

Your Ways or Our Ways? Addressing Canadian Neo-Colonialism and Restorative Justice

Dean Young*

ABSTRACT

In Canada, there is much focus on diversionary tactics and restorative justice programs designed to redirect offenders from the judicial processes and incarceration. This study examines the impact of race on accessibility to restorative justice, as well as the challenges of colonialism, and the potential role of neocolonialism in exacerbating the inequities of the Canadian criminal justice system with respect to restorative practice. This study of race-based access to restorative justice involves a critical examination of the origins of contemporary restorative justice through the application of Critical Race Theory. The phenomenon of over-representation of Indigenous persons in Canadian correctional institutions is considered in light of emphasis on reportedly Indigenous-based restorative practices in the Canadian criminal justice system. The study findings confirm that restorative justice practices in the Canadian criminal justice system are purported to be Indigenous based, but if one were to examine Indigenous culture and investigate the history of such practices, one would discover that this is not accurate. Moreover, Indigenous people do not enjoy the benefits of their alleged cultural traditions with respect to restoration of collective interests due to inequitable access to restorative practices built into the justice system. Despite this current reality, researchers continue to investigate restorative practice and practitioners continue to work toward the development of restorative justice programs that can be delivered in a manner respecting authentic Canadian Indigenous ways.

Keywords: Restorative justice, Canadian criminal justice system, Indigenous, colonialism

* Corresponding author: deanyoung.71@gmail.com

INTRODUCTION

Restorative justice is certainly not unique to Canada: England, Scotland, New Zealand, Norway, the United States and European countries apply restorative practice to manage criminal behaviour (Government of Canada, 2019). Restorative justice can be defined as any process resulting from a harm caused to an individual or community by another individual or group (Government of Canada, 2019; Monchalin, 2016). The Centre of Justice and Reconciliation expands the definition to include the reparation of harm caused by criminal behaviour, accomplished through cooperative processes utilized by all parties, and resulting in transformation of people, relationships and communities (Bright, 2019). However, there is contention as to the origins of diversionary philosophies being utilized in Canada. This study's findings suggest that Indigenous ways that are purported to be the basis of restorative justice, in fact, are not reflected in the contemporary restorative practices.

In Canada, philosophies underlying the evolution of crime control and correctional processes include those brought over from Western Europe during the colonial era, those adopted from local Indigenous cultural practices, and even those based upon the work of, and ultimately imported from, New Zealand and Australia. Yet research demonstrates an incongruence of contemporary restorative justice and that of the traditional nature of Indigenous restorative justice in Canada (Daly, 1999; Lachhin, 2015; Tauri, 2016; Boyington, Aulakh, Kazarian, & Roberts, 2017). In fact, Boyington et al. posit that indigenisation is problematic with respect to the justice system. They claim that the belief that inclusion of a people does not guarantee the incorporation of their values, and that the addition of Indigenous justice workers does not improve the adversarial nature of the judicial system, which is "intrinsically opposed to Indigenous values" (Ibid. p.337).

This study applies the issues of colonialism, neocolonialism, and race issues to the accessibility of restorative justice practices in Canada. It first considers the inequity of contemporary restorative justice delivery in Canada and attempts to reconcile the access to restorative justice with the disproportionately high incarceration rates amongst Canadian Indigenous persons. It is a reality that incarceration is over-represented by our

Indigenous peoples in Canada (Government of Canada, 2019). Further to accessibility, this study will address the indigenisation of restorative justice in Canada and explore the impact of restorative justice philosophies from other cultures. According to the Royal Commission on Aboriginal Peoples (1993),

On the Canadian legal landscape, as in the experiences of other countries' dealings with Aboriginal peoples, various forms of indigenisation of the justice system have been experimented with. On the whole these have produced models that use the process of indigenisation as ways of injecting Aboriginally appropriate concepts and mechanisms into (or more likely adhering Aboriginal adjudicative mechanisms onto) the existing legal concepts and the prevailing justice system (p. 71).

If it is such a valuable approach to crime control, why is it that Indigenous people (the alleged originators of this system) are so overrepresented in Canada's correctional institutions? In fact, the cultural practices of Indigenous cultures are appropriated by colonial powers for reasons far from meting out justice, harm reduction and community reconciliation (Daly, 1999; Breton, 2012; Tauri, 2016). This paper suggests that the primary intention of the contemporary restorative practice in Canada is to ease the financial burden experienced by the courts and correctional system rather than the restitution of harms to the victim and community (Tauri, 2016), and the ultimate restoration of collective social interests.

This paper intends to explore the role of colonialism and neocolonialism in the evolution of Canada's justice "market" (as opposed to justice "system"), the introduction of early restorative justice programs to Canada, and to challenge claims that such programs are based upon the Canadian Indigenous cultures. Building on the effects of colonial history, this paper will explore the Critical Race Theory and paternalism with respect to the evolution of contemporary restorative justice in Canada. Finally, some Indigenous peoples' perspective on contemporary restorative justice will be examined.

PRECOLONIAL LEGAL SYSTEMS

Traditional North American Indigenous laws are aligned with contemporary restorative justice, in that they are closely related to restoring harmonious relationships that encourage each member of society to contribute to the repair of relationships within the entire community. Traditionally, qualities of character, such as honesty and harmony resulting from forgiveness, restitution, and rehabilitation were cornerstones of social life with respect to harms committed. Canadian Indigenous society was not legalistic until such systems were introduced by European settlers. Traditionally, conflict resolution, both personal and interpersonal, was guided by spiritual means nurtured by the influences and teachings of Elders, parents, and grandparents, rather than by formal police, courts and governments (Public Legal Education Association of Saskatchewan, 2006).

