Restorative Justice, Domestic Violence and Sexual Assault in Canada: A Summary of Critical Perspectives from British Columbia

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Introduction

Violence Against Women and Children in Canada: a Snapshot

- Up to one in five women are victims of violent crime in Canada each year. Two thirds of all female victims of violence know their attackers.[1]
- Of persons charged in Canada 98% of sexual assaults are by men and 86% of violent crimes are by men.[2]
- Percentage of incidents of violence that are reported to police: 14%.[3]
- Half of Canadian women have survived at least one incident of sexual or physical violence. [4]
- 98% of sex offenders are men and 82% of the survivors are girls and women.[5]
- Aboriginal women have an even higher chance of suffering physical or sexual abuse. Estimates range from 48 to 90% of Aboriginal women are assaulted at the hands of their partners, depending on what community they live in.[6]
- " Eight in ten Aboriginal women witnessed or experienced intimate violence in childhood, and the same number have been the victims of child or adult sexual assault."[7]
- Aboriginal women typically endure 30 to 40 beatings before calling the police.[8]
- Physical injury is the leading cause of death for Aboriginal women on-reserve.[9]

Western Versus Aboriginal Restorative Justice

Restorative justice is a 'new/old' phenomenon that is quickly gaining a place in the Canadian criminal justice system. Restorative justice refers to a set of practices, theories and values that are extremely diverse. It is practiced in many different forms, with varying procedural, institutional and community configurations.

It is important at this point to differentiate between what has been called "western" restorative justice and "Aboriginal" restorative justice.[10] Western Restorative justice refers to practices, theories and principles developed since the late 1970's by predominantly white, Christian prison abolitionists. It purports to incorporate a

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[1] YWCA of Vancouver " There's No Excuse for Abuse" October 2000.
[2] Johnson, Holly, "Violent Crime in Canada" *Juristat* 16, 12. Canadian Center for Justice Statistics, Statistics Canada, 1996.
[3] Statistics Canada, *Violence against Women Survey*, *The Daily,* November 18 1993.
[4] *Ibid*.
[5] Statistics Canada, "Sex Offenders", *Jurisat* (19) 3 March 1999.
[6] Pauktuutit Inuit Women's Association, *Inuit Women: the Housing Crisis and Violence- Achieving Equality* (Ottawa: Minister of Industry, 1999) at 19.
[7] McGillivray and Comasky, *Supra* at 13.
[8] *Ibid.*
[9] *Ibid.*
[10] See Michael Jackson, " In Search of the Pathways to Justice: Alternative Dispute Resolution in Aboriginal Communities" (1992) *UBC Law Review* Special Edition: Aboriginal Justice.

homogenized version of "global Aboriginal" values and traditions. Its current manifestations are mainly within the Mennonite and Quaker churches, although this influence is not always immediately apparent in some programs. Many of the 'pioneers' in western Restorative justice, such as Braithwaite, Hudson, Strang and Galaway are white, Christian criminologists and legal scholars who use Christian values, such as forgiveness, to inform and shape their ideas of restorative justice. Versions of Aboriginal spirituality are also incorporated. There are a large number of Western restorative justice models at work in Canada, and in the lower Mainland. They are closely associated with the church, and often also receive government funding. The Mennonite church, in Ontario in the 1970's, initiated the first Restorative justice project in Canada.

Aboriginal restorative justice, on the other hand, refers to criminal justice initiatives that originate from Aboriginal nations that exist within Canadian borders. They *may* be based on the traditions and practices of that particular band. Unlike western restorative justice healing rhetoric is couched completely in terms of Aboriginal spirituality and tradition. There is huge variability in the models that claim to embody Aboriginal restorative justice. Most of these initiatives receive government funding.

Many Canadian initiatives contain elements of both western and Aboriginal restorative justice. Much of the rhetoric and programming initiated by both the federal and provincial governments around restorative justice comes from the western restorative justice literature, yet Aboriginal persons administer and plan the programs.

It is important in assessing a particular program to discern it's theoretical and spiritual roots, as critiques may vary depending on its origins.

Urban and Rural Differences

Besides the distinction between western and Aboriginal restorative justice, it is also important to differentiate between urban and rural initiatives. The experiences of rural and urban women in situations of abuse or sexual assault may vary significantly, and restorative justice programs must include safeguards that address these experiences. Rural women, for instance, may live in a very small community where there may be retribution for reporting abuse when a well-known community member is involved. Urban Aboriginal women may, on the other hand, face the isolating effects of systematic racism in a predominantly white urban environment.

Legislative and Extra-Legislative Regimes

Both restorative and Aboriginal justice initiatives are an integral, functioning part of Canada's criminal justice system.[11] They are made possible by diverse legal mechanisms

[11] See for instance: *R v. Naappaluk* [1994] 2 CNLR 143 (Crt. Of Que, Crim Div.), *R v. Morin* (1995) 101 CCC (3d) 124 (Sask. Crt. QB), *R v. Taylor* [1995] 104 CCC (3d) 346 (Sask CA), *R v. Bennett* [1992] YJ No. 192 (Yuk. Terr. Crt.), *R v. Charleyboy* [1993] BCJ No. 2854 (BC Prov. Crt.), *R v. Clement* [1994] BCJ No. 1247 (BC Prov Crt.), *R v. Craft* [1995] YJ No. 15 (Yuk Terr. Crt.), *R v. Green* [1992] YJ No. 217 (Yuk. Terr. Crt.), *R v. DN* [1993] YJ No. 193 (Yuk. Terr. C), *R v. SEH* [1993] BCJ No. 2967 (BC Prov.

and funded by a variety of sources, both government and non-government. Conflation of models, and in this case legal regimes, leads to confusion and an inability to effectively evaluate specific regimes. While different models share common goals and characteristics, they may be created or maintained under different legal regimes.

For instance a circle sentencing may be conducted as a result of at least three legal mechanisms. First it may be convened as a result of a conditional sentence, as part of discretionary conditions imposed by the sentencing judge. Second, it may take place as a result of a special agreement between local Crown Attorneys and an Aboriginal community. Finally it may exist due to being recognized as an Alternative Measure by the Attorney General of a given province.

