such as a drug or alcohol addiction, child abuse, family and individual experience with the residential school system, lack of familial ties, and other situational factors that may have contributed to the commission of the offence will be considered.¹⁵

Restorative Justice—applied appropriately—allows for a humane balance in allowing the consideration of an offender's punishment to be addressed in a manner that gives the appropriate attention to the victim's experience and healing process, but without the circular systemic oppression and suffering that is often additionally punitive with and following incarceration.

The concept of 'appropriate application' and the proposed structural definition coincide. By making space for adjusting how innovation can occur in RJ practices are provided, while still creating standards of expectation, the meaning of 'appropriate application' can be established with closer certainty. John Braithwaite, distinguished criminologist specialized in studying the regulation of restorative justice practices, provides extensive narrative on both the need for standards for RJ practices, and what

12 For general understanding and further explanation of the current definition of restorative justice in Canada, see Government of Canada, "About Restorative Justice" (13 January 2014), *Correctional Service Canada* (webpage), online: <<http://www.csc-scc.gc.ca/restorative-justice/003005-0007-eng.shtml>> archived at <<https://perma.cc/TAL4-S6Y2>>.

13 *R v Moses* (1992), 71 CCC (3d) 347, (Yukon Terr Ct).

14 Native Counselling Services of Alberta, "A Cost-Benefit Analysis of Hollow Water's Circle Healing Process" (3 April 2014), *Government of Canada, Public Safety Canada* (webpage), online: <<http://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/cst-bnft-hllw-wtr/index-eng.aspx>> archived at <<https://perma.cc/FQ3C-CG54>>.

15 The Justice Education Society of BC [*Justice Education Society*] outlines the goals of a healing circle by saying that "the healing circle often leads to an organic consensus of what steps should be taken by the offender to correct the harms caused by their actions. These could include:

- a. Specialized counselling or treatment programs targeted at the impact factors that contributed to the offence (alcohol programs, abuse counselling)
- b. Community work service at the direction of an elder's counsel
- c. Potlatch and other traditional remedies specific to the customs of the tribe
- d. Direct restitution to the victim or the community
- e. Sometimes unique and creative solutions emerge, such as the offender agreeing to tell the public their story and speak out against the conduct that led to their offence."

they would practically entail. Such standards provide a basis for the foundation that this proposed structural definition would be built upon.¹⁶ Notably, Braithwaite urges that his proposed standards and the factors that define them are malleable: that such standards can provide an opening point for dialogue on what standards any particular RJ practice should be measured upon.¹⁷ Braithwaite succinctly provides a justification for the following proposed structural definition, saying that “[e]vidence and innovation from below [...] should be what drive the hopes of restorative justice to replace our existing unjust system [...]”¹⁸ The following provides space for innovation, and the controlled expansion of the definitional scope of RJ in response to evidentiary feedback to its successful iterations.

B. A Definitional ‘Box’—Outlining Thresholds of Expectation on All Sides

This paper proposes that a theoretical ‘box’ defining the expectations of RJ in practice needs to be built to support further structuring, refinement, and positive reform of RJ. It can be built by establishing lines defined by expectations.¹⁹ The top horizontal line of this ‘box’, as illustrated in the following graphic, will establish the threshold of expectation, so that it can be clear when RJ practices are being met or not. This serves a dual purpose: first, as an assessment of when a RJ practice falls short, so that it can be improved in the instant case if there is time to remedy the practice, or in the future in similar implementation, and; second, as a bar of expectation set so that once consistently surpassed, practices can be assessed in order to determine why. This can lead to innovation in restructuring and assessing *why* certain practices worked in certain contexts, and encourage ever-striving reform of RJ applications. Importantly, this ‘box’ is flexible, and the top threshold can move upwards in response to such assessments.

The two ‘side’ lines of the definitional ‘box’ of RJ, also illustrated in the following graphic, which connect the upper aspirational threshold of expectation to the lower, set state of RJ as it currently stands, are those that capture all of the possibilities of innovation in creating new practical applications of RJ practices—this would capture the derivations of sentencing circles and healing circles and novel implementations of victim-offender mediation. The lines can move laterally, allowing the shape to expand horizontally to consistently add new applications of RJ practices.

The bottom line of the ‘box’ is a definitional structure that will outline all that RJ should not achieve or entail in practice. This is also visually represented in the following graphic. Factors such as those outlined fully in the remainder of this paper, such as judicial misapplication of the *R v Gladue* (“*Gladue*”)²⁰ factors, lack of or inappropriate community for support, and lack of education regarding cultural appropriateness, should be embedded within this definition, so that a standard best practices model is incorporated to outline what *does not* work in RJ practice. Incorporating this limitation within the definition of RJ will help move away from repeated misapplication of the theoretical framework to practical applications, and act as a gatekeeper for objective assessment of the application or implementation of RJ principles. This theoretical ‘base’ of the ‘box’ stands upon the ground. It is thus unable to move up or down, unlike the top threshold. It is the only line set by this structural definition that has already been defined by the current state of RJ practices, and thus remains unchanged.