However, concepts of guilt, punishment and isolation by imprisonment or banishment (reserved in Indigenous justice for more serious offences such as murder and adultery) were more commonly seen in traditional European systems of justice models in seventeenth century Britain. The model of justice in place during the first wave of settler migration to Canada, brought over from Europe, was more formal and involved a robustly structured restitution process. However, this system provided few choices for a justice system implemented by a fledgling colony with the challenge of integrating a wholly different society found in the Indigenous population. In seventeenth century Britain, a common outcome was financial restitution, paid to the prosecutor (the victim) by the offender; a very flexible system involving the agreement between the victim and offender through bargaining rather than a specified penalty assigned by the courts (Friedman, 1995). Rarely was the outcome of a transgression corporal or capital punishment or transportation to a penal colony. Ironically, the Indigenous justice systems in place at the time were also deeply involving “restorative justice”. However, this is not the system that was employed upon colonising Canada with respect to Indigenous offenders. The Indigenous population was held to a more stringent penal system, including segregation, higher rates of imprisonment and capital punishment. Jacobs (2012) writes of the role incarceration played in the assimilation of Canada’s Indigenous people: “Assimilation through

incarceration is rooted in the early days of colonial settlement when the inaccuracy of early predictions that “Indians” could be segregated on temporary reserves where they would either die out or assimilate” (p. 2).

COLONIALISM IN CANADA

Canada’s experience with colonialism is typified by *settler colonialism*. Settlers from Europe primarily came to occupy (by way of force as well as deceit) the lands on which the Indigenous population lived. Settler colonialism is “inherently violent,” and “as its central function is the removal of peoples from their land by any means” (Monchalin, Marques, Reasons, & Arora, 2019, p. 213). In addition, colonial institutions are built upon the foundations of false narratives that espouse the incivility, unsophistication, and uneducated nature of Indigenous peoples; such narratives are applied with the sole purpose of assimilation of Indigenous peoples (Ibid.). With reference to the characteristic falsehoods utilised by colonialism, Hudson asserts that “[t]he narratives which constitute this Otherness of ‘lesser breeds without the law’ are necessary not only to justify colonialism and slavery; they are necessary also to constitute the western subject’s idea of (his) self-identity” (2006, p. 33). Monchalin (2016) contends that colonialism was a conscious choice made by settlers, not something inescapable, inexorable, or preordained by European philosophical thinking about the state of nature. Europeans could have followed the notion of the treaty commonwealth and entered into limited contractual alliances with Indigenous peoples, but this did not occur. This form of colonialism can be seen demonstrated throughout Canada’s colonial period through such examples as unhonoured treaty agreements, violent quelling of socio-political uprisings of Indigenous people, and residential schools. Some would argue that Canada has not evolved away from these trends with respect to its Indigenous people.

NEO-COLONIALISM IN CANADA

Critical Race Theory, a perspective that holds that racial conflict results in the internalisation of the racial identities created by the state into

the daily lives of individuals and social systems (Bailey, 2012), applies directly to the issue of the impact colonialism continues to have on restorative justice in Canada. The colonial narrative continues to have far reaching implications with respect to the internalisation of such narratives, such as the denial of colonialism and its impact on the Indigenous Peoples of Canada. Canadian politicians have denied this impact and, when acknowledging the truth, belittled Canada's colonial past (Lacchin, 2015; Fontaine, 2016; Freeman, 2017). Within the past ten years, two Canadian Prime Ministers, Stephen Harper (former) and Justin Trudeau (current), have publicly denied or diminished Canada's status as a colonial nation. For example, Canada's former Prime Minister Stephen Harper was quoted in MacLean's magazine stating:

There are very few countries that can say for nearly 150 years they've had the same political system without any social breakdown, political upheaval or invasion. We are unique in that regard. We also have no history of colonialism. So we have all of the things that many people admire about the great powers, but none of the things that threaten or bother them about the great powers (Wherry, 2019).

Meanwhile, Canada's current Prime Minister Justin Trudeau's response to concerns surrounding Canada's colonial history creates confusion regarding the current government's views towards Indigenous relations. During an interview, Prime Minister Trudeau recognised Canada's colonial history by stating, "We have consistently marginalised, engaged in colonial behaviours, in destructive behaviours, in assimilationist behaviours, that have left a legacy of challenges to a large portion of the people who live in Canada who are Indigenous peoples" (Fontaine, 2016). However, he qualified this by stating that Canada was "without some of the baggage that so many other Western countries have — either colonial pasts or perceptions of American imperialism" (Ibid.).

It is impossible for any nation with roots in European expansion, within the past three hundred years, to disavow any form of ongoing colonial systems, let alone any colonial past whatsoever (Coates, 2008; Breton, 2012; Jacobs, 2012; Freeman, 2014; Lacchin, 2015; Monchalin, 2016; Boyington et al., 2017). That any nation, in general terms, might diminish the past harms perpetrated on Indigenous populations

demonstrates the very proliferation of neocolonialism seen in contemporary times. Freeman assesses Canadian discourse on reconciliation, or what is traditionally seen as a process of decolonisation, essentially supporting a “top-down, government defined and controlled agenda, which is at best ineffective and misleading and, at worst, fraudulent and *recolonising* (emphasis added)” (Freeman, 2014, p. 213).