The legal regime regulating a particular initiative is an important consideration, as it contains provisions that effect offender, community and victim variably. Factors such as administrative accountability mechanisms, breach provisions, provision of mandatory victim services and selection of participants may all be dictated by the legal (or extra-legal) regime that a particular initiative functions under.

The primary legal foundation for the current use of restorative justice was laid with legislative changes occurring in 1996, with Bill C-41. [12] The legislation introduced by Bill C-41 was intended to provide more alternatives to incarceration for more serious offenders than previous regimes of restitution and community service orders. It has significantly changed sentencing in Canada in ways that previous legislation was not intended, or was unable to do.

Circle Sentencing: was introduced to Canada via the common law in the late 1980's and early 1990's[13]. Until the 1996 amendments circle sentencing functioned as a discretionary common law sentencing remedy used by activist judiciary, mainly in Canada's North. Bill C-41 codified the use of sentencing circles by mandating the use of alternative sentencing practices, and alternatives to incarceration under certain circumstances.[14] Circle sentencing is one of the alternatives frequently employed.

Aboriginal Offenders: Sections 718.2 (c) through (e) of the *Criminal Code, 2002* seek to provide principals which may shorten or 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].

Crt.), *R v. Seymour* [1989] MJ No. 273 (MB Prov. C). All of these cases, excluding *Croft* and *Morin* are cases of violence or sexual assault against women and children.

[12] *An Act to Amend the Criminal Code (Sentencing),* SC 1995 c. 22, passed into law Sept 1996.

[13] See: *R v Moses* (1992) 71 CCC (3d) 347 (Yuk. Ter. Ct.) (hereinafter *Moses*).

[14] See above for circumstances under which circle sentencing may be used under the *Criminal Code*.

This provision (often in combination with the Conditional Sentencing legislation and case law) has provided for a reduction in sentence for Aboriginal offenders based upon Bill C-41's expressed desire to reduce the use of incarceration against First Nations people. [15]

Conditional Sentencing: Section 742 of the *Criminal Code 2002* provides for the imposition of a conditional sentence.[16] A conditional sentence differs from alternative measures in that it is the result of a judicial process. Generally, following a trial or a guilty plea the offender is sentenced to a term of imprisonment. This term must not exceed two years, and is served in the community under conditions imposed by the sentencing court. 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 such as a healing circle.[17]

Alternative Measures: Section 717 of the *Criminal Code 2002* allows for "Alternative Measures"[18] 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 s. 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)
>
> …

[15] See for instance: *R v. Innes* Doc. Vancouver CA027073, June 30, 2000, *R v. JEA* [1999] BCJ No. 1661 (BCCA), *R v Kelly* [1999] NWTJ No. 122 (NWTC), R *v AJJ* [1999] SJ no. 917 (Sask. Prov. C) (*Gladue* is applied to young offenders), *R v. Sackanay* [2000] OJ No. 885 (Ont. CA), See also *R v Moyan* [1999] AJ No. 1458 (Alta Prov Crt, Crim Div.), *R v. Hunter* [1999] SJ No. 335 (Sask. CA).

[16] For extensive interpretation of these provisions see: *R v Gladue* [1999] SCJ No. 19, online: QL (SCJ) and *R v Wells* [2000] 1 S.C.R. 207 See also: J. Roberts "The Hunt for the Paper Tiger: Conditional Sentencing After Brady" [1999] 42 Crim LQ 38 and P. Healy, "Questions and Answers on Conditional Sentencing In the Supreme Court of Canada" [1999] 42 Crim. L Q 12.

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

[18] For the purposes of this discussion 'alternative measures' is presumed to include both Aboriginal and Western restorative justice models. See: T. Quigly, " Are We Doing Anything about the Disproportionate Jailing of Aboriginal People? [1999] 42 Crim LQ 129.

(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; …

Negotiated Protocols: A number of restorative justice projects exist today by virtue of specially negotiated protocols between First Nations and the federal and provincial governments. Although they differ, these protocols usually allow for immediate and complete diversion of offenders into a specialized, structured program designed and administered by the First Nation in question. They deal extensively with domestic abuse and sexual assault. One of the first and best-known examples is the Hollow Water Project.

As much as possible the points below will address critiques to specific types of restorative justice models.

Restorative Justice: Critiques

Cultural Appropriation and Homogenization

- Well-meaning, white activist lawyers and judges, based on models from Australia and New Zealand, introduced circle sentencing into the Canadian criminal justice system via common law. Currently, in most cases involving a sentencing circle it is the white judges and lawyers who decide who will be diverted, and ultimately have a veto over what the sentence will be is should they disagree with the community's sentence.

- In Western Restorative justice models Aboriginal spirituality and traditions are often homogenized and appropriated to support a Christian agenda of forgiveness and reconciliation.

- Many First Nations were formerly matriarchal. Most of those in positions of power within restorative justice initiatives are men. Often they are white.

- Viola Thomas, formerly of the United Native Nations calls restorative justice a mutilated version of First Nations diversity, 'beads and feathers' culture. Homogenized models of 'traditional justice' may be imposed upon communities. In many cases 'traditional' models of restorative justice (such as the sentencing circle) are imposed upon a particular First Nation by white judges and lawyers, when historically that First Nation used another model of justice. The Inuit, for instance, did not historically use sentencing circles, yet they are regularly imposed upon Inuit communities.[19]

[19] See: Mary Crnkovich, " A Sentencing Circle" (1996) 36 *Journal of Legal Pluralism* at160.

Christian Influences

- Most of the western restorative justice projects in Canada have their roots in Christianity, not traditional Aboriginal spirituality. There is little regard for or analysis of Christianity's historical and continued role in the oppression of gays and lesbians, women and people of color. This aspect of western restorative justice is not analyzed, and rarely even disclosed, yet Christian values underlie much of the writing, practice and rhetoric in this area. Forgiveness and reconciliation should not be the primary objectives in cases of domestic violence and sexual assault, the safety and autonomy of the women and children involved must be paramount.

- The rhetoric supporting western restorative justice is that of the 'pious forgiver'. The literature and models which support it have some class analysis (i.e. young, poor (white) boy breaks window, pays back victim by painting fence) but little or no gender analysis. Any gender analysis is set against a backdrop supporting the continued hegemony of the heterosexual, nuclear family. There is little or no race analysis, except cloaked in a cleansed version of appropriated Aboriginal cultural 'values'.