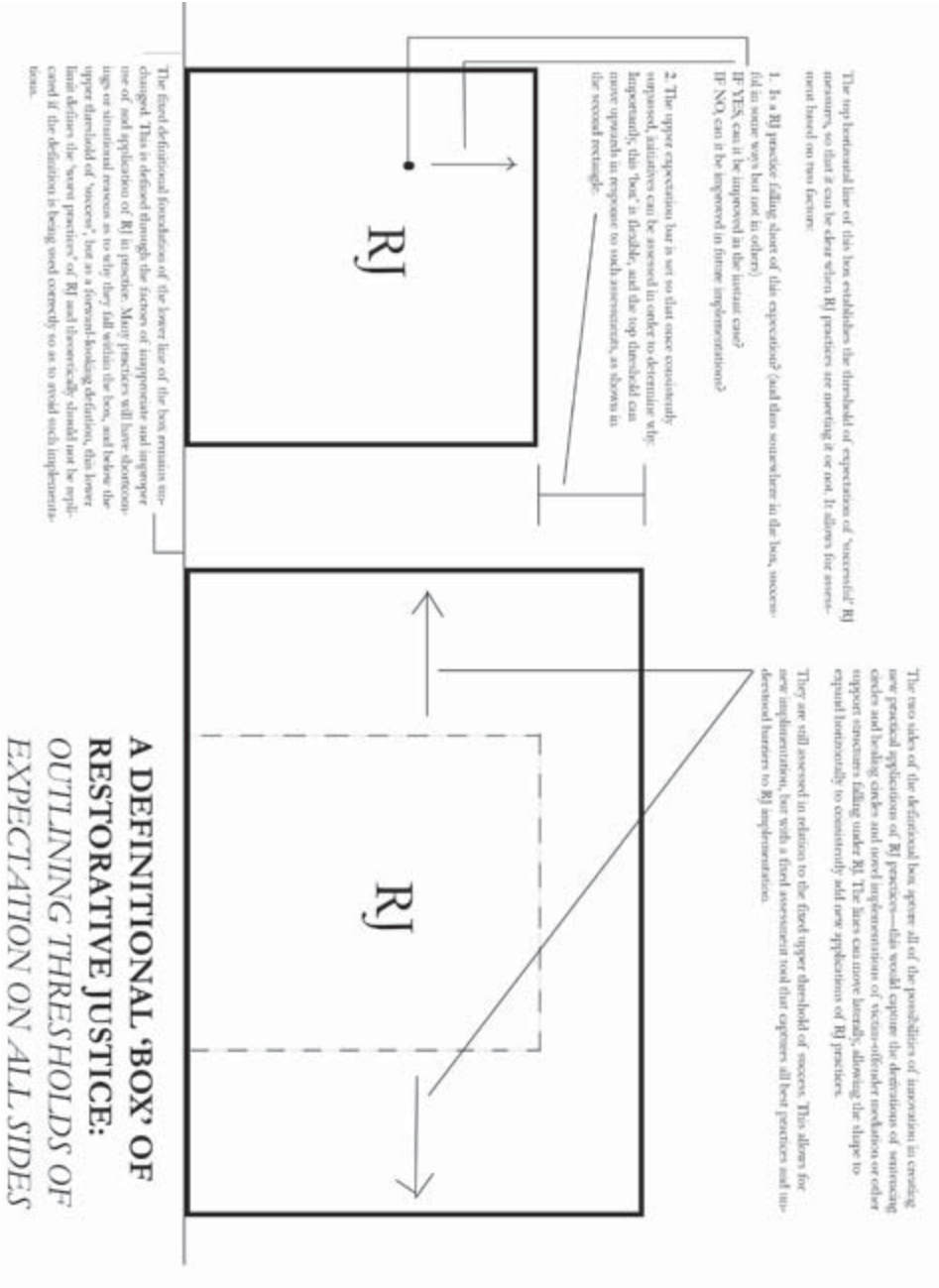
16 John Braithwaite, “Setting standards for restorative justice” (2002) 42:3 Br J Criminol 563 at 572 [Braithwaite Setting Standards].

17 *Ibid.*

18 Braithwaite Setting Standards, *supra* note 16 at 576.

19 An illustration of this conceptual definition is below for aid.

20 *R v Gladue*, [1999] 1 SCR 688 [*Gladue*].



II. A HISTORY OF RESTORATIVE JUSTICE IN CANADA AS APPLIED TO ABORIGINAL PEOPLES

The ability to consider and allow RJ practices at sentencing was established through the sentencing reforms outlined in Bill C-41,²¹ which expanded sentencing options to include such practices—by addressing the special circumstances of Aboriginal offenders—through section 718.2(e) of the *Criminal Code*. This section statutorily enshrines this intent:

718. (2) A court that imposes a sentence shall also take into consideration the following principles:

(e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.²²

This section allows for trial judges to consider other sanctions aside from imprisonment, usually in the form of community-based sentences such as conditional sentences, healing circles, sentencing circles, or victim-offender mediation. Clarification on the application parameters of section 718.2(e) was established through the Supreme Court of Canada's ("SCC") guidelines in *R v Gladue*, which sought to ensure that a proper sentence 'fit' for Aboriginal offenders is obtained in each particular case.²³ The SCC held in this case that sentencing judges must:

1. consider the unique systemic or background factors which may have played a part in bringing the particular offender before the courts; and
2. the types of sentencing procedures and sanctions which may be appropriate in the circumstances for the offender because of his or her particular [A]boriginal heritage or connection.²⁴

Resources supporting the obligation of the judiciary to assess proper sentence fit for Aboriginal offenders based on the *Gladue* factors are innovative and showcase the promise of proper application of *Gladue*. Such innovations include *Gladue* reports offered through private services such as IndiGenius²⁵ and by the Aboriginal Legal Services in Toronto ("ALST"), *Gladue* courts in Ontario, the creation of an Aboriginal Caseworker Program by the ALST,²⁶ and the existence of many community-based RJ support organizations. The *Gladue* Court (the Court) in Toronto was established in 2001 and was the first court specifically tailored and designed to properly apply the *Gladue* principles set by the SCC and to address the particular needs of Aboriginal offenders.²⁷ Specific training is given to justice officials sitting at the Court on the resources and restorative options available in general and in the particular community. *Gladue* reports are incorporated at every sentencing case. Judicial acceptance, knowledge, education, and experience in applying

21 Bill C-41, *An Act to amend the Criminal Code with respect to sentencing*, 1st Sess, 35th Parl, 1994.

22 *Criminal Code*, RSC 1985, c C-46, s 718(2)(e).

23 *Gladue*, *supra* note 20.

24 *Ibid* at para 6.