PATERNALISM AND CRITICAL RACE THEORY

One cannot explore Indigeneity in Canada without considering the impact paternalism has had on multiple groups. Canada’s Indian Act is a paternalistic and archaic piece of legislation (Coates, 2008), and remains in effect in 2019. In 1969, the Government of Canada embarked on an official path of reform of the Indian Act, starting with The White Paper 1969, calling for its revocation (Government of Canada, 2013). However, Indigenous people overwhelmingly rejected this due to the lack of consultation. They viewed the recommendation as a continuation of the tradition of the very paternalistic policies and approaches the White Paper had sought to address. The Manitoba Framework Agreement (early 1990s), Bill C-79 (1996), Bill C-7 (2002), and Bill S-216 (2006) all failed to achieve legislative status due to opposition of Indigenous leadership (Ibid.). Although there has been success in the implementation of additional legislation that has garnered support from Indigenous Peoples of Canada, the Indian Act remains in place. However, these reforms have led to additional legislated controls over Canada’s Indigenous peoples without the dismantling the paternal system of government.

Critical Race Theory provides a lens from which to look at the issues of over-representation of Indigenous people in the criminal justice system. Critical Race Theory suggests that race is a social construct created by the dominant group, where racialised categories are created through the development of norms, laws and public policies (Bailey, 2016). In Canada, the tenets of Critical Race Theory are demonstrated by the modern use of the Indian Act (Monchalin, 2016), continued land management through the use of reserves (Lacchin, 2015), crises of poverty, health, and substance abuse among Aboriginal communities, and persistent inequitable incarceration rates (Royal Commission on Aboriginal Peoples,

1993). Indigenous Peoples of Canada have little to no cultural capital, which is expressed as power when it is used to legitimate privilege, prestige, and hierarchical social relations, creating social distance and is instrumental in creating a gap between the dominant group and others in society (Bailey, 2016; Breton, 2012). Monchalin writes that “inequality, reinforced and intensified by capitalism, keeps those ‘othered’ from the system near the lower end of the hierarchy and in danger of being criminalized” (2016, p. 260).

Bailey suggests that in society, there may be “taken-for-granted ways of interacting in everyday life at the systemic and institutional levels, which may influence the work of those in institutions, but may or may not reflect conscious exclusionary practices on the parts of individuals” (2016, p.16). The formalising of restorative practices by the courts and justice system has inhibited the ability of Indigenous community’s ability to work toward self-determination in the justice arena (Hudson, 2006; Tauri, 2016), thus impacting the growth of social capital.

The over-representation of Indigenous people in the criminal justice system is influenced by both cultural and systemic discriminatory treatment of Indigenous groups. Poverty, poor education, systemic racism, and the colonial impact still enforced on Indigenous people contribute far greater to over-representation than high Indigenous crime rates (Hudson, 2006; Breton, 2012). When policing an area primarily Indigenous in population, most police calls for service are not criminal code violations, but social disorder situations (Brown & Newberry, 2015). According to the white paper, “The Dollars and Sense of Policing and Community Safety,” commissioned by the Canadian Association of Chiefs of Police, only 30% of calls for service relate to offences that are tracked in the Uniform Crime Reports (Ahlgren, 2015). According to the Aboriginal Justice Implementation Commission :

What constitutes criminal conduct and how it is punished are also related in part to economic considerations. The criminal law has made illegal some acts that are linked directly to poverty, such as vagrancy, public intoxication and stealing, and incarcerates those who are unable to pay fines, or holds in custody those who cannot post bail. There are other discriminatory barriers facing Aboriginal people

as well, including cultural ones (Aboriginal Justice Implementation Commission, 1999).

As most social disorder issues are non-criminal, the question of why Indigenous people continue to be overrepresented in custodial sentences must continue to be investigated.

The role discrimination plays in the over-representation of Aboriginal people in the criminal justice system is an important consideration. The work of Bailey (2016) applies Critical Race Theory to the racialisation of restorative justice. Her research focused on applying restorative justice to immigrant youth in Calgary, Alberta. In her work, Bailey, listed four specific types of exclusion that she argued ultimately distinguish a dominant group from others. The first exclusion was that of self-elimination. This was defined by Bailey as “where those in the disadvantaged position exclude themselves from the mainstream as they “adjust their aspirations to their perceived chances of success” (p. 168). This learned helplessness can be expected when offenders no longer feel that they will be offered access to certain programs, that the programs are designed to set them up for failure, or that the programs offered are not culturally relevant to them. The result of such self-exclusion can lead offenders to just give up and accept the criminal record without attempting diversionary measures. Another form of exclusion is the necessity to “over-perform in order to compete with those who possess the desirable social capita” (Ibid.). This exclusion can occur when the offenders are, or expect to be, required to perform more, or more cumbersome tasks than others. Reflecting upon the established over-representation of Indigenous people in the correctional system, it could be argued that this is a very real reflection of failure of Indigenous offenders to adequately avoid imprisonment. The next form of exclusion is seen through relegation, “where culturally disadvantaged individuals are relegated to the less desirable positions in society” (Ibid.). This can easily be demonstrated by virtually all systemic racial issues with Canadian Indigenous people, such as lack of access to economic capital, education, health, food, and security. These issues negatively impact access to restorative justice programs by nature of admittance to programs on-reserve/off-reserve and can introduce barriers to successful completion of programs due to health-related issues and lack of activities for which community service can be served. Bailey’s final identified form of exclusion is “direct exclusion [which] refers to the exclusion of those with the lesser valued capital who do not possess the

tastes that are deemed desirable” (Ibid.), or sheer racism. In Canada, all four of these types of exclusion are present in Indigenous social stratification, regardless of living on-reserve or off-reserve, levels of education or credential, and even regardless of economic standing.