The Language of 'Community'

- According to both western and Aboriginal restorative justice literature, initiatives are supposed to be based upon the participation and healing of three equal parties: the community, the victim and the offender. This trio is set up in contradistinction to the conventional justice system that frames the conflict as between the state and the accused individual only. There are a number of critiques of this framing:

    - 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. Often in Aboriginal restorative justice initiatives the concept of 'community' is used to homogenize individual Aboriginal people, and insulate 'traditional' practices against criticism. This is particularly true in cases where Aboriginal women have tried to bring the issue of woman and child abuse to the planning table. The 'individual'[20] rights of the women are submerged in order to promote the 'community's' collective rights to self-determination and control over criminal justice.

[20] Ironically, 'women's rights' are dismissed as the agenda of a 'special interest *group*' in the current neo-liberal construction of rights.

> " The word 'community ' is used widely but often indiscriminately in the 'new' justice discourse. It is wheeled out in almost every publication addressing the topic."[21]

- 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? To simply speak of the "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. Aboriginal women, for instance, feel that they have not been sufficiently consulted or heard in the processes leading to restorative justice projects now in place in British Columbia. 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.

  We have seen circumstances where those who are chosen (or self-selected) to represent the 'community' are those who already hold power and have vested interests in the outcome, and neither represent the diversity of the actual community nor the interests of the victims.[22]

  Mary Crnkovich in her 1996 article " A Sentencing Circle" describes how, during a circle sentencing for a repeat physical abuser, the major of the town was asked to invite participants. He chose prominent community members who dominated the discussion, while the victim was virtually silent throughout. (at 168). (See below for more details)

  The Naukana Native Women's Association on the Saanich Peninsula on Vancouver Island are speaking out against the restorative justice project currently underway in their communities. The project diverts sexual and physical abusers. In their words: " the project discriminates against women, is not community based, reflects values that that the community does not support and fails to represent women, victims and women elders…a few people have been involved in this project, but not the ones that it affects." They go on to describe how the elites of the larger community have been actively involved in promoting the program and obtaining substantial funding, but that the victim stakeholders have been

[21] Carol LaPrairie, " The 'New' Justice: Some Implications for Aboriginal Communities" 1/1/98 *Can J C* at 1.
[22] Crnkovich, *Supra*.

left out of the planning and practice of restorative justice in their community.
(Times *Colonist* January 11, 1993, A1 and A2)

- It may be difficult in a given community to get broad-based community participation. Particularly in some Aboriginal communities, where violent crime rates are high, a restorative justice process can be a long and arduous one. High numbers of Aboriginal people scarred by colonial history make healthy human resources scarce, and burn out likelihood. The impact on those who have suddenly become responsible for the well-being of both the victim and the offender, with limited human and financial resources, can be huge.[23]

- The distinctions between rural and urban communities are not always made. For instance Vancouver-based restorative justice projects are not reflective of those who live here: single mothers who have left Aboriginal reserves due to intergenerational violence are disproportionately represented in Vancouver's Aboriginal population.[24] White bureaucrats and Aboriginal men dominate Vancouver's urban restorative justice initiatives.

- There is broad support within the Aboriginal "community" (defined to include the dissident voices of women) for proceeding carefully with restorative justice, with proper research, evaluation and ironclad safety and support mechanisms for victims of abuse and sexual assault. [25]

<u>Assimilated Aboriginal Sexism, Communities Decimated by Colonialism</u>

- The long legacy of the *Indian Act*, and other colonizing social and economic structures is that Aboriginal communities that once experienced harmony between genders, have internalized the sexism of the Eurocentric mainstream.[26]
  In two recent circumstances male-dominated Band Councils have pursued lengthy and acrimonious litigation against groups of women from their own bands, in order to secure a greater share of power and wealth for themselves.

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[23] La Prairie, *Supra* at 4.
[24] The demographics of urban Aboriginal people have been studied extensively. Aboriginal women outnumber Aboriginal men overall, yet are outnumbered by men on reserve. Demographic studies also show that Aboriginal women far outnumber men in urban settings, due mainly to the sexist effects of the *Indian Act*, and the need to flee violence and unemployment on-reserve. See for example: Canada, *Report of the Royal Commission on Aboriginal Peoples, Perspectives and Realities*, vol. 4 (Ottawa: Supply and Services Canada, 1996) at 9.
[25] See: Jocelyn Proulx and Sharon Perrault Eds. <u>No Place For Violence: Canadian Aboriginal Alternatives</u>, (2000)(Halifax: Fernwood and Resolve) and Anne McGillivery and Brenda Comaskey, <u>Black Eyes All of the Time: Intimate Violence, Aboriginal Women and the Justice System</u>, (1999) (Toronto: University of Toronto Press).
[26] See Thomas Isaac and Mary Sue Maloughney, "Dually Disadvantaged and Historically Forgotten: Aboriginal Women and the Inherent Right to Self-Government" (1992) 21 *Man LJ* 453- 475.

The implementation of "Bill C-31" has seen Bands across Canada litigating in order to prevent women newly re-instated under this Bill from returning to reserves and sharing in Band resources.[27]

In the *Corbiere* case Bands litigated against off-reserve members (who are predominantly women, many of the plaintiffs and organizers were in fact "Bill C-31" women) to prevent them from being able to vote in on-reserve elections and referenda.[28]

Much of the rhetoric surrounding both Western and Aboriginal restorative justice indicates that these social and gender pressures do not exist in the idealized version of the "traditional community'. The reality of violence against women and children in Canada indicates that no community is free from sexism.

> "Given the social and economic changes is Aboriginal communities (such as exposure to the mainstream justice system and the reproduction of the dominant social structure in communities), the question of whether community justice will have the capacity to transcend these ideological and structural constraints must be raised"[29]

- In the Aboriginal justice context many Aboriginal communities are broken due to colonialism; suffering from extreme poverty, illiteracy, poor health, alcohol and drug abuse, sexual abuse and domestic violence. Many commentaries conclude that restorative justice should be used, at least initially, for less serious crimes, and only in selected cases. This is due to the fact that many community members may be unable to participate effectively or safely.[30]

Administrative Accountability

Accountability mechanisms are important aspects of processes that deal with violence against women. They allow for transparency, rules of conduct for all parties, recourse in case something goes wrong, safety, the production of records, and for evaluation

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[27] See for example: *Sawridge v Canada* FCJ No. 1013 (TD), online: QL (ABRT), [1997] FCAD 015.20.70.00-01 (CA), [2000] FCJ No. 749, online: QL (ABRT), *Mousseau v Canada* [1993] NSJ No. 382, appealed [1993] NSJ No. 607, online: QL (ABRT). For litigation involving housing benefits see also *Sandy Bay Band of Indians v. Canada* (1988) FCJ No. 144, online; QL (ABRT), *Scrimbitt v Sackimay Indian Band Council* [2000] 1 FC 513, online: QL (ABRT).