25 *IndiGenius & Associates* (webpage), online: <<http://indigeniusandassociates.com>> archived at <<https://perma.cc/LK2S-SF7D>>.

26 Government of Canada, "Location of Aboriginal Justice Strategy Programs in Canada: Ontario" (7 January 2015) *Department of Justice* (webpage), online: <<http://www.justice.gc.ca/eng/fund-fina/acf-fca/ajs-sja/cf-pc/location-emplace/index.html>> archived at <<https://perma.cc/BN4Y-DDHQ>>. In order to support the *Gladue* Court, Aboriginal Legal Services of Toronto created the position of the *Gladue* Caseworker. These caseworkers prepare written reports on Aboriginal offenders at the request of the judge, defence or Crown.

27 *R v Armitage*, 2015 ONCJ 64 at para 6.

the *Gladue* principles is demanded and embedded within the culture of the Court. The presence of such a court sets a standard of what should be expected by the considerations of any court; however, such a court remains a rarity nationally.

Gladue reports contain case-specific information tailored to the individual offender's circumstances, which is not only helpful in assisting judges, but has a significant positive effect on both full understanding—which decreases the likelihood of racist assumptions and misunderstanding—and on sentencing outcomes.²⁸ Research shows that 76% of offenders being sentenced for a repeat offense received a shorter sentence when a *Gladue* report was considered than offenders without one.²⁹

Gladue reports are in practice under-produced and not expected or demanded, due to lack of money, time, information or a cultural shift within the criminal justice system to embed them as necessary within a justice process.³⁰ Without a proper *Gladue* report, courts are limited in awareness of the particular circumstances surrounding an Aboriginal offender and are thus unable to determine proper bail conditions or impose appropriate sentences. Jonathan Rudin, Program Director at the ALST, in the executive summary for the Ipperwash Inquiry, made note of this pervasive limitation; stating—that outside of the *Gladue* Court—“judges are generally not getting the information they require to make *Gladue* meaningful to Aboriginal offenders before the court.”³¹

R v Gladue makes specific allowance for the use of sentencing approaches that incorporate RJ principles. *R v Wells* clarifies that application of section 718.2(e) does not mean that an offender will receive an automatic sentence reduction; rather, a full assessment of individual circumstances of the offender, the offence, sentencing options, and community context are all part of the “different methodology” for assessing a proper sentence for an Aboriginal offender, though such methodology does not “mandate a different result.”³² *R v Ipeelee* (“*Ipeelee*”) refined and reaffirmed the application of the *Gladue* factors by reaffirming that they apply in all contexts.³³ In *Ipeelee*, the SCC noted that misapplication of the considerations necessitated by *Gladue* by the courts must be addressed, that offenders need not establish any causal link between the background factors that the court needs to consider and the commission of the offence, and that

28 Recognizing historical as well as circumstantial impact, *Gladue* reports contain, and are not limited to, outlines on any relevant events that have impacted an Aboriginal offender's life: the *Indian Act*, *Bill C-31*, outlawing of ceremonies & traditional practices, enfranchisement to get a job, join the army, or vote, the *Canada Act 1982*, Missing and Murdered Aboriginal Women and Girls, the Yukon gold rush, WWII and the building of the Alaska Highway, Residential Schools, the 60s Scoop, Land Claims and Self Government Agreements, Community specific events, such as the creation of National parks or energy sector projects on traditional territories, settlement relocation, Band amalgamation) and circumstantial factors affected by these events, including increased violence, substance abuse, intergenerational violence, unemployment and poverty, food insecurity, lack of clean water on reserves, and poor health determinants. Any childhood factors are considered, including school experiences, foster care, and group home experience. Past criminal involvement and mental health issues are also considered.

29 Legal Services Society of BC, “*Gladue* Report Disbursement: Final Evaluation Report” (June 2013), online: <<http://legallaid.bc.ca/assets/aboutUs/reports/aboriginalServices/gladueReportDisbursementEvaluationJune2013.pdf>> archived at <<https://perma.cc/35L2-WMKT>>.

30 Sébastien April & Mylene M Orsi, “*Gladue* Practices in the Provinces and Territories” (2013) *Research and Statistics Division, Department of Justice Canada*. Note that the 2013 DOJ report says that *Gladue* Reports are available in NWT. However, the Law Society of NWT's Summer 2014 newsletter says that none are available. The Quebec government is currently considering a proposal to fund a *Gladue* Report program through the Department of Justice.

31 Jonathan Rudin, “Aboriginal Peoples and the Criminal Justice System” (2005) *Ipperwash Inquiry*, online: <http://www.archives.gov.on.ca/en/e_records/ipperwash/policy_part/research/pdf/Rudin.pdf> archived at <<https://perma.cc/WU4X-ZAHL>> at 2.

32 *R v Wells*, [2000] 1 SCR 207 at para 3.

33 *R v Ipeelee*, 2002 SCC 13 at para 3 [*Ipeelee*].

misapplication by courts of the factors outlined in *Gladue* “display[s] an inadequate understanding of the devastating intergenerational effects of the collective experiences of Aboriginal peoples.”³⁴ Yet, assuming that no changes need to be made to these principles, and that *Gladue* represents the pinnacle of what RJ should strive to achieve, this leaves RJ with limited possibility to reach for and establish a higher standard of success.

*R v Morin*³⁵ outlines that sentencing circles—a common RJ practice—are allowed as “part of the fabric of our system of criminal justice...[and are] a recognized and accepted procedure.”³⁶ Together, these cases open the door so that such sentencing options are available; however, with no expectation established that such principles can and should be improved upon, and with no understanding that there is room for them to change in response to practical weaknesses, means the door is opened narrowly. Currently, not everyone who should be passing through this doorway can fit through it.