RESTORATIVE JUSTICE IN CANADA: PAST AND PRESENT

During the development of restorative justice practices in the 1990s, elements of Canadian Indigenous culture came to be incorporated into restorative justice practices. Such components, including “the circle,” placed emphasis on Canadian Indigenous culture. Yet, although the programs were touted as Australian based, they were marketed by people who were not associated with the Māori people upon which the Canadian programs were allegedly based. Nor were those marketing the programs actively involved in the Australian and New Zealand restorative justice services. Tauri references an anecdote from Dr. Wenona Victor, a criminologist from Stó:lō (sic) Nation in British Columbia. She described receiving training on the implementation of family group conferencing, a restorative justice process. The training was marketed as a Māori based practice, but the Nation was shocked when the presenter was not, in fact, a Māori person, but of European descent. By the end of the training session, Dr. Victor “was convinced the Māori had lost their minds! There was absolutely nothing Indigenous about this [FGC] model of justice whatsoever!” (2016: p. 58). Cathy Fobister (2019, March), an Indigenous person who works as a crisis worker of a remote Indigenous community, reflected on this situation stating, the ways of Canadian restorative practices “are not our ways.” Fobister’s perspective reflected the point that Canadian Indigenous culture is steeped with real restorative *practice*, rather than the culturally appropriated and paternalistic version of restorative “justice”, prevalent in today’s Canadian Criminal Justice System. The discussion revolved around differing thoughts on the concepts of shame, guilt and accountability, and ultimately falls at the feet of transgenerational trauma, addressing the need to develop programs specific to Indigenous people and the need to identify issues currently addressed through the use of Gladue Reports (Hebert, 2017).

Historically, Canada rejected the Indigenous peoples' ways but now emphasises these ways, if in name only, to resolve the matters resulting from the very colonialisation systems that vilified them. Beyond paternalism, it is questionable why Canada found it necessary to look to Australia and New Zealand for models of restorative justice when Indigenous Peoples of Canada have a long history of restorative practices in their individual cultures. This decision to look outside of Canada's own Indigenous cultures for restorative justice practices reflects the country's paternalist policies. Tauri (2016) provides a perspective, writing of certain myths associated with restorative justice practices with respect to their alleged Indigenous roots. As Tauri explains, two restorative justice myths have been circulated amongst crime control markets. The first of these myths involves the claim that Indigenous influence is heavily involved in the creation and design of restorative justice programs. In reality, as Tauri argues, this has been "greatly exaggerated" (2016: p. 46). The Royal Canadian Mounted Police, for example, reportedly based its programs of restorative justice on the Wagga Wagga model founded in Australia (Chiste, 2013). However, this model was found to have originated in the United States from a program which had been based upon the Australian Wagga Wagga model, which was itself influenced by traditional Māori practices (Tauri, 2016). The result was a practice that was applied to Indigenous Peoples of Canada that had no roots in their own unique cultures; cultures which already contain their own traditional restorative practices. Some might argue that Indigenous peoples should not have to accept practices that are both not their way and continue to reflect the historical path of the colonial powers.

The neocolonialist approach used to create Canadian restorative justice programming involves the misappropriation of traditional practices of non-Canadian Indigenous cultures and the paternalistic application of same on Indigenous Peoples of Canada. Monchalin et al. state that "Indigenous voices and experiences have been largely rendered invisible and subsumed to colonial understandings of Indigenous peoples and societies as inferior and primitive. These early colonial understandings underpin the systemic stereotyping, discrimination, and labelling of Indigenous people as criminogenic" (2019: p. 217), and as such, it can be concluded that Canada's government, at the time of colonisation, did not believe Indigenous culture possessed the requisite strength to draw upon to adequately participate in restorative processes. Contemporary

restorative justice can be criticised for being selective about Indigenous social control conforming to some principles of restorative justice, while concurrently ignoring others.

INDIGENOUS REJECTION OF RESTORATIVE JUSTICE

Many Indigenous people now reject contemporary restorative justice on the grounds previously discussed in this paper. Specifically, Indigenous peoples have not embraced contemporary restorative justice due to its links to colonisation, paternalism and the misappropriation of Indigenous culture (Breton, 2012; Tefft, 2013). Breton (2012) writes of the rejection of restorative justice by Indigenous persons and characterises the reconciliation efforts with respect to root causation of harms as empty rhetoric by colonial power structures. She believes that restorative justice is used to serve the needs of the coloniser state, not to empower communities and liberate peoples. She goes on to state that if restorative justice practices fail to address colonial crimes of our history, the crime control networks risk losing credibility. Meanwhile, Tefft (2013) puts the failure of restorative justice for Indigenous people upon the failure of the Canadian justice system to embrace Indigenous values in favour of making the existing system more efficient. She writes:

These so-called restorative justice initiatives erode Aboriginal traditions by taking them out of their intended context and placing them within a western European system that is based on totally incompatible values. The traditions that are left are fragmentary and watered down, further whitewashing Aboriginal identity. Moreover, they attempt to appease Aboriginal people by giving the illusion that the system is culturally appropriate and non-oppressive, while hijacking their traditions and spirituality (Ibid).

Breton also describes contemporary Indigenous rejection of restorative justice:

Instead of working toward wholeness for colonised peoples, restorative justice functions as another tool of coloniser institutions, whose goal is not healing but for one group to justify and reinforce their domination of another (Breton, 2012, p. 47).

Further, to repeat the clear and poignant statement presented earlier in this paper by Fobister (2019), who is of First Nations ancestry, contemporary Canadian restorative justice practices as they have developed are “not our ways.”