[28] *Corbiere v. Canada* [1994] 1 CNLR 55 at 57. See also: *Napoleon v Garbitt* [1997] BCJ No. 1250 (BCSC), online: QL (ABRT), *Gros-Loius v. Nation Huronne-Wendat* [2000] F.C.J. No. 1529 (TD), online: QL (ABRT).

[29] LaPrairie, *Supra* at 6.

[30] See for example Ryan and Calliou, *Infra* at 4

processes. Both western and Aboriginal restorative justice initiatives often see the removal of almost all institutionalized mechanisms of accountability. This is done in the name of 'community control'. No matter how inadequate such safeguards are within the conventional justice system (for example Crown attorneys as advocates for victims, the rules of evidence in a criminal trial) they still serve the purpose of creating a level of institutional accountability.

Given the epidemic proportions of woman abuse in Canada, and within First Nations these safeguards must remain in place to protect women and children until restorative justice has been fully evaluated and adjusted to deal with the concerns of abused women. Particularly in some First Nations, where often the entire community still suffers under the legacy of residential schools and other forms of colonial oppression, it is too early and too dangerous to remove these administrative safeguards. Below are some examples of legislative regimes and initiatives with severe accountability gaps:

- Circle Sentencing: Major concerns revolve around record keeping, public access to records of proceedings, and the lack of an appeal process. Most circle sentencing cases are not fully reported. In the early 1990's when they were first being introduced as an alternative to incarceration they were reported in lengthy, glowing records, with written introductions by activist judiciary explaining the rationale behind their use.[31] Now circles are rarely fully reported, often the 'reported' case will simply note that the case was 'handed over' to the community, or discuss the restorative justice program in use. This means that there is no public record of the proceedings or outcome of the program, and often no way of using the public record to track breaches. In many cases even the record of the charges are expunged after a certain period of time, or when certain conditions are met.

  No transcripts of circles or panels are kept at all, unlike regular trials. This eliminates our ability to can compare the written judgment to the transcript for gender analysis. It would be impossible for women's anti-violence advocates to assemble accurate statistics on violence against women that is dealt with by restorative justice under the methods of record keeping currently used under most restorative justice regimes. There is no appeal process from a sentencing circle.

- Negotiated Protocols: Even Aboriginal restorative justice models that actively incorporate women-centered counseling and other services for victims of abuse have a serious lack of institutional control mechanisms. Even anti-violence activists have lauded the Hollow Water Community Holistic Circle Healing Program, as a model restorative justice program capable of dealing with domestic violence. Although this program does

[31] *Moses*, *Supra.*

contain excellent features designed to aid and support victims of abuse the institutionalized supervision and breach-control mechanisms fall short. This is of particular concern as the program is specifically designed to address intergenerational sexual and physical abuse. Historically high levels of recidivism in such abuse cases makes ironclad breach protection an important aspect of all such initiatives.

- In exchange for participating in the community program and avoiding almost certain incarceration, an abuser must plead guilty and agree to participate in a five-year treatment program. Legally it is only possible to place the abuser on a two-year probation period, or under a three-year suspended sentence. The result is that for the final 2-3 years of the treatment program there is no legal sanction available against those who breach the conditions of their treatment.[32]
- Under the *Criminal Code* supervision is provided by a probation officer, however in reality it is the program that provides the 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 a probation officer, who is no longer in a supervisory role. [33]

- Alternative Measures: Section 717 of the *Criminal Code* allows for Alternative Measures. This is defined as "…measures other than judicial proceedings…" and can include programs designed and administered by the province, or by other organizations, or First Nations. Restrictions in the *Criminal Code*, and British Columbia's administration of justice policies do not prevent domestic and sexual violence from being dealt with under these provisions, in some cases. Many of the administrative provisions under this regime allow for records to be 'erased' or kept from public scrutiny, as programs are designed to function outside of the judicial process.
    - Under these provisions police may choose not to lay charges at all, but to divert the offender with no threat of judicial penalties, even in the event of a failure to comply with the program. No record of the criminal offence is then retained. His next abuse charge can be seen as his 'first'.
    - If the offender successfully completes the program the charges (if laid) are dismissed, effectively making his next abuse charge his 'first'.

[32] T. Lajeuness, " Community Holistic Circle Healing: Hollow Water First Nation" (Canada: Solicitor General, 1993) at 2 and 8.
[33] Ross Gordon Green, *Justice in Aboriginal Communities: Sentencing Alternatives* (Saskatoon: Purich, 1998) at 95.

- If charges are laid, and the offender completes a portion of the program the judge may, in her discretion, dismiss the charges, erasing the record.
- Sections 717.1 through 717.4 deal with the creation, disclosure and retention of any records generated from these programs (i.e. statistics on success rates, recidivism, violent offenders, breaches, etc). Creating records is *discretionary* in the organization running the program, as is disclosing them to police, community organizations etc.

- Conditional Sentencing[34]: Section 742 allows for conditional sentencing. It differs from Alternative Measures in that it is always the result of a judicial process. Following a trial or a guilty plea an abuser is sentenced to a term of incarceration, to be served in the community under certain conditions. Some of these conditions may require community supervision, abstinence from alcohol, involvement in Aboriginal traditional healing programs etc. This may require contact with the victim. The degree of freedom of movement allowed those who are 'incarcerated' varies extensively. Conditional sentences are used extensively to deal with situations of physical and sexual abuse of women and children by men. The main accountability problem under this regime is the high rates of breach, and the inadequate reaction by the justice system to these breaches.