III. WHY ARE RESTORATIVE JUSTICE PRACTICES NOT BEING MORE WIDELY IMPLEMENTED?

As *R v Gladue* sets out, there is an expectation in any case involving the sentencing of an Aboriginal offender that if the *Gladue* factors are considered and met, then RJ practices should be the preferred and primary approach in sentencing considerations. Of course, not all offenders and cases will meet these factors. This is not the concern. The real concern, which contributes to the over-incarceration of Aboriginal peoples and to the under-use of RJ practices when they would be appropriate, lies in two distinct and broadly encompassing issues:

1. Whether—within the population of those individuals who are objectively suitable under the *Gladue* factors for consideration of RJ practices at sentencing—the same number of individuals are actually being sentenced in accordance with the *Gladue* factors. This ties into judicial discretion, which will be addressed further in this paper.
2. The second factor that may contribute to RJ not being more widely used at sentencing is a lack of a practical implementation ‘net,’ consisting of resources and community support, in order to actually allow for an appropriate or applicable RJ practice to be implemented, even where an accused individual has been assessed to meet the *Gladue* factors.

A further problem that hampers the ability of RJ to establish an appropriate definitional ‘box’ built on suitable and effective practical application is that in cases where RJ is *not* the correct or appropriate approach, the misapplication of using RJ in these cases restricts and hampers the growth and acceptance of RJ practices in the future. Improper applications of RJ practices reflect RJ in a globalized manner to the public, as a ‘failed’ principle, when in reality, these instances reflect an inappropriate application in incorrect circumstances. We must seek to both:

1. Limit inappropriate use of RJ practices, by clearly including what factors and circumstances are ‘appropriate’ and will thus lead to ‘successful’ implementations; and
2. determine which instances are inappropriate based on factors that can be controlled and improved so as to make the circumstances more appropriate, and thus, establish the parameters of the definitional ‘box’.

34 *Ibid* at paras 81-83.

35 *R v Morin*, [1995] 3999 SKCA, 9 WWR 696.

36 *Ibid* at para 85.

A. Limitations on Aboriginal Communities To Be Able To Regulate and Practice Their Own Models of Restorative Justice

Another proposed reason for the stagnation of progress in RJ reforms and appropriate structuring for different contexts is the limited regulatory ability of Aboriginal communities to self-regulate justice practices. *The Royal Commission on Aboriginal Peoples* listed the following statement as the first of its *Major Findings and Conclusions*:

The Canadian criminal justice system has failed the Aboriginal peoples of Canada. First Nations, Inuit and Metis people, on-reserve and off-reserve, urban and rural in all territorial and governmental jurisdictions. The principal reason for this crushing failure is the fundamentally different world views of Aboriginal and non-Aboriginal people with respect to such elemental issues as the substantive content of justice and the process of achieving justice.³⁷

The conflict caused by these different views of the nature and purpose of justice is further aggravated when combined with the difficulty of implementing reforms to RJ because of the possibility of warranted apprehension of Aboriginal peoples in accepting legal reform. The subjugation of Aboriginal peoples has often been enabled and allowed through law.³⁸ Examples of this historic legal subjugation are laws under the *Indian Act 1876* restricting the movement of Aboriginal peoples out of reserves,³⁹ and legal limitations—including penal sanctions—to access family unification in the wake of the residential school system.⁴⁰

This is not a new criticism of the seemed inertia of the development of RJ. Deeper reform is needed, and has been called for, which would allow for the practice of community-controlled justice practices *within* the ability to self-govern.⁴¹ The limitations are thus seen to stem not from the practices or theoretical framework of RJ, but rather, the fact that it is controlled, offered, and dictated through the court system and largely controlled through judicial implementation, rather than by the community whom the individual is reconciling with and being supported by during the restorative process.

An argument forwarded by Jennifer Grace, an academic focusing on RJ in the Canadian context of Aboriginal peoples, discusses the slowing of the appropriate use of RJ in the context of the ‘social control’ seen throughout colonization and the resultant loss of Aboriginal peoples’ culture. She posits that to ‘allow’ for RJ through the dominant non-Indigenous criminal legal system is a mirror of the continued social control and power dynamic that Aboriginal peoples of Canada have experienced since contact.⁴² Within this context, RJ is seen as an ‘allowance’ by the dominant legal system.

37 Royal Commission on Aboriginal Peoples, *Bridging the Cultural Divide: A Report on Aboriginal People and Criminal Justice in Canada* (Ottawa: Minister and Supply Services, 1995) at 309.

38 Patricia Monture-Angus, “Myths and Revolution: Thoughts on Moving Justice Forward in Aboriginal Communities” in *Thunder in My Soul: A Mohawk Woman Speaks* (Halifax: Fernwood Publishing, 1995) at 263.

39 Honourable Justice Murray Sinclair, “What Do We Do about the Legacy of Indian Residential Schools?” (The Tom Courchene Distinguished Speakers Series delivered at the Isabel Bader Centre for the Performing Arts, Kingston, 27 March 2015) [unpublished].

40 Paula Mallea, *Aboriginal Law: Apartheid in Canada?* (Brandon, MB: Bearpaw Publishing, 1994) at 2.

41 Jennifer Grace, *The Challenges of Restorative Justice Projects in Aboriginal Communities through Social, Economic, and Political Perspectives* (MA Thesis, Carleton University Faculty of Arts, 2004) at 10 [Grace].

42 *Ibid* at 12.