Acorn, in her book *Compulsory Compassion: A Critique of Restorative Justice*, approaches the Indigenous rejection of restorative justice from a deeper perspective. Her rejection is based upon the inability of non-Indigenous people to possess the requisite compassion, because it cannot be expected that people will feel compassion for people different than themselves (Kimel, 2006). Although there are numerous Indigenous-run restorative justice programs, many programs are not Indigenous-run, nor are they staffed with Indigenous people. Acorn writes of her appeal of restorative justice:

Thus the tremendous appeal of restorative justice seemed to lie primarily in its validation of my own and other people’s dissatisfaction with a legal system that depersonalises, desiccates, and fetishises justice in a way that deprives people of meaningful experiences of justice in relation (Acorn, 2004).

As such, it is far more legitimate to have one’s own people providing cultural programming with respect to producing and delivering culturally based programs. Wildcat also discusses the role of legitimacy in Indigenous matters, stating that:

relating to each other based on the Cree idea of miyo wahkotowin, and having formations of legitimacy taking root, will allow us to move beyond the current political landscape, which is so destructive to the future of our communities (Wildcat, 2011).

The core vision of going to the roots of harm and doing what it takes to put things right is experienced as empty rhetoric, invoked only when colonial power structures deem it advantageous to do so. The increasing misappropriation of Indigenous justice practices and philosophies without any significant application represents the continuation of colonialism and will only exacerbate the issues experienced by Indigenous People in Canada’s modern criminal justice system. Over the last 20 years, the Canadian judiciary has accepted that

Indigenous people require special consideration for their social and cultural circumstances with respect to sentencing (Government of Canada, 2019; Boyington, Aulakh, Kazarian, & Roberts, 2017; Hebert, 2017).

In 1996, the Criminal Code of Canada was amended to reflect the reformation of sentencing in Canada, specifically with the introduction of Gladue Reports (Hebert, 2017). However, the reality of such reformation is not demonstrated by the official statistics, as Indigenous over-representation in the correctional system continues to be skewed (Government of Canada, 2019, Malakeih, 2018; Aboriginal Justice Implementation Commission, 1999). The over-representation has been consistent, but with all restorative justice approaches over the years, said representation continues to increase. Statistics gathered by the Government of Canada continue to show the over-representation and, in fact, show a continued increase in this over-representation (Malakeih, 2018). The 2016/2017 data shows that Indigenous adults accounted for 28% of admissions to provincial/territorial correctional services, and 27% for federal correctional services, while representing only 4.1% of the Canadian adult population. Further to these figures, data demonstrates that the proportion of Aboriginal admissions to adult custody has been trending upwards for over 10 years, steadily increased from 2006/2007, when it was 21% for provincial and territorial correctional services and 20% for federal correctional services, respectively.

In light of the fact that Indigenous people are at a higher risk of custodial sentences, as restorative justice is a process that builds on the need to consider the cultural context of the offender, it is vital to investigate if access to restorative justice is widely provided. The legal framework to address some of these cultural considerations, embodied in the requirement for Gladue Report in the cases of Indigenous offenders, is in place in Canada. Gladue Reports are authored by trained Gladue Report writers, requested by a sentencing Justice, and presented for the purpose of addressing an Indigenous offender's "macro-circumstances, such as colonial history and enduring discrimination, as well as the offender's micro-circumstances, such as community, family and addiction" (Hebert, 2017). The benefits of the Gladue Reports pertain to the ability of Justices to consider the biographical and social information as mitigating factors for crimes committed by Indigenous offenders, and the resulting possibility of alternative or lesser sentences. The question remains as to

why this group continues to be over-represented in the Canadian criminal justice system.

Much of the crime committed by the Indigenous population is symptomatic of the erosion of traditional culture, and that the intergenerational trauma inflicted during the colonial era, and this is, arguably, the root cause of this group's over-representation in the Canadian Criminal Justice System. The Gladue Report requirements, although mandated by the judiciary, remain inequitable in their use and availability (Monchalin, 2016). Hebert (2017) confirms this assertion, as she acknowledges the benefits of Gladue Reports, but questions the disparity of its application. She writes:

...given this evidence that Indigenous offenders with a Gladue report have a significant advantage in sentencing, the great disparity in access to such reports across Canada creates an access to justice problem. Many Indigenous offenders still cannot enjoy the full extent of their sentencing rights pursuant section 718.2(e) of the Criminal Code, and the extent to which an Indigenous offender can benefit from a full Gladue analysis depends primarily on whether Gladue report funding is available in his or her location. This disparity in how Gladue is implemented among Indigenous offenders is paradoxical, considering that section 718.2(e) of the Criminal Code aims to address the disadvantage of Indigenous offenders versus non-Indigenous offenders. (Herbert, 2012, p.171-172)

It is clear that Gladue Reports are often not being made available due to lack of resources, lack of awareness, or blatantly being ignored by the trying Justices. Hebert makes the claim that "access to full Gladue reports is limited and not uniform across Canadian regions and jurisdictions and judges often do not have enough resources to fulfill their statutory obligations in sentencing Indigenous offenders" (Hebert, 2017: p. 170). She also points to the disparate nature of Gladue Reports when comparing urban and rural areas, individual provinces, and application with respect to men versus women and children (ibid). This can be seen in the rates of the Indigenous People in the Canadian correctional population with respect to geographical area; primarily rural provinces such as

Saskatchewan and Manitoba show a greater proportion of custodial sentences when compared to more urban provinces (Malakeih, 2018).