  - Section 742.6 deals with breaches. Essentially in the event of a breach it is often the responsibility of the victim of the breach to report it, and to pursue the already overburdened Crown Attorney to make a breach application. The supervising probation officer may also pursue a breach application, but with huge caseloads and almost daily breaches it is far from a priority. In most cases a breach application is never made.
  - If a breach application is actually made the judge has three choices: 1) do nothing, 2) change the conditions, 3) incarcerate the abuser. Preliminary research shows that in many cases the judge chooses to do nothing.[35]

Public Accountability and funding

- Government and other funding sources should be accountable to the public and the entire community, including women. There is a serious lack of evaluation and reporting on restorative justice projects.

[34] It is worth noting that the recent cases of *R v Gladue* [1999] SCJ No. 19, online: Ql (SCJ) and *R v Wells* [2000] 1 SCR 207, make it more likely for an Aboriginal offender to receive a conditional sentence, even in aggravating circumstances such as woman or child abuse.
[35] See for example: *R v Steele* [2000] Crim. L.D. 36(BCCA). See also: Dawn North, " The Catch 22 of Conditional Sentencing" [2001] 44 *Criminal Law Quarterly* at 342.

- Those who run restorative justice projects should be providing regular open, public evolutions and accounts. This is not happening.

- The enthusiasm showed by both the provincial and federal governments for restorative justice is not matched by funding. 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. In order for a restorative justice program to fully support victims of violence it must first undergo vigorous, long-term evaluation and stakeholder input, 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, and evaluation and accountability mechanisms. These are all costly, and currently unavailable in most restorative justice initiatives.

<u>Planning and Evaluation</u>

- 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.[36]

- There has been little overall evaluation examining such factors as recidivism and cost. There has been no evaluation that I am aware of that includes a gendered perspective, or an anti-violence perspective. There are only five major evaluations of Canadian restorative justice practices, **and none of these is complete or adequate in either the qualitative or gender analysis areas. (see below)**

  Under the law women and children are to be protected, in every circumstance, from sexual and physical abuse, and these activities are to be treated as crimes. Until we know that restorative justice WORKS there must be a moratorium in cases of violence against women and children. Until solid, reliable research and evaluation has been conducted, that adequately addresses the concerns of those with knowledge of the psychology of abuse, a moratorium must be in place. To do otherwise is to knowingly place some women and children in danger, in violation of their legally protected rights, in order to conduct what amounts to a social and legal experiment.

- In those evaluations which do exist success rates are overblown and exaggerated, with samples using small numbers, subjective criteria, and anecdotal testimony from selected participants. There are overall few Canadian evaluations that exist. The same community pressures that may coerce a battered or sexually assaulted

[36] See for instance: Joan Ryan and Brian Calliou, " Aboriginal Restorative Justice Alternatives: Two Case Studies", Law Commission of Canada, January 2002 at 2, Don Clairemont and Rick Linden, " Developing and Evaluating Justice Projects in Aboriginal Communities: A Review of the Literature. Ottawa: Solicitor General, 1998.

woman into participating in a restorative justice process may cause her to be less than honest in an open evaluation process.

Hooper and Busch (see below) address the problem of the evaluations that are currently available in this field. They point to a 1994American study by Umbreit, a pioneer in the use of restorative justice, and an advocate for its use. (Umbreit MS, *Victim Meets Offender: the Impact of Restorative Justice and Mediation* (1994)) This study showed a remarkable success and satisfaction rate amongst victims (from 81 to 95%). Hooper and Busch point out, however, that there are a number of other studies that complicate these glowing results. First, they point to New Zealand studies involving youth offenders (Maxwell, G. and Morris, A. *Family, Victims and Culture: Youth Justice in New Zealand* (1993)) that produced low participation rates by victims (46% of victims attended), and showed that 38% of those who did participate felt worse after attending the victim-offender conference. (Hooper and Busch at 119).

The researchers make the important point that in both of these studies the researchers failed to separate the offences involving domestic violence or sexual assault in their samples, and speculate that victims may be less likely to attend if they are victims of these types of violence. (at 120).

Further they point out that measuring 'successful outcome' for victims of domestic violence will require some knowledge of the psychology of battering. Hooper and Busch cite a 1991 study on battered women's syndrome and mediation at separation that shows a successful outcome for a battered woman will most likely involve 'getting the violence to stop', and not necessarily ensuring her that her economic, emotional, custody or access needs are met. (Leonore Walker, " Post Traumatic Stress Disorder in Women: Diagnosis and Treatment of Battered Women's Syndrome" (1991) 28 Psychotherapy 21 at 24.)

These same concerns are echoed in Canadian evaluations. Not only is there a shortage of serious, thorough evaluation, there are a number of concerns around the evaluations that have been completed. They do not separate out domestic violence and sexual assault 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.

These are the five main Canadian evaluations:

1) Calhoun, Avery, " Evaluation Report: Calgary Community Conferencing- An innovative Pilot project of the Youth Justice Renewal Initiative" 9 Ottawa: Justice Canada, 2001). This is a youth project.

2) Latimer, J., Dowden, C., Muise, D., " The Effectiveness of restorative justice Practices: a Meta-Analysis" (Ottawa: Department of Justice, 2001). This report

concluded that overall, restorative justice is working, the measurable gain was to reduce recidivism.

3) Bonta, J., Rooney, J., Wallace-Capretta, S., " RESTORATIVE JUSTICE: An Evaluation of the Restorative Resolutions Project" (Ottawa: Solicitor General Canada, 1998). This is an evaluation of a Winnipeg based restorative justice program for Aboriginal and Metis people. They did not take cases of sexual assault or domestic violence.

4) Clairemont, D. and Linden, R., " Developing and Evaluating Justice Projects in Aboriginal Communities: A review of the Literature" (Ottawa: Solicitor General, 1998). Basically a lit review.

5) Canada, Solicitor General Canada, "Community Holistic Circle Healing: Hollow Water First Nation" by T. Lajeunesse (Ottawa: Solicitor General, 1993) .This contains the most comprehensive evaluation, in my opinion. 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. As noted above there are serious administrative accountability problems. I also note that there is very little data produced, and the methodology for obtaining victim satisfaction is not reveled. There is little or no serious feminist or gender analysis.