IV: PROBLEMS AND LIMITATIONS WITHIN THE CURRENT APPROACH TO RESTORATIVE JUSTICE IMPLEMENTATION FOR ABORIGINAL PEOPLES IN CANADA

A. Lack of Resources within a Response Community

The lack of consideration and understanding of the social, economic, and political realities that affect Aboriginal communities and their ability to actually make RJ practices work is a barrier to their increased and improved use. Other contributions to this barrier include decreased funding to support programs and training of required support staff, lack of community motivation or ability to volunteer for RJ practices (often influenced by poverty, unemployment, and other endemic social factors), and lack of resources. Justice Barry Stuart—the first judge to implement sentencing circles within standard sentencing practice—noted that “many communities do not have the ability to provide sufficient finances and personnel to sustain the efforts of restorative justice.”⁴³ When RJ practices are implemented without proper planning or attention to the lack or presence of these necessary factors within the community, volunteer retention can suffer, as community volunteers will often not have the training and ability of professionals, which are necessary to avoid volunteer burnout.⁴⁴ Correctional Service Canada (“CSC”) Officer Ruby Gordey of the *Edmonton Institution for Women* (“EIFW”)⁴⁵ addressed the need for an appropriate community for RJ to work and achieve sustainable goals for the offender and community, in her statement:

If leadership in that reserve is not healthy, this is another situation in which justice is not going to work. If you feel as a worker by going into a school and hearing from students that it is not a safe community, then it is not a community where it can work. You may have a willing participant who is assessed under the *Gladue* factors, and in some cases, a willing victim, but the community support is not there. You need to uplift the community before you are able to uplift any individual member of a community.⁴⁶

B. Lack of an Appropriate Community

A community can be defined strictly as those related to the offender’s crime, or as the community which an offender is part of; however, increased rates of Aboriginal peoples moving to urban centres have changed the dynamic of what constitutes a ‘community’ for the purposes of practical implementation of RJ practices. This lack of community means a lack of support for the healing of relationships following the commission of a crime. It can also mean a lack of the ‘community shaming’ element that is inherently present in RJ models. The lack of a community makes RJ practices less effective for community cohesion, reparation of relationship, and offender recidivism rates.⁴⁷ CSC Officer Gordey regards the lack of community as one of the most difficult factors limiting

43 Barry Stuart, *Building community justice partnerships: Community Peacemaking Circles* (Ottawa: Department of Justice, 1997) at 93.

44 Grace, *supra* note 41 at 76.

45 CSC Officers at the Edmonton Institution for Women are on the front line of what the federal government has called “even more pronounced” over-representation of Aboriginal women as opposed to men, among a system already over-incarcerating Aboriginal peoples. Aboriginal women “represent the fastest growing offender population.” See Mandy Wesley, “Marginalized: The Aboriginal Women’s experience in Federal Corrections”, *Government of Canada, Public Safety Canada* (webpage), online: <<https://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/mrgnlzd/index-en.aspx>> archived at <<https://perma.cc/4D7V-KLHG>>.

46 Interview of Correctional Service Canada Officer Ruby Gordey by Meagan Berlin, Edmonton Institution for Women, Correctional Service Canada (18 March 2015) [Gordey].

47 Grace, *supra* note 41 at 73.

the effectiveness of RJ, noting that “most [offenders] come from Winnipeg, Regina area. Their communities, reserves, families are gone. There is no community on the reserve, where there could otherwise be a restorative justice circle.”⁴⁸

Even within communities that *are* present and established, the very factors that are contributory to criminal activity in the first place also add to the difficulty in community mobilization efforts. High unemployment rates, poverty, low education, family dysfunction, and weakened sense of community ties due to the loss of cultural practices or language, all affect the ability of community members to participate in and maintain RJ practices.⁴⁹

As a majority of programs within Aboriginal communities structured around RJ are dependent on volunteers, underfunding and under-involvement often leads to burnout in those volunteers who are engaged.⁵⁰ Additionally, in cases that include violence or sexual violence against the victim, additional support—which often cannot be provided solely by volunteers—needs to be present (often in the form of counselling) to protect the victims, who may not wish to see their offender.⁵¹

An objective ‘failure’ in implementation of RJ practices was seen in the case of *R v Pauchay*, where the accused was sentenced with circle sentencing and allowed to return to his community after being convicted of the negligent deaths of his two daughters, who froze when left outside while he was drinking.⁵² Public and media response was immediate, harsh, and critical. The nature of the crime and the lack of understanding of RJ practices conveyed through the media coverage tainted public opinion on the use of RJ for Aboriginal peoples, and made the lack of community support evident.⁵³ Margaret Roper, a social worker who was on the Yellowquill First Nation reserve at the time of the offense, remarked on the need for continued measures of support to make RJ achievable and ‘successful,’ mentioning that there was “talk about a treatment facility [and] bringing programs in,” but that nothing had changed.⁵⁴ Pauchay breached his conditions by drinking; there were no support structures in place within the community to support him or his family following the sentencing.

C. Judicial Limitations

The imposition of restrictive sentencing measures for offences that have mandatory sentencing restricts the ability to implement RJ practices.⁵⁵ With the imposition of mandatory sentencing in so many different areas, such as weapons possession, cultural context and RJ practice options cannot be appropriately considered, as they are supposed to follow *Gladue*. This closes the door on the opportunity and ability to use RJ in instances that could have otherwise included an appropriate offender. With the option removed simply because of mandatory sentencing, it is challenging to incorporate RJ principles where they are otherwise warranted.

48 Gordey, *supra* note 46.

49 Grace, *supra* note 41 at 45.

50 *Ibid* at 62.

51 Emma LaRocque, “Re-examining Culturally Appropriate Models in Criminal Justice Applications” in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* (Vancouver: UBC Press, 1997) [LaRocque].

52 *R v Pauchay*, [2009] SKPC 4.

53 Kevin Libin, “Sentencing circles for aboriginals: Good justice?” *The National Post* (27 February 2009), online: <http://www.nationalpost.com/news/story.html?id=1337495#__federated=1> archived at <<https://perma.cc/P952-XZMH>>.

54 Brendan Wagner, “Former Yellowquill counsellor reflects on Christopher Pauchay case”, *Prince Albert Now* (27 January 2011), online: <<http://panow.com/article/41126/former-yellowquill-counsellor-reflects-christopher-pauchay-case>> archived at <<https://perma.cc/E9FM-FRJX>>.

