9.6: Sentencing – Alternative Measures and Restorative Justice

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1 Introduction

Alternative measures and restorative measures were introduced into the *Criminal Code*[1] in 1996 with Bill C-41, *An act to amend the Criminal Code (sentencing) and other acts*. This reform of criminal sentencing in Canada was the result of numerous consultations on the subject. At the time, Parliament's intent was to deal with criminal offences of lesser gravity in a way that would facilitate the social reinsertion of offenders and the administration of justice,[2] so that these offenders would be able to remain in society and participate in alternative measure programs or restorative justice initiatives. As a result, the justice system's resources and funds are now used to incarcerate and treat more serious offenders.[3]

2 Alternative Measures

2.1 Defining alternative measures

Despite falling under the section of the *Criminal Code* that deals with sentencing, alternative measures, commonly referred to as "diversion," do not constitute a sentence.[4] Alternative measures are defined 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."[5]

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[1] *Criminal Code,* RSC 1985, c C-46.

[2] Julie Desrosiers et al, "Étude comparative des programmes canadiens de mesures de rechange ou comment favoriser le désengorgement des tribunaux" (2020) 50:1 Revue générale de droit 103.

[3] Canada, *House of Commons Debates,* 35-1 (20 September 1994) at 5873 (Hon Allan Rock): "A general principle that runs throughout Bill C-41 is that jails should be reserved for those who should be there. Alternatives should be put in place for those who commit offences but who do not need or merit incarceration."

[4] Public Prosecution Services of Canada, *Public Prosecution Service of Canada Deskbook,* Part III: Procedural Issues and Trial Practice, 3.8 Alternative Measures (5 March 2020) at S 1.2: Section 717 of the *Criminal Code*, online: <https://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/p3/ch08.html>.

[5] *Criminal Code,* s 716.

Alternative measures are implemented before a sentence is imposed by a judge[6] and can take different forms, depending on the jurisdiction and the offence. They can include community service, a charitable donation, anger management counselling, addiction or mental health counselling, a letter of apology, or a combination of these.

Sections 716-717.4 of the *Criminal Code* create a flexible legislative framework that gives leeway to the provinces in the creation of alternative measures programs; each Attorney General is responsible for creating such programs. Consequently, provinces and territories have not created alternative measures programs at the same rate. For example, in Quebec, the first alternative measures program for adults was implemented in 2017, while Prince Edward Island, Nova Scotia, and the Northwest Territories have had these programs since 1996.[7]

2.2 When can alternative measures be used?

Alternative measures can only be used in cases where they are not inconsistent with the protection of society.[8] Typically, Crown counsel and/or police officers will determine whether an offender should be referred to the program. The Crown's decision to refer an individual to an alternative program is discretionary[9] and cannot be subjected to a judicial review.[10] Participation and admission in an alternative measures program are not admissible as evidence in a civil or criminal proceeding.[11]

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[6] Desrosiers et al, *supra* note 2 at 108.

[7] *Ibid* at 97.

[8] *Criminal Code,* s 717(1).

[9] While the decision to refer an individual to an alternative measures program is discretionary, recently the Law society of Québec determined that a prosecutor who consistently refused to refer defenders to an alternative measures program and follow the policy of the Attorney General was in breach of his professional obligations, and he was temporarily disbarred as a consequence. See *Barreau du Québec (syndic adjoint) c Tétreault*, 2020 QCCDBQ 50.

[10] *Okimow v Saskatchewan (Attorney General),* 2000 SKQB 311 at paras 8, 22.

[11] *Criminal Code,* s 717(3).

A number of conditions[12] must be met for alternative measures to be used. These conditions fall under two categories: (1) conditions that are within the control of the defendant and (2) conditions that are determined by actors within the justice system.[13]

Conditions within the control of the defendant[14] are the following:

1. The defendant has to consent to participate in the measures;[15]
2. The defendant must accept responsibility for the act or omission that is at the basis of the alleged offence;[16]
3. The defendant must not deny participation or involvement in the commission of the alleged offence;[17] and
4. The defendant must not express the wish that the charge be dealt by the court.[18]

These are ongoing conditions. If at some point the defendant no longer agrees with these conditions, alternative measures cannot be used to deal with the accusation.