Ryan and Calliou in their 2002 case study note that " Evaluation of current rj 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." (at 48)

A 1997 Study by Joan Nuffeild for Public Works and Government Services Canada does a review of 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. (She 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 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 if the proportion of the total crime caseload and the eligible caseload who were accepted into the program, and the reasons why some were rejected." (at Part 1).

Nuffield's concerns do not even touch upon the concerns I feel about the exclusion of a feminist, gendered or anti-violence approach to evaluations. The lack of comprehensive, useful evolutions themselves is quite disturbing; the complete lack of feminist or gendered analysis is even more disturbing. Women must be involved in the evaluation process, particularly in formulating evaluation questions, and choosing a process that will set victims of violence and sexual assault at ease to express their true opinions, without fear of retribution from community or abuser.

- Overall there is a serious need for solid research and planning, not *ad hoc*, project funding and short-term projects.[37]

  Ryan and Calliou (see above) in their 2002 case study of two Canadian restorative justice projects note in tier conclusion that " Evaluation of current restorative justice initiatives is clearly needed."(at 47, and 16) and that "Surprisingly, 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." (at 4) They note that many of the conclusions are ' impressionistic'. (at 4).

<u>Revictimisation/Decriminalization</u>

- Any attempts at restorative justice in circumstances of domestic violence or sexual assault must prioritize the safety and support of the victims. This means that all other agendas including: offender rehabilitation, community rehabilitation, a self-government or self-determination agenda, and reconciliation of the family MUST be subordinate to the safety of women ad children who are victims of violence. This is not the case, and in most initiatives these other considerations are taking precedence.
  Ryan and Calliou, in their 2002 case study on two Canadian rj initiatives note that revictimisation of women was taking place in at least one of the initiatives

[37] Carol LaPrairie, *Supra.*

they studied. (Joan Ryan and Brian Calliou, "aboriginal restorative Justice Alternatives: two Case Studies" (Law Commission of Canada, Jan. 2002) Below is an extensive quote from Joan Ryan, one of the researchers, describing what she saw in the community:

"…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.

Footnote: 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 a and that I could offer no protection to young women. The second time was during the trial of a young 14 year old girl and her father on a charge of incest. (Tracey: note the interesting choice of language here: the girl was also' on trial'.) I knew both well and I could not (sic) 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. (at p.9)

- Decriminalization: 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". Alternative measures policy often does not import ANY of these long fought for safeguards into restorative justice initiatives.

- Feminists have fought for over twenty years to bring domestic violence out of the private sphere of the home and into the public forum of the courts; to make it a crime. By taking domestic violence out of the mainstream, public justice system it is effectively privatized. The dynamics of restorative justice's 'mediation' style, close community participation, and 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"[38] to assert themselves, making a criminal act once again into a private 'problem' shared by both the abused and the abuser.

- The dynamics of a sentencing circle, family conference, sentencing panel etc., increases pressure on victims to 'speak up' for themselves. In circles and other forms of 'mediation' 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 or sexually assaulted woman from speaking up against her abuser. How can it be possible for a battered woman to stand up in front of her abuser and a room full of his peers and say " I want him to go to jail, I do not want to be reconciled with him, I do not want him to have access to my children" if that is what she REALLY wants?

> "…the power imbalances and dynamics of control which characterize many domestic violence relationships suggest that, in most instances, the victims of violence do not have the capacity to negotiate freely and fairly with their abusers."[39]

- Purportedly, one of the main goals of restorative justice is to heal the victim. In fact in much of the literature restorative justice is characterized as a 'victim's movement'. This is not borne out in practice. Victims of domestic violence and sexual assault need specialized advocacy and support even in the conventional justice system. The needs of these victims become even more urgent when they are expected to speak up for themselves with no advocate (no matter how inadequate Crown Attorneys may be in some circumstances). The availability and quality of such services across Canada is inconsistent and more often non-existent. Too often where it exists the 'counseling and support' for the victim that appears in literature and evaluations are conducted by unqualified, untrained personnel with no professional knowledge of the psychology or symptoms of abuse or sexual assault.

- There exists a significant body of preliminary evidence that women being are pressured and coerced into participating in restorative justice initiatives when they don't want to. Particularly 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. [40]

Please see notes in mediation section on coersion.

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[38] Hooper and Busch, *Infra* at 111.
[39] Stephen Hooper and Ruth Busch, " Domestic Violence and the Restorative Justice Initiatives: The Risks of a New Panacea" 91996) 4 *Waikato LR* 101 at 105.
[40] See Crnkovich, *Supra*.

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 and sexual assault. She has observed a number of sentencing circles in order to provide a feminist, anti-violence critique of the proceedings, a particularly valuable exercise given the lack of transcripts. 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. (see *R v. Naappaluk* [1994] 2 CNLR 143 (Crt. Of Que, Crim Div.). The accounts could not be more different. The judicial decision speaks glowingly of the circle process and a community-based solution to violence and the over representation of Aboriginal people 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 include:

- The Inuit community involved did not traditionally use sentencing circles.
- The participants were untrained and poorly prepared by the judge.
- Those chosen to participate in the circle were not representative of the community, but rather represented the most powerful and influential members of the community, and were personally asked to participate by the mayor.
- Despite the 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.
- 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. He proceeded anyway.
- The powerful members of the community who had been asked by the mayor to participate dominated the discussion.
- The focus was on healing and helping the accused. " There was virtually no discussion about the harm suffered by the offender's wife, children and family relations because of his actions." (at 167).
- 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." (at 168) She was nervous and frightened. The accused had returned to the community for the circle and was stating with her in her home.
- 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 the paramount goal.

- In cases involving on-reserve Aboriginal women or children who are victims of physical or sexual violence there are often no economic or property resources to allow her to escape an abusive situation, or to support her in her refusal to participate in an restorative justice initiative. Her only recourse may be to leave her cultural community for an urban setting. On-reserve matrimonial property laws and land tenure is male dominated and controlled, making resisting restorative justice, and NOT reconciling next to impossible, unless she (and her children) have somewhere else to live.

- There is preliminary evidence within Aboriginal communities of retaliation for those who report breaches or disclose abuse.[41] Much of this evidence is anecdotal, and gathered from individual Aboriginal (exclusively) women I have met at conferences etc.(Not very persuasive I know, but you can note that the academics listed below, who have experience in the area, have concerns that this is occurring).

