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Commentary on “Breaking the Barrier: Rethinking Sexual Assault and Restorative Justice”

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This Commentary is premised on a paper published in the *Canadian Arbitration and Mediation Journal*, Spring 2025, titled *An Ex Post Facto Review of a Restorative Justice Deferment Circle Case* (CAMJ Paper).¹ This article described the practical procedures for conducting a Canadian Restorative Justice Circle for a Sexual Offence case. Circles have their roots in indigenous traditions. In keeping with our Canadian legal confidentiality requirements, we are not disclosing any case facts, details or identifiers.

Albert Eglash coined the term “restorative justice” (RJ) in the 1970s as a critique of the punitive nature of the adversarial, criminal justice system.² RJ is an approach to criminal justice that emphasizes repairing harm. RJ invites the victim, offender, family, community and judiciary to participate in a confidential process. In Canada, RJ is offered in two modes: Victim/Offender Mediation (Deferment), or RJ Circles.

Eglash, Zehr and Gavrielides built upon many global, historical, indigenous and religious traditions to shift focus from punitive to rehabilitative and restorative.³ These include alternatives to incarceration, addressing conflict in the community and youth conferencing.

In addition to RJ, there is reparative justice. Reparative justice is a concept of justice

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focused on acknowledging, redressing and repairing historical and systemic harm inflicted by individuals or groups, particularly those rooted in slavery, colonialization, racial injustice, war crimes and genocide. Reparative justice adds another nuanced and complementary layer to the current debate on accountability. It draws upon the cumulative damage experienced in the Caribbean and other lands by the decimation of indigenous peoples, the Middle Passage, slavery and indentured servitude. Reparative justice seeks acknowledgement and compensation for the forced labour, external debt, resource extraction and imposition of colonial forms of law and government. Reparations are not new to the Caribbean: the British government compensated slave owners and the Republic of Haiti paid France.

Multiple regional and international organizations, such as UNESCO, the African Union (AU) and CARICOM, are drawing attention to reparative justice.⁴ The AU explicitly recognized this legacy and designated 2025 as the *Year of Reparations: Justice for Africans and People of African Descent through Reparations*. The AU stated: "...reparations is not merely symbolic; it stands as a moral, legal and political imperative. Reparations and restorative justice are essential instruments for correcting historical wrongs, dismantling systemic inequities and fostering meaningful reconciliation".⁵

Restorative Justice in the Caribbean

The legacy of a repressive colonial legal system continues to cast a long shadow. The retributive sanctions derived from many colonial-based, punitive laws (execution, cat o' nine tails, solitary confinement, shackling and so on) remain. Today, Caribbean nations acknowledge that this violent and dehumanizing historical legacy is a contributing factor to the ongoing challenges of high crime, high recidivism and social breakdown.⁶ In 2013, the Caribbean Community (CARICOM) passed its *CARICOM Crime and Security Strategy*, which advocated for community-based rehabilitation initiatives.⁷ In April 2024, the International Centre for Criminal Reform released a report entitled *Gap Analysis on Crime Prevention and Response Interventions in CARICOM* (Report).⁸ The Report identified several recommendations, including the implementation of community-based sentences, alternatives to pre-trial detention, mediation and RJ.

In the English-speaking Caribbean, Jamaica has taken the lead in RJ. It published a White paper, *The National Restorative Justice Policy* (2012), the *Restorative Justice Act* (2016), which introduced Victim/Offender mediation and community reconciliation programmes, and a Green paper, *Restorative Justice Policy: Promoting Restorative Justice to Resolve Conflicts and Grievances* (2023).⁹ Jurisdictions, including Belize, Antigua and Barbuda, Guyana, Trinidad and Tobago and Turks and Caicos Islands, have followed Jamaica's path in incorporating RJ into their criminal justice systems. Other Caribbean countries are collaborating internationally,

including: PACE Justice to reduce criminal case backlogs; UNESCO on reparations; COPOLAD on juvenile RJ and Canada (through its Caribbean Development Program and JURIST project) to train police, mediators and court officials on RJ.¹⁰

2025 Leveson Report (UK)

In July 2025, Sir Brian Leveson, KC, released a report on the UK criminal court system (Leveson Report), which stated:

...there is a real risk of total system collapse in the new future ...cases have little or no chance of being brought before the court, victims and witnesses disengage and if they do attend court that would be three or four years later, when they cannot recall specifics. Overall, the criminal justice system would stagnate, open caseloads would continue to increase, agencies would not be able to cope and inefficiency would be the norm. Little or no consequences for lawlessness could lead to a breakdown in law and order and society taking things into their own hands. Every submission and discussion with criminal justice agencies that I have had as part of this Review has confirmed this reality.¹¹