In order to develop empowering social capital in the indigenous population, Canada must address the very colonial and neocolonial harms systemic in its justice system. Breton (2017) describes the lack of restorative justice effectiveness with respect to the reconciliation processes being courted by Canada and the United States. As the theorist argues, any attempts to strengthen the justice system for Indigenous peoples will be in vain if North American countries do not holistically address the conditions which create much of the criminal and public order matters that bring Indigenous people to the attention of the police and into the courts. Davis, Hiller, James, Lloyd, Nasca, & Taylor (2016) ask some very pertinent questions related to overcoming of Canada's paternalism. Specifically:

Is it enough to hear the 'truth' about residential school history or the history of colonialism? Is it enough for settlers to recognise Indigenous territory? To grapple with their own implication in history? To support Indigenous struggles to alter the way things are? To actively interrupt and challenge processes that recreate settler privilege and Indigenous dispossession? To work on issues of restitution and returning land and land access? Indigenous dispossession? (p. 12).

Contemporary social conditions in Canada are not conducive to a short restorative process for long term resolutions (Boyington, Aulakh, Kazarian, & Roberts, 2017). Yet these are the circumstances for which many diversionary youth justice programs, and, to a larger extent, generalized community restorative programs are designed. Restorative justice, as a judicial practice, presents many challenges, such as lack of due process, self-incrimination, false confessions, and issues surrounding public shaming (Hudson, 2006). Restorative justice research must be conducted in a socially responsible manner and must contend with the challenges to individual rights for both victim and offender in order to reach the goal of restored relationships.

A VISION OF TRUE INDIGENOUS RESTORATIVE JUSTICE

The erosion of traditional Indigenous values and traditions Indigenous roots have contributed to the rising chaos in Indigenous communities (Boyington, Aulukh, Kazarian & Roberts, 2017), and some may argue that it has adversely eaten away the cultural influence behind restorative justice as a driver for indigenous justice. As it pertains directly to youth, Bailey's (2016) research addresses a concern that was raised as to "whether or not the aim of reconnecting youth to their community is possible with youth who are seen as existing outside of the community" (p. 8). What we must strive for at a more foundational level is a return to actual Indigenous peoples' tradition of true restorative justice by returning to the traditional social convention of group interest. Victor (2007) posits:

For Indigenous communities we need to go a step further, as the Stó:lo (sic) and other Indigenous Nations have done, and ensure our justice forums are our "own" as opposed to "alternative." Indigenous justice offered by Indigenous people for Indigenous people needs to find ways to not only address colonial harms, but to respect and make use of our own Indigenous teachings and concepts of justice (p. 16).

The Miyo Wahkotowin Community Education Authority model of Indigenous people of Maskwacis, Alberta, Canada provides insight into a contemporary program of restorative justice buttressed by legitimacy (Wildcat, 2011). The characteristics of a contemporary Indigenous program can draw legitimacy and influence when the practice is initiated by people who have chosen to come together to pursue the shared interest in community safety, harm reduction and relationship healing (Ibid). Atypical of contemporary restorative practice, such programs should not be dependent on one person or a small elite group of people for its continued success. As with many social coalitions, typical restorative justice groups are small in numbers, and do not survive slow periods of activity and as people move on to the next new thing. As stated earlier, the collective interest characteristic of traditional Indigenous cultural practices is a foundational aspect to restorative justice and that "restorative justice initiative and the form of citizenship it advocates will help to overcome these obstacles to creating formations of legitimacy. (Ibid, p. 939). Wildcat (2011) states that such programs must rest upon existing norms

and values within the specific communities that can be traced back to pre-reserve times, and it is these values that must be reflected in restorative justice to overcome the resistance of Indigenous peoples to buy-in to contemporary diversionary tactics.

One feature of the Miyo Wahkotowin model that diverges from the traditional Canadian justice model is that of the non-coercive and consensual aspect of such programs. While in some jurisdictions the police have a role in direct referrals to justice, most diversionary programs are typically referred by the courts, which presents the potential for coercion. If the participation of an offender is made mandatory (especially when the alternative is threat of criminal record and the potential for incarceration), the legitimacy will suffer and the potential for harm reduction and relationship restoration decreases. Wildcat posits that, for increased legitimacy, programs should operate in collaboration with other programs and systems that are interrelated with communities, both impacted and associated. Unfortunately, typically the Canadian system continues to compartmentalise restorative justice away from the affected communities and distances the victim in many cases. This can be successfully addressed, as Wildcat has demonstrated through the Miyo Wahkotowin Community Education Authority model. Wildcat (2011) speaks to the necessity of Indigenous identity for youth to grasp the concept of their own cultural restorative justice:

When Miyo Wahkotowin started to learn about restorative justice, it helped them to work on the question: ‘How do we make things fit into the belief we’re a Cree school?’ As the group began to learn more about restorative justice, they realised that it was simply part of the larger vision and mission of Miyo Wahkotowin (Wildcat, 2011, p. 930).

Finally, restorative practice programs should be independent and able to challenge any exterior forces that reflect non-core community interests beyond the need for public safety. As discussed earlier, most offences committed by Indigenous offenders involve public disorder and minor criminal offences. These offences involve, by and large, community harming behaviours with both general and specific victims, but generally do not involve significant public safety concerns. Therefore, the involvement of the criminal justice system is not always necessary, yet it

is the only system set up to deal with social control in general, and restorative justice specifically.