55 Dickson-Gilmore, *supra* note 3.

Commentary on the actual application of the *Gladue* factors at the trial level reflects mixed views. The discrepancy with which they are applied and how they are considered can be a reflection of judicial experience⁵⁶ in application of the factors, or knowledge by judges of the support or lack of support for implementing a RJ practice, which can be an outward deterring factor when deciding to allow for RJ practices.⁵⁷ CSC Officer Gordey commented on a noticeable culture at trial sentencing, stating, “despite [the fact that] that they are supposed to take into account the social history and *Gladue* factors, there is a feeling that this is being done at a cursory level.”⁵⁸ The Justice Education Society of BC has made a recommendation in response to this problem: “Judges need to know that the facilities for best practices are in place before they can provide sentencing which is innovative and restorative.”⁵⁹ Educative measures for those involved in the judiciary at the trial sentencing stage can address the support systems available in communities at regional and provincial levels in the sentencing process, which can target this lack of understanding.

As an example of judicial guidance when implementing a sentencing circle as an application of RJ, Justice Fafard lays out seven factors of consideration as to whether or not application is appropriate in the circumstances, in *R v Joseyounen*:

1. The accused must agree to be referred to the sentencing circle.
2. The accused must have deep roots in the community in which the sentencing circle is held and from which the participants are drawn. Elders or respected, non-political community leaders will participate.
3. The victim is willing to participate, without being subjected to coercion or pressure.
4. Although not applicable to this case, the following criterion was added to cover future possibilities: The court should try to determine beforehand whether the victim suffers from battered woman’s syndrome. If she does, then she should receive counseling and be accompanied in the circle by a support team.
5. Disputed facts have been resolved in advance.
6. The case is one in which a court would be willing to take a calculated risk and depart from the usual range of sentencing.⁶⁰

56 Pamela Rubin, *Restorative Justice in Nova Scotia: Women’s Experience and Recommendations for Positive Policy Development and Implementation, Report and Recommendations* (Nova Scotia: Status of Women Canada’s Women’s Program, 2003) [Rubin]. Mandatory education programming for the Judiciary was one of the key recommendations from the 2003 *Report and Recommendations*: “Education on abuse, women’s equality issues, [and cultural sensitivity] was needed...for all justice system professionals. Women cited out-dated and insensitive remarks, actions and attitudes of police, lawyers, judges and other justice system professionals throughout discussions. They felt that mandatory education on abuse, women’s equality and cultural sensitivity for judges in particular was needed, who, women felt, would not educate themselves on these issues unless compelled.”

57 AJIM, *supra* note 1.

58 Gordey, *supra* note 46.

59 Justice Education Society, *supra* note 15.

60 *R v Joseyounen*, [1995] 6 WWR 438, [1996] 1 CNLR 182 (SKPC).

D. Lack of Appropriate Application of RJ for the Crime or Victim

Concern for the victims of crime is central to the healing process intended by RJ processes. Consideration of the involvement of the victim within this process is an element that is lacking in the traditional criminal justice system, where the victim is limited to testifying under carefully controlled conditions, or to providing a victim impact statement. The increased focus on the involvement of victims of a crime within RJ practices such as sentencing or healing circles has a specific concern that needs to be adequately addressed and often is not: a power imbalance between the offender and victim, produced by the relationship or by the crime itself.

One example of this issue being poorly considered, within the context of a repeated domestic violence offender, occurred in a community of Inuit Peoples in Nunavik region, Quebec.⁶¹ The victim had been repeatedly assaulted, over fifty times, and the offender had received four other convictions for the same offence against the same victim. The victim rarely spoke during the sentencing circle. Members of the community only spoke to the impact of the assault on her once.⁶² The nature of domestic violence as a cyclical pattern can silence the victim. Thus, for a fully equal balance of power to occur within the context of RJ practices, there is a strong argument that the nature of domestic abuse or child abuse cases on the relationship between the offender and the victim make this equality unattainable without specific and targeted support, training, and attention to the victim's needs and ability to participate. In the absence of such support, training, and attention, such offences should not be addressed through RJ practices. Additionally, it is noted by Mary Crnkovich, a lawyer and scholar focusing on Northern Inuit culture and sentencing circles, that in an analysis of collected observations of sentencing circles, an evident commonality is that judges "express the idea that the views of the community and the victim are the same."⁶³ The danger of this perception is that focus can fix on the accused, rather than the specific needs or desires of the victim. The nature of domestic abuse and the factors that perpetuate it also make it more difficult for victims to feel able to speak up and share these specific needs or desires for sentencing or healing.⁶⁴

A further obstacle that is present in the use of RJ practices for all crimes, not just domestic assaults, is the nature of the community. Many pre-existing relationships will be brought into the process.⁶⁵ In cases where the community consists of friends, family members, and people who know the victim and/or the offender, there is a fear of conscious or unconscious bias in favouring the accused over the victim, leading to the possibility of victim blaming and the perpetuation of unbalanced power relations seeping into the RJ practice.⁶⁶

E. Lack of Appropriate Cultural Understanding in Assuming "Blanket" Appropriateness of Restorative Justice Practices

Approaches to using RJ principles in sentencing by the courts are predominantly made with limited understanding of the specific cultural appropriateness of the practices to some Aboriginal communities. Restorative Justice is founded on an assumptive understanding of most Aboriginal communities being based upon the prioritized

61 Mary Crnkovich, "A Sentencing Circle" (1996) 36 J Legal Plur Unoff Law 159 at 159 [Crnkovich].

62 *Ibid.*

63 *Ibid* at 167.

64 *Ibid* at 278.