The Leveson Report made multiple recommendations to address the backlog in both the Crown Court and the Magistrate Court, including: introduction of an Intermediate Court; restoring the criminal justice system to an essential service; funding to repair court buildings; increased data sharing and offender diversion.¹² The UK Bar Council's Response to the Leveson Report considered many points. In respect to Intermediate Courts: "The Bar Council opposes the introduction of an intermediary court both on principle (the right to trial by jury), and in practical terms".¹³ They accepted innovative thinking that is required to solve the crisis in the criminal justice system, particularly reducing backlog and waiting times. The UK Bar Council suggested that the government adopt the recommendation on diversion, specifically:

[a] new model for rerouting criminal cases, [based on the existing] Deferred Prosecution Agreements and referral orders...[as] the experience of victims is also likely to be improved...[Currently] a victim may wait four years to give evidence in a criminal trial at the end of which a defendant, if convicted, receives a community order or suspended sentence whose terms could be mirrored in a diversion Order.¹⁴

The UK Bar Council is supportive of diversion (or criminal deferment) as a direction in the reform of the UK criminal justice system.

Canadian Legal Framework

With reference to the CAMJ Paper,¹⁵ the Government of Canada defines RJ as "...an approach to justice that encourages communication between victims, offenders and the community to address the harm caused by a crime. RJ is a voluntary process that leads to healing in victims, meaningful accountability of offenders, and contributes to healthier, safer Communities".¹⁶

RJ's jurisdiction is the *Director of Public Prosecutions Act*. Section 3.1. General Principles permits Crown Counsel to use alternative measures before or after charges are laid,

and only if the decision to prosecute test is met. Section 3.2 has the legislative preconditions to be satisfied before alternative measures can be utilized. In Section 3.3, Crown Counsel determines whether the alternative measures are appropriate in the particular circumstances of the accused, such as overrepresentation of First Nations, Inuit, Métis, Black persons and persons from other racialized and marginalized groups; mental health, substance abuse, housing insecurity and expressions of remorse.¹⁷

Section 3.4. The Nature of the Offence: “The law does not limit the type of offences that can be dealt with by alternative measures. Therefore, all offences are eligible for alternative measures”.¹⁸ Alternative measures, on one hand, must be appropriate and consistent with the protection of society, maintaining public confidence and safety and address the underlying cause of crime. On the other hand, they must also balance the degree of responsibility of the accused, the nature and seriousness of the offence, potential harm to community, society or victim, and whether the harm caused requires the use of the criminal justice system or can be adequately addressed with alternative measures.¹⁹ In Section 3.4.1. Consultation, it states, “Based on the unique and particular circumstances of a case, Crown Counsel must consider consultation with the following individuals before making an assessment about alternative measures: Chief Federal Prosecutor (CFP) or Deputy CFP; Victims; the Community; Law Enforcement agencies; Defence Counsel; Colleagues”²⁰

Section 4. Implementation of Alternative Measures:²¹ Completion of alternative measures may lead to the charges being withdrawn, stayed or sentence reduced. The Crown should inform the court as such. Furthermore, in cases where the accused does not complete alternative measures within the prescribed time and re-offends, the Crown may consider reinstating the original charges.²²

Section 717 of the *Criminal Code of Canada* states that:

...alternative measures...[in] criminal proceedings should be used with restraint...not everyone who is alleged to have committed an offence should be prosecuted...Alternative measures provide an accused with an opportunity to have charges dealt with outside of the criminal process, if they accept personal responsibility and agree to make amends. This allows Crown counsel to take into account both the nature and circumstances of the offence, as well as the accused’s personal circumstances.²³

Section 717(1) of the *Criminal Code* sets out when alternative measures may be used. Crown Counsel should consider the use of alternative measures in cases where the following are met: sense of accountability in the accused; recognition of damage done; deterrence, rehabilitation and restitution to the victim ... and the consequence of a criminal conviction and criminal record.²⁴ In Section 717(1)(a) of the *Criminal Code*, alternative measures are appropriate, having regard to the needs of the accused, the interests of society and the interests of the victim. In Section 717(1) (b) of the *Criminal Code*, the accused consents to participate fully and freely after being informed, and the accused accepts responsibility for the offence charge (section 717(1)(e) of the *Criminal Code*).²⁵ Alternative measures under this legislation include: a

letter of apology, victim-accused reconciliation programmes; specialized programmes for counselling, treatment or education; mediation; restitution or compensation.²⁶

The above Canadian legislation provided the alternative measures/RJ authority to conduct the case below.

The Sexual Assault Case

Once we were assigned this case, the following factors were considered and met:

- All stakeholders provided voluntary consent
- Person who caused harm accepts responsibility
- Acceptance by person who experienced harm
- Coordination with defence lawyers and crown
- Inclusive of others (Community)

Pre-Circle

Our instructions were that this case was to be an RJ Circle. Designing a Circle is a collaborative, multi-layered and nuanced process. In our pre- Circle individual meetings with each stakeholder, we discussed with them the concept of the Circle, its indigenous roots and their role in designing and participating in it. Our training provided us with the recognition that designing this process would require compassion, patience and time. Stakeholders led the conversations and were invited to return and speak with the Circle Keepers as often as they wished.