CONCLUSION

This study's findings suggest that the Indigenous ways that are purported to be the basis of modern, Canadian, restorative justice, in fact, are not reflected in the contemporary restorative practices. Research shows that the justice systems in Canada and Britain at the time of colonialism were incompatible with those of the colonised. Further, the colonisation of Indigenous Peoples of Canada included both the rejection of the local Indigenous-devised restorative-based justice system, and the forced adoption of a system resulting in the criminalisation of a disproportionate number of Indigenous persons. Aboriginal persons remain over-represented in the incarcerated population in Canada. Meanwhile, restorative justice was, and still is, not adequately accessible by Canada's Indigenous population. Research also demonstrates that Indigenous people are not fully embracing restorative justice in its current form, based upon the false narratives of its origins. Still, there remains the opportunity to embrace authentic Canadian Indigenous practices and incorporate same into restorative justice programs. Indigenous Elders and professionals offer specific perspectives that can help to adequately address the unique circumstances involved in Indigenous criminal justice issues and diversion.

Restorative Justice research must continue, thus providing longitudinal data to support restorative practice in Canada. Canada's Indigenous culture revival continues to be embraced socially and academically, thus providing more investigation into authentic cultural means of strengthening community relations, interpersonal growth, and ultimately the reduction of the unequal application of justice products on the Indigenous peoples in Canada. While the racial issues of Indigenous people who interact with the justice system is not a new concept, the understanding as to how modern Canadian restorative justice practice is not as rooted in the principles of Canadian Indigenous culture as some may think, requires further exploration. Colonialism certainly has played a significant role in the evolution of Indigenous overrepresentation in the

Criminal Justice System. Further, the imposition of a substantially different means to achieve justice, the disenfranchising of the population, the insensitively co-optation of cultural ways for material gains, as well as neocolonialism have each served to exacerbate the issues.

This paper explored the history of colonialism and the development of restorative justice in Canada. The conclusion to be drawn upon considering the research presented is that restorative justice in Canada, while imperfect, has a future to positively impact all Canadians, Indigenous or otherwise. Understanding the issues and truths about Indigenous involvement with the criminal justice system helps point to a path of holistic restoration. That is, a system that aligns Canada's future path with its own true Indigenous peoples' traditional ways, thereby promoting restoration of the individual, of the family, of the community, and perhaps of the country itself. It is undeniable that emotional and psychological harms play a significant role in criminal and public disorder involving Indigenous peoples. Hudson (2006) posits that "[I]inking questions of identity and questions of oppression is surely at the philosophical heart of the restorative justice ideal" (p. 41). Using tools such as Gladue Reports, group family conferences, and youth justice committees, Canada can continue to work to identify and incorporate Indigenous identity and limit inherent oppression. In doing so, Canada can work toward decolonisation, and strive to remove neocolonial government processes from the criminal justice system and related areas. A return to the pursuit of community harmony should prompt Canadians to implement a more equitable application of the philosophy of *justice*, regardless of the transgressions that bring everyone to the table.

REFERENCES

- Aboriginal Justice Implementation Commission (1999, November) Report of the Aboriginal Justice Inquiry of Manitoba, Chapter 4: Aboriginal Over-Representation. Retrieved from <http://www.ajic.mb.ca/volumel/chapter4.html>
- Acorn, A. (2004). *Compulsory Compassion: A Critique of Restorative Justice*. Vancouver: UBC Press.

- Ahlgren, A. (2015). The dollars and sense of policing and community safety A white paper commissioned by the Canadian Association of Chiefs of Police Research Foundation. Retrieved from https://www.cacp.ca/index.html?asst_id=1090
- Boyington, D., Aulakh, H., Kazarian, S., & Roberts, J. (2017). *Diversity and Indigenous Peoples in Canada*, 3rd Edition. Toronto: Emond Montgomery Publications.
- Breton, D. (Winter, 2012). Decolonizing RJ. *Tikkun Magazine*: Volume 27, Issue 1. Retrieved from https://journals-scholarsportal-info.libproxy.wlu.ca/pdf/08879982/v27i0001/45_drj.xml
- Bright, C. (2019). Centre for Justice & Reconciliation. Retrieved from <http://restorativejustice.org/restorative-justice/about-restorative-justice/tutorial-intro-to-restorative-justice/lesson-3-programs/restitution/#sthash.K1cwBkfy.dpbs>
- Brown, J. & Newberry, J. (2015). An Evaluation of the Connectivity Situation Tables in Waterloo Region. Evaluation report submitted to Waterloo Region Connectivity Partnership. Guelph, ON: Taylor Newberry Consulting. Retrieved from https://www.usask.ca/cfbsjs/research/pdf/research_reports/AnEvaluationoftheConnectivitySituationTablesinWaterlooRegion.pdf
- Chiste, K. (2013). "The origins of modern restorative justice: five examples from the English-speaking world." *University of British Columbia Law Review*, Jan. 2013, p. 33. *Academic OneFile*, <http://link.galegroup.com/apps/doc/A337816319/AONE?>
- Coates, K. (2008, May). The Indian Act and the Future of Aboriginal Governance in Canada. Research Paper for the National Centre for Indigenous Governance. Retrieved from http://fngovernance.org/ncfng_research/coates.pdf
- Davis, L., Hiller, C., James, C., Lloyd, K., Nasca, T., & Taylor, S. (2016). Complicated pathways: settler Canadians learning to re/frame themselves and their relationships with Indigenous peoples, *Settler Colonial Studies*. DOI: 10.1080/2201473X.2016.1243086
- Fobister, C. (2019, March 19). Personal interview.