65 Grace, *supra* note 41 at 78.

66 Rubin, *supra* note 56. "Women talked about how, upon criminalization or after suffering woman abuse, what they had thought was their "community" could quickly become hostile to them, particularly in more insular communities. This was particularly emphasized for women who had experienced sexual assault or abuse, or who were non-offending parents of children who were sexually abused by male partners."

concern for collective forgiveness. This assumption ignores the vast differences between Aboriginal communities, in relation to economic participation, connection to historical cultural practices, geographic location, and values.⁶⁷ The Inuit, influenced by geographic circumstance and a relatively protected continued way of life in line with historic cultural practice, would prize collectivism and community empowerment, differently from Métis culture, where independence and “individuals [...] were highly regarded in society [...] and their safety and dignity were, as a rule, not sacrificed for the collective.”⁶⁸ Even the treatment of offences that are now approached through healing RJ practices were not collectively approached in such ways by all Aboriginal groups. Ignoring the differences that exist community-to-community and proposing a blanket form of RJ perpetuates homogenizing views of Aboriginal peoples.

For example, past practice in the treatment of serious offences, such as violent assault or murder, and even offences leading to non-bodily injury to the victim or community, such as theft, were treated by the Ojibway of Northern Manitoba with swift retribution through imposed illness, death, or psychic manipulation, with no account to community healing.⁶⁹ Banishment cases also point to differences, especially in Northern Inuit communities, in the conceptual definition of ‘community healing.’ The maintenance of a community and its ability to survive cooperatively were dependent on the removal of an individual whose presence could endanger the ability of the community to function and thrive collectively. Crnkovich, at the *Canadian Institute for the Administration of Justice Conference*, outlined the frustration of Inuit communities when RJ principles are implemented judicially with the assumption and lack of knowledge that sentencing circles are not, in fact, a “traditional” practice that is being re-instituted:

In the context of Inuit culture, [there is nothing] so exact or complete as a traditional justice ‘system’ or traditional justice ‘practice’ that you can immediately identify and implement. There are well known formal and informal traditional practices of social control such as a shaming song, individuals fighting one another, challenges of strength, ostracization, banishment, or in very rare cases, killing.⁷⁰

V: APPROPRIATE RJ IMPLEMENTATION EXAMPLES—WHAT LESSONS CAN BE LEARNED?

A. Example of Proper Assessment of *R v Gladue* Factors at Sentencing

An upper-threshold defining example of judicial expertise in applying and considering the extensive factors outlined in *R v Gladue* during the sentencing of an Aboriginal offender is the recent Ontario Court of Justice decision by Justice Nakatsuru in *R v Armitage*⁷¹ (“*Armitage*”).

Of important note is that the decision was one of many stemming from a *Gladue* Court.⁷² The presence of this court itself is a promising example of the possibilities of RJ implementation and of judicial acceptance, education, and expertise in considering the *Gladue* factors at sentencing.

⁶⁷ *LaRocque*, *supra* note 51 at 73.

⁶⁸ *Ibid* at 81.

⁶⁹ *Ibid*.

⁷⁰ Mary Crnkovich. “The Role of the Victim in the Criminal Justice System – Circle Sentencing in Inuit Communities.” Prepared for the *Canadian Institute for the Administration of Justice Conference*, Banff, Alberta, 1995.

⁷¹ *R v Armitage*, 2015 ONCJ 64 [*Armitage*].

⁷² *Ibid* at para 6.

Yet, *Armitage* also outlines the danger of a sweeping definition of ‘success’, as this will be different case-by-case. This is an important consideration to take into account when interpreting the success of RJ reform and practices; *they must be assessed as to their success in each particular case.*⁷³

B. Example of Proper Resources, Established Community, and Community Engagement

Restorative Justice principles can also be used at any point *during or after* an incarceration sentence. The allowances for this through Correctional Service Canada are extensive and take into account the specific needs of Aboriginal offenders, with extensive programming targeted to their specific needs. The use of halfway healing houses by CSC should be recommended as a partial solution for RJ reform at sentencing. This necessitates funding, but could target the dual issue of a lack of community for offenders from an urban centre, and lack of volunteer and community support.

Section 81 of the *Corrections and Conditional Release Act* (“CCRA”) allows for the transfer of an Aboriginal offender to an Aboriginal community in a non-institutional setting. Section 84 of the *CCRA* provides Aboriginal communities with the opportunity to participate in an offender’s release plan following incarceration. Successful reintegration becomes part of the overall healing path for all involved: the community, the offender and the victim.

Buffalo Sage Wellness House (“BSWH”) in Alberta is a representative example of what could be, and of what proper and appropriate RJ practices can achieve. BSWH offers the aid of Elders, Alcoholics Anonymous, Narcotics Anonymous, Sharing Circles, Sweat Ceremonies, support groups, drumming circles, Powwows, Round Dances, Night Lodge Ceremonies, and Sun Dance ceremonies, and picking of traditional medicines as part of the healing process for the offender, and jointly for the offender and victim or victim’s family, if they are willing to partake. BSWH is a makeshift community for those who do not have one to return to. Valerie Gow of the EIFW states that the biggest challenge for expansion of such programs outside of the correctional service system, and into urban centres, is funding for such facilities. The communities, through an agreement with CSC, run four of the eight Wellness Houses under CSC programming on reserves. A further difficulty in continuing to offer restorative services is that innovation by these Aboriginal communities is stilted, as only CSC ‘core’ lessons are federally funded. “Lack of continuity” after leaving the program was also cited as a challenge, as Aboriginal-specific programming is limited both within reserves and in urban centres, depending on where an ex-inmate is. A recommendation is that Aboriginal peoples’ efforts to develop more localized, community-based justice programs grounded in their own legal traditions need to be fostered, and federal funding and structural assistance where requested, needs to be made available.⁷⁴

Indigenous legal traditions suffer within the legal and procedural confines of Canadian criminal law, even though the SCC has supported incorporation and validation of Aboriginal customary law in Canada by noting the continuity of Aboriginal legal traditions before and after colonial contact.⁷⁵ John Borrows, Canada Research Chair in Indigenous Law, in his report on Indigenous legal traditions in Canada for the Law Commission of Canada, argues for national recognition of Indigenous legal traditions,

73 *Ibid* at paras 67-72.