  Two of the main problems is substantiating this trend are that breach provisions are so lax that women who speak out can easily be the subject of more violence with relative impunity for the abuser, and 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 (especially in shared custody and access arrangements).

- In broken communities sexual and physical abuse of women and children can be seen as normative, and go unpunished by a group of community peers. A recent study of two Canadian Aboriginal restorative justice projects based on first person researcher accounts shows that men are regularly being found 'not guilty' (or the equivalent) in cases of sexual and physical abuse against women and girls. Victim blaming and gender stereotypes informed the community's consensus about a man's 'entitlement' to rape and sexually abuse women and girls. No man had been 'convicted' of rape during the course of the program, despite rampant sexual abuse within the community.[42] Despite this disclosure the authors of the report still claim that restorative justice is 'working' in these communities.

- Gendered power imbalances within community governance structures work to protect men who abuse women and children. In some cases those who are chosen to sit in a circle or on a sentencing panel are closely related to the abuser, and effectively protect him from harsh punishment, or allow him to breach his conditions with impunity. [43]

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[41] This concern is expressed in: C. LaPrairie, "The 'New' Justice; Some Implications for Aboriginal Communities" (1998) 40:1 *Can J Criminology* at 61-79.See also Crnkovich, and the Nova Scotia Transition House Report.

[42] See Ryan and Calliou, *Supra* at 9.

[43] Crnkovich, *Supra* and Ryan and Calliou, *Supra* at 9.

- Despite the rhetoric of healing victim, community and offender, many restorative justice processes are deeply offender-centered, with success rates being measured by reported recidivism and changes in 'offender attitude'.

Mediation

- Despite the fact that mediation in family law matters and restorative justice are not identical processes, in cases of domestic 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 circles restorative justice is considered a subset of ADR.

- 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.[44] Although there is a paucity of feminist research in the restorative justice field dealing with the dynamics of abuse in sentencing circles, family group conferences etc, it is clear from the research in the mediation field that there are serious concerns with using mediation-type techniques in situations of domestic violence.

  - **Stephen Hooper and Ruth Busch** in their 1996 article " Domestic Violence and the Restorative Justice Initiatives: The Risks of a New Panacea" acknowledge the parallels between restorative justice and mediation practice. " Because of the similarities in philosophical perspectives and process techniques between mediation and the processes used to implement restorative justice, the controversy about the appropriateness of adopting a victim-offender mediation approach for domestic violence cases is embedded in the more general debate about utilizing mediation processes to deal with domestic violence." (at 101). Their comments and critiques are aimed both at mediation and restorative justice practice.

  Steven Hooper is a law professor, and the Co-ordinator and mediator in the Hamilton restorative justice Project in New Zealand. Ruth Busch is also a law professor and a member of the Pilot Review Panel for the Hamilton Project.

[44] See for instance: Stephen Hooper and Ruth Busch, " Domestic Violence and the Restorative Justice Initiatives: The Risks of a New Panacea" (1996) 4 *Waikato LR* 101, Hillary Astor: ' Swimming Against the Tide: Keeping Violent Men out of Mediation" in Julie Stubbs, ed, Women, Male Violence and the Law (1994) (Sydney; Federation Press) at 148, Lisa G. Lerman, " Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women" (1984) 7 *Harvard Women's LJ* 57-113.

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. (at 105)

They substantiate their claim by citing three recent studies on the effects of mediation techniques in circumstances involving violence. The first is a 1994 study conducted in the family courts of two American cities, where mediation took place to settle custody and access disputes in cases involving domestic violence. (Newmark, L., Harrell, A and Salem P., *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).

The second was a 1992 New Zealand study that examined the experiences of battered women in Family court mediation and counseling. (Busch, R., Robertson, N. and Laspley, H., *Protection From Family Violence* (1992)).

Both 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. (Busch and Hooper at 104)

The American study showed that:

> 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. (Busch and Hooper at 105)

They also cite a 1985 study by Rowe, 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." (Busch and Hooper at 105)
>
> 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. (Busch and Hooper at 105)

> (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.)

Busch and Hooper found the conclusions of the studies mentioned above borne out in their own experience and research at the Waitakato Mediation Services, the precursor to the Hamilton RESTORATIVE JUSTICE Project. (p.108, Busch and Hooper).

> "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." They also observed that, in their experience "…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." (at 111).

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 sentencing circles, and other forms of restorative justice that rely on community consensus and censure.

They conclude that, although a preferable method to the more 'private' victim-offender mediation, FCG has serious shortcomings in its ability to deal with domestic violence that are rooted in its reliance on community. (Busch and Hooper at 118). 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 there fore there is "no reason to believe that violent men will readily be shamed into accepting their violent acts are wrong." (Busch and Hooper at 118). The incidence of domestic violence in Canada, and the socially sanctioned secrecy that surrounds it surely indicates that Canadian communities, on the whole, are not yet willing to censure violent offenders. This is borne out in the recent case study by Ryan and Calliou (discussed in detail above) where Aboriginal communities using restorative justice models regularly excused sexual abuse of children and young women based upon a community standard. (Ryan and Calliou at 9).

-**Hilary Astor**, An Australian academic, 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" As noted above many of our restorative justice practices and theory come from the lengthy Australian experience with various forms of Alternative Dispute Resolution.

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. "…violence created an extreme imbalance of power between the parties..."(Astor at 151), 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.

Astor notes that restorative justice and other forms of mediation take place during the what has been documented as the time of most volatile and violent behavior on the part of the abuser: just after separation. (Astor at 151) (This is echoed by Hooper and Busch at 110. their experience with victim-offender mediation shows that this is a serious concern.).

-**Lisa G Lerman,** an American law Professor with experience in clinical mediation settings, shares Astor's conclusions on power imbalances in mediation. Although she does not conduct a formal study, she speaks to her own experiences with battered women clients in making her observations. In her 1984 article " Mediation of Wife Abuse Cases: the Adverse Impact of Informal Dispute resolution on Women", she examines commonly used mediation techniques, and concludes that "…mediation (in domestic abuse situations) not only fails to protect women from subsequent violence, but also perpetuates their continued victimization." (Lerman at 61).