- Freeman, V. (2014, January). In defence of reconciliation. *Canadian Journal of Law and Jurisprudence*, p. 213-223. Retrieved from Academic OneFile, <http://go.galegroup.com.libproxy.wlu.ca/ps/i.do?id=GALE%7CA360795928&v=2.1&u=wate18005&it=r&p=AONE&sw=w>
- Friedman, David D. (1995) "Making Sense of English Law Enforcement in the Eighteenth Century," *The University of Chicago Law School Roundtable*: 2(2): Article 7. Available at: <http://chicagounbound.uchicago.edu/roundtable/vol2/iss2/7>
- Government of Canada (2019). *Re-Thinking Access to Criminal Justice in Canada: A Critical Review of Needs, Responses and Restorative Justice Initiatives*. Department of Justice. Retrieved from https://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr03_2/p3b.html
- Government of Canada (2013). *Attempts to Reform or Repeal the Indian Act*. Retrieved from <https://www.rcaanc-cirnac.gc.ca/eng/1323350306544/1544711580904>
- Hebert, A. (2017). Change in Paradigm or Change in Paradox: Gladue Report Practices and Access to Justice. *Queen's Law Journal*: 43(1), 149. Retrieved from <http://go.galegroup.com.libproxy.wlu.ca/ps/i.do?id=GALE%7CA530829374&v=2.1&u=wate18005&it=r&p=AONE&sw=w>
- Hudson, B. (2006). *Beyond white man's justice: Race, gender and justice in late modernity*. *Theoretical Criminology*, Sage Publications. 10(1): 29–47; 1362–4806. DOI: 10.1177/1362480606059981. Retrieved from https://journals-scholarsportal-info.libproxy.wlu.ca/pdf/13624806/v10i0001/29_bwmj.xml
- Jacobs, M. (2012). *Assimilation Through Incarceration: The Geographic Imposition of Canadian Law Over Indigenous Peoples* (Doctoral Dissertation). Retrieved from <https://www.collectionscanada.gc.ca/obj/thesescanada/vol2/OKQ/TC-OKQ-7557.pdf>
- Kimel, E. (2006). Book Review: *Compulsory Compassion: A Critique of Restorative Justice*. *Ottawa Law Review*, 37(2), 356-364.

- Retrieved from http://rdo-olr.org/wp-content/uploads/2018/01/olr_37.2_Acorn.pdf
- Lacchin, J. (2015) "The 'Wretched of Canada': Aboriginal Peoples and Neo-Colonialism," *Sociological Imagination: Western's Undergraduate Sociology Student Journal*: 4(1): Article 2. Retrieved from <https://ir.lib.uwo.ca/si/vol4/iss1/2>
- Malakieh, J. (2018) Adult and youth correctional statistics in Canada, 2016/2017. StatsCan. Retrieved from <https://www150.statcan.gc.ca/n1/pub/85-002-x/2018001/article/54972-eng.htm>
- Monchalain, L. (2016). *The Colonial Problem: An Indigenous Perspective on Crime and Injustice in Canada*. University of Toronto Press. Retrieved from <https://ebookcentral-proquest-com.libproxy.wlu.ca/lib/oculwlu-ebooks/detail.action?docID=4931326>.
- Monchalain, L., Marques, O., Reasons, C., & Arora, P. (2019). Homicide and Indigenous peoples in North America: A structural analysis. *Aggression and Violent Behavior*, 46, 212-218, ISSN 1359-1789, Retrieved from <https://doi.org/10.1016/j.avb.2019.01.011>.
- Public Legal Education Association of Saskatchewan, Inc. (2006). *Currents: Exploring Traditional Aboriginal Justice Concepts in Contemporary Canadian Society*. Retrieved from <http://docs.plea.org/pdf/Currents.pdf>
- Royal Commission on Aboriginal Peoples (1993). *Report of the National Round Table on Aboriginal Justice Issues*. Retrieved from http://publications.gc.ca/collections/collection_2017/bcp-pco/Z1-1991-1-11-2-eng.pdf
- Tauri, J. (2016). Indigenous Peoples and the Globalization of Restorative Justice. *Social Justice*, 43(3), 46-67. Retrieved from http://www.socialjusticejournal.org.libproxy.wlu.ca/archive/145_43_3/145_03_Tauri.pdf
- Tefft, K. (2013). Canadian justice system failing Aboriginal people: Restorative justice, self-government needed to correct "systemic discrimination". *The Manitoban*. Retrieved from

<http://www.themanitoban.com/2013/08/canadian-justice-system-failing-aboriginal-people/15822/>

Victor, W. (2007). Indigenous Justice: Clearing Space and Place for Indigenous Epistemologies. National Centre for First Nation Governance. Retrieved from https://books-scholarsportal-info.libproxy.wlu.ca/en/read?id=/ebooks/ebooks0/gibson_cppc/2010-08-06/6/10385323

Wherry, A. (2009). *What he was talking about when he talked about colonialism*. MacLeans Magazine. Retrieved from <https://www.macleans.ca/uncategorized/what-he-was-talking-about-when-he-talked-about-colonialism/>

Wildcat, M. (2011). Restorative Justice at the Miyo Wahkotowin Community Education Authority. *Alberta Law Review*, 48(4), 919. Retrieved from <https://albertalawreview.com/index.php/ALR/article/view/140>

ABOUT THE AUTHOR

Dean Young is a sworn peace officer in Alberta, Canada and is completing studies in public safety at Wilfrid Laurier University, Ontario Canada, where he is concentrating his interests on countering crime. He has worked in both law enforcement and fire service. He is a trained restorative justice facilitator and currently participates in a local youth justice committee.