74 AJIM, *supra* note 1.

75 *R v Mitchell*, [2001] 1 SCR 911 at para 8.

and specifically, for the need to “[provide] Aboriginal peoples with the resources and political space to cultivate and refine Indigenous law according to their own aspirations and perspectives.”⁷⁶

The lack of funding and restricted political space to incorporate Indigenous legal traditions is—surprisingly—evidenced in the specialized Cree Court within the Saskatchewan Provincial Court. Though the Cree Court’s ability to expand opportunities for RJ practices is greater because of community, structural, and judicial support, and though RJ concepts reflect Cree traditions in a culturally appropriate way, Borrows notes that “it does *not* represent anything close to a fully functioning Cree legal system.”⁷⁷ Though similarities to Cree legal tradition are reflected in sentencing options available through Canadian law in RJ practices, some aspects remain—in actuality—incompatible with Cree legal traditions.⁷⁸ This discrepancy highlights that *even where* extensive work has been done to affirm and reflect “Aboriginal legal principles” in Canadian criminal law and sentencing practices—such as the presence of the Cree Court—without the political and financial support necessary to develop community-based justice programs reflective of (or at least not incompatible with) the community’s own Indigenous legal system, good intentions will fall short. RJ practices not grounded in the appropriate Indigenous legal tradition will not satisfy the goals that RJ practices seek.

VI: WHERE IS THE DEFINITIONAL ‘BOX’ AS IT STANDS AND WHERE SHOULD WE STRIVE FOR IT TO BE?

The issue of lack of definition as to what RJ should accomplish, and what factors contribute to a definition of ‘successful’ versus ‘non-successful’ implementation of such practices was discussed.⁷⁹ A definition that establishes both upper and lower expectation thresholds and ‘best practices,’ allowing for reform and innovation possibilities, but considering the substantial challenges facing RJ practices for practical implementation, is advised as necessary in order to move past inappropriate practical implementations of RJ, which lead to its current suspended state. Many factors must be addressed before the implementation of RJ practices will consistently meet and surpass the definitional ‘success’ captured by the upper threshold line of this definition. If RJ practices are not consistently applied and assessed, no documentation or data of its suitability and appropriate application will be incorporated within the definition, and it will remain stationary. This points to a need for increased research and documentation, which is a further recommendation made that will strengthen the definition’s utility.

The most key feature that ties into the lack of support, resources, training, and ability for volunteer motivation and retention is lack of funding.⁸⁰ The *Royal Commission on Aboriginal Peoples* (“RCAP”) recommended strongly “at a *minimum*, funding for new

76 John Borrows, *Indigenous Legal Traditions in Canada: Report for the Law Commission of Canada* (Ottawa: Law Commission of Canada, 2006) at 6 [Borrows] [emphasis in original].

77 *Ibid* at 52.

78 *Ibid* at 53.

79 It is of note that a strong argument exists that any RJ measure, as an alternative to incarceration, may be considered ‘successful’ when measured on such an external, single-function criterion, if incarceration were a sure alternative. However, this paper rests on the argument that though this may be true, internal standards of assessment must be considered in order to improve RJ in practice, thus making the markers of success based on comparisons between and among RJ practices and implementations, not as compared singularly against the alternative of incarceration.

80 Community engagement efforts to address support services, motivation issues, and volunteer retention can also take the form of within-community engagement measures that train members to provide services.

[RJ] initiatives should be guaranteed for at least the period required.”⁸¹ Funding is key to allowing for increased research into assessing the failures of and barriers to RJ implementation at provincial and national levels, in order to address them adequately. Recent political pressure with the release of the Truth and Reconciliation Commission of Canada’s (“TRC”) reports and series of recommendations may be what is needed in order to meet the funding gap that has perpetuated in the 20-year wake since the release of the RCAP’s recommendation. Particularly, in the Calls to Action by the TRC, the explicit call to the federal government to provide sustainable funding for “existing and new Aboriginal healing centres to address the physical, mental, emotional, and spiritual harms caused by residential schools” has a direct link to the need for federal funding to ensure healing and community lodges for use in RJ practices are present and functioning.⁸² Additionally, the TRC’s call upon the Federation of Law Societies of Canada to “ensure that lawyers receive appropriate cultural competency training,” if implemented properly, will address, at a deep level, the continuity of judicial misapplication or ignorance of appropriate applications of RJ.⁸³ The last recommendation that will put explicit political pressure on addressing, through the provision of funds for continued research, is the call upon all levels of government to “provide sufficient and stable funding to implement and evaluate community sanctions that will provide realistic alternatives to imprisonment for Aboriginal offenders and respond to the underlying causes of offending.”⁸⁴

The proposed definition in this paper is *only a first step* in addressing the harsh and uneven distribution of justice to Aboriginal peoples.⁸⁵ Justice needs to be informed and supported by continued research and the appropriate government funding to support this, in order to come to just and continually-improving standards of RJ for Aboriginal offenders.

Shortly after the 2015 federal election, Prime Minister Trudeau mandated that the new Minister of Justice, Jody Wilson-Raybould, review the criminal justice system with a view to include increased use of restorative justice practices and other initiatives with the intent to reduce the incarceration rate of Indigenous Canadians.⁸⁶ It is hoped that these modernization efforts will improve the efficiency and effectiveness of the criminal justice system.⁸⁷ Hopefully, this new tone in Canadian governance will address the funding gap needed to support RJ practices, which may reduce the systemic over-representation of Aboriginal peoples in the Canadian correctional and criminal justice system.

81 RCAP, *supra* note 1 at 269 [emphasis added].

82 Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Calls to Action* (Winnipeg, 2015) at para 21 [TRC].

83 *Ibid* at para 27.

84 *Ibid* at para 31.

85 AJIM, *supra* note 1.

86 Letter from Prime Minister of Canada Justin Trudeau to Minister of Justice Jody Wilson Raybould (15 November 2015) “Minister of Justice and Attorney General of Canada Mandate Letter” issued from the Office of the Prime Minister at para 19.

87 *Ibid* at para 20.