Circle Day

Our aim was to transition into a quiet, focused, confidential and sacred space where stakeholders would feel comfortable speaking and listening. The custom design included sensory, spiritual and visual elements. Visually, we added historical and indigenous pieces, such as wildflowers, sweetgrass, hand cleansing ritual and inspirational quotations on the walls. The aim was to leave the outside world (and their cell phones) and enter into an inner sanctum with respect, trust and honour. The Circle itself took an entire day. Stakeholders shared their vulnerabilities, regrets, apologies and tears. Every voice was heard.

Denouement

Since this case was concluded, the person who experienced the harm now refers to themselves as a sexual assault survivor.²⁷ The survivor continues to educate and campaign for the use of RJ in sexual assault cases as an alternative. The criminal defense lawyer expanded his legal practice to be RJ-inclusive. In Ontario, Canada (to the best of our knowledge), no further sexual assault cases were referred to RJ, as there is now a moratorium. The most recent sexual assault case that went to trial in Canada, the Hockey Canada Trial, has attracted a wide response from academia and legal practitioners who maintain this matter should have been referred to RJ.²⁸

Future RJ Considerations

Research indicates that RJ is more effective in reducing crime and recidivism.²⁹ The Scottish government's evidence review of RJ (2019) identified jurisdictions, such as Norway, Belgium and Colorado, as global leaders in the implementation of RJ.³⁰

Norway's national mediation services are centralized under the Ministry of Justice and Police, with over 20 regional mediation services delivering approximately 10,000 cases per year. Facilitation is by trained volunteers from the community.³¹ In addition, Norway's Halden prison offers an RJ approach in rehabilitation for prisoners. Guards call prisoners by their first name, share meals together and prisoners have an opportunity to spend the night with their families in an on-site guest house. The results are Halden's low recidivism: 20% re-offend two years after release.³²

Belgium similarly has access to RJ at each stage of the judicial process, regardless of the seriousness or type of offence. Belgium differs from Norway in that it uses third-sector professional mediators, rather than volunteers.³³ Colorado (the United States of America) also has a central body, the statutory RJ Coordinating Council that provides training and support for the development of all RJ programmes.³⁴

RJ for youth is more universal than for adults. Youth conferencing in Northern Ireland, New Zealand and Australia, all have universal access to forms of conferencing for youth offenders. By contrast, in England and Wales, victims of young offenders under the *Victim's Code* are entitled to be offered RJ, which is carried out by Youth Offending Teams.³⁵

In 2025, the RJ Council (UK) issued *State of the Restorative Sector 2025 Criminal Justice*.³⁶ This review identified that RJ is still a work in progress. Among its recommendations, increased training and funding, enhanced community involvement and collaboration, technology integration into service delivery and demand for culturally responsive practices.

In the Caribbean, Richard Barraclough, K.C., wrote *Restorative Justice in Jamaica* (2024). He noted that Jamaican RJ staff and facilitators were conducting more than 2300 case

conferences with a total of 1853 agreements signed; 98% of the cases were completed in 24 months. He commented that RJ practice in Jamaica was not just about bringing together the victim and the criminal. It was also “to teach those involved in mainly domestic and anti-social criminal behaviour just how they might seek to resolve their differences without resorting to violence”.³⁷

In 2024, Anil Nandall, the Attorney General of Guyana, in his presentation, *The role of restorative justice in the criminal justice system – making the cultural shift* stated that alternative methods of settling disputes are not just a trend, but a necessary evolution in the justice system.³⁸ He cited Jamaica as a pioneering jurisdiction with its Restorative *Justice Act* (2016) and further noted that penal sanctions and the conventional approach to punishment have failed in achieving deterrence. The Attorney General went on to outline Guyana’s implementation of RJ training for the judiciary, prison officers, police, religious leaders, teachers, community leaders and Toshaos. In 2025, Guyana, RJ is only available for a limited number of minor offences.³⁹

The legal, moral and public policy case for RJ continues to build momentum globally, including the Caribbean. Some Global North countries, such as Denmark, Norway and Ireland, have moved towards introducing RJ for more serious offences, such as sexual assault.⁴⁰ While the logic of extending RJ is clear, these legal innovations may also challenge deeply-rooted social values, beliefs and myths, as well as shining an uncomfortable light on systemic deficiencies. Developing public awareness and support will require time, extensive stakeholder training and political will. Caribbean governments have already demonstrated significant progress on all these dimensions. For example, the JURIST project developed Model Guidelines for Sexual Offence Cases in the Caribbean.⁴¹—This framework may be easily adaptable to RJ.

NOTES

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