Lerman points out that mediator's emphasis on 'reconciliation" (a refrain often heard throughout restorative justice theory and practice) can " …gloss over the issue of violence, and simultaneously encourage the victim to maintain her relationship with the abuser…" in order to keep the family together. (Lerman at 83).

Lerman also speaks to the culture of victim blaming that can function within mediation. She examines the commonly used mediation theory that "…disputes are most successfully resolved if the mediator can persuade each party to acknowledge his or her contribution to the problems, and to make a commitment to change his or her behavior to avoid these problems in future." (Lerman at 86). She quotes two mediation experts who support the use of mediation in cases of violence: " (o) ften in family violence it is difficult to determine to what extent the victim has contributed to her own victimization. It is particularly in these victim-offender interactions that diversion through mediation is appropriate." Busch and Hooper echoes her concerns in their more recent study, indicating that their first hand experience with such mediations show that there is often some suggestion that domestic violence is inherently a 'couple problem', a defect in the

relationship rather than a serious problem on the part of the batterer. (Busch and Hooper at 110)

Lerman reviews an American study that examines the outcome of mediation in cases of domestic abuse.

> In one study conducted in 48 cases in Dorchester, Massachusetts (no date provided) none of the mediation agreements explicitly dealt with, or prohibited violence in the relationship. Mediators showed more concern for how both of the parties appeared to 'feel' rather than how they behaved. The closest approximation was an agreement to 'get along', one that implicitly includes the abused woman as a party who must change her behavior. (Lerman at 94)

- **A recent Canadian study out of Nova Scotia** [45] has summarized some alarming 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." (Study, at p. 16)

    " 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 me letters all through the mediation. I told the mediator about the calls, and she said," Yes, but we have to go on." (Study Participant, p.8)

  - Mediators were untrained in the psychology of abuse, and were unable to recognize situations where women were being intimidated by their abusive partners, and did not stop the

[45] The Transition House Association of Nova Scotia " Abused Women in Family Mediation: A Nova Scotia Snapshot" Janury 2000.

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." (Study at p. 15)

"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." (Study Participant, at p. 7)

- 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. (Study at p. 16)

"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 form a judge or conciliator, women report feeling coerced." (Study, p. 17)

" No private mediators and no professionals of the Family Division (Court), including judges, mediators and conciliators, presented any of the possible disadvantages of mediation." (Study at p. 18)

"The conciliator said the judge wouldn't be too please 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." (Study Participant, p. 8) (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." (Participant, p. 7)

- The final recommendation of the report is "…an immediate moratorium on conciliator's referrals to mediation assessment for abusers and their former partners, pending more permanent resolution of the issue by policy and legislation." (Study at p. 9)

British Columbia

The following is a critique of the provincial policy regarding Alternative Measures and Domestic Violence. This policy was in place in the final months of the NDP mandate. It appears that this policy has not been amended since the Liberal party took office.

-Approval Process: The policy notes that certain types of "aggravated" sexual offences will not be deemed appropriate for Alternative Measures (AM).

- The term "certain" makes it unclear if *some* aggravated sexual offences will be deemed appropriate for AM. Section 718.2 (a)(i) of the *Criminal Code* includes abuse of a spouse or child as an "aggravating circumstance" in all cases of violence. It is not appropriate for *any aggravated sexual assaults* to be dealt with under AM.

- The current policy notes that the only exception to this policy will be in specialized programs authorized by the Attorney General.
  - The authors are unsure if specialized programs mean those within Aboriginal communities. Aboriginal women are legally entitled to *every* protection guaranteed to other women in British Columbia. This includes the shelter from violence provided by both the Violence Against Women in Relationships (VAWIR) policy and the *Criminal Code*. A designation of "specialized program" should never allow Aboriginal victims to fall prey to "sexual offences" without equal protection of law and policy. The creation of such exceptions makes it very unclear whether these protections will apply.

- The current policy notes that authorization for specialized programs will only be allowed where there is "wide community support".
  - See above points under "community" participation.

  What specific steps will be taken to ensure full consultation with diverse women's groups?

  Once in place, what specific steps will be taken to ensure that systematic inequities do not undermine the ability of AM to protect women from being revicitimized?

- The current policy notes that "exceptional" and "rare" have been more clearly defined than previous policies, and provides examples.

    - Violence against women and children is never committed in a "rare" or "exceptional" circumstance. Violence against women and children is well documented to be part of a socially sanctioned, systematic pattern of behavior. There is no such thing a one push or one slap, these actions are underlain by a fundamental feeling of entitlement by the abuser. Both the *Criminal Code* and the VAWIR policy recognize and attempt to address this.
      To create "rare" or "exceptional" circumstances invites arguments involving outrageous justifications that miss entirely the systematic nature of even the most "mild" form of violence.

-The current policy provides a number of scenarios demonstrating what "Exceptional circumstances" might include.

    - The two propositions outlined represent unlikely hypothetical situations. The reality of violence against women is reflected in the VAWIR policy. Until the problems of accountability and training outlined above are addressed there must be a moratorium on AM for cases of violence against women and children. There is currently a fully functional criminal justice system, informed by VAWIR, able to deal with all cases.

- The current policy notes that" exceptional circumstances" will not include "only" certain factors.

    - The wording here is very vague. The inclusion of the term "only" may be misleading for decision-makers. Does that mean that one of these circumstances combined with other mitigating circumstances will create an "exceptional" or "rare" circumstance?

    - The presence of these descriptions of power dynamics within the policy is a tacit recognition of their influence and importance in an AM process. By taking violence against women out of the court system institutionalized mechanisms of accountability (no matter how inadequate) are effectively removed. They *must* be replaced within AM with a victim-centered, accountable mechanism informed by full consultation with women. At this point, as outlined here, there are serious problems with approval, training and accountability as well as insufficient consultation with women.

Accountability

- The current policy notes that an improved database has been developed to track AM in the area of violence against women, and that summaries of this data will be released periodically.

- Does this database provide interprovincial tracking? If not an offender may move from province to province perpetually committing a "first" offence and receiving AM.

- Will offences such as breaking and entering or destruction of property that are informed by violence against women be tracked? For instance, a man breaking into the dwelling of an ex-partner to attack her, or destroying her property as an intimidation tactic? In the current justice system these types of offences are often "cleansed" of their true context.

- How frequently is "periodically"? Will women's anti-violence groups be able to request raw data?