The conditions within the controls of actors of the justice system (i.e., the Crown) are as follows:[19]

1. The alternative measures are part of a program of alternative measures authorized by the Attorney General or designate;[20]
2. The alternative measures program must be appropriate for the needs of the defendant and the interests of society and the victim;[21]

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[12] In *R v Henwood,* 2017 ABPC 166 (CanLII), Justice AA Fradsham refers to these conditions as "facts": see para 38 and Criminal Code, s. 717(1) and s. 717(2) note 1.
[13] *Ibid* at para 38.
[14] This categorization of the conditions or facts can be found in *Henwood, supra* note 12 at paras 39, 40, and 41.
[15] *Criminal Code*, s 717(1)(c).
[16] *Ibid,* s 717(1)(e).
[17] *Ibid,* s 717(2)(a).
[18] *Ibid,* s 717(2)(b).
[19] *Henwood, supra* note 12 at para 43.
[20] *Criminal Code,* s 717(1)(a).
[21] *Ibid*, s 717(1)(b).

3. The defendant must be advised of the right to be represented by counsel before consenting to their participation in the program;[22]
4. Crown counsel must be of the opinion that there is sufficient evidence to proceed with the prosecution of the offence;[23] and
5. The prosecution of the offence is not barred at law.[24]

These conditions are static and historic: “if they existed at the time when the accused was referred to an alternative measures programme, then, for the purposes of section 717 (1), those facts cannot cease to exist.”[25]

In most provinces and territories, alternative measures programs are available for the following offences: mischief, assault, theft under $5,000, breaking and entering, and offences against the administration of law and justice.[26] Admissibility criteria for the programs vary. Some provinces, such as Alberta and Saskatchewan, refuse to admit offenders who recently participated in an alternative measures program or were recently convicted of a similar offence. Provinces such as Ontario or Alberta do not allow offenders who were convicted in the past to participate in an alternative measures program.[27]

The process and administration of the alternative measure programs vary as well. Some jurisdictions, such as Prince Edward Island and Nova Scotia, allow the referral of offenders to the program from a police officer before charges are laid. Other provinces, such as Ontario and Quebec, allow referral by prosecutors after charges are laid.[28] Once the program is completed, the charges are withdrawn or stayed, depending on the jurisdiction.[29]

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[22] *Ibid,* s 717(1)(d).
[23] *Ibid,* s 717(1)(f).
[24] *Ibid*, s 717(1)(g).
[25] *Henwood, supra* note 12 at para 44.
[26] Desrosiers et al*, supra* note 2 at 128.
[27] *Ibid* at 139.
[28] *Ibid* at 144-46.
[29] *Criminal Code*, s 717(4).

3 Restorative Justice

3.1 Defining restorative justice

Restorative justice practices in Canada have existed for more than 40 years. They are informed by Indigenous legal traditions.[30] Restorative justice is an approach to justice that brings together the victim, the offender, community members, and other supports to collectively address the harm done.[31] It is a response to crime that focuses on restoring the losses suffered by victims, holding offenders accountable for the harm they have caused, and building peace within communities."[32]

"Fundamentally, restorative justice emphasizes a focus on the underlying causes of criminal behaviour, and aims to reintegrate the offender into the community and 'make things rights' with the victim."[33] The purpose of undergoing a restorative justice process is not to restore relations to what they were before the harm was committed — rather, it is an opportunity for the individuals involved to be "capable of entering into equal and healthy interpersonal relationships again without relying on criminal justice sanctions."[34]

Bill C-41 articulated three objectives in the *Criminal Code* that speak to restorative justice measures:

1. Section 718.2(d): to assist in rehabilitating offenders;

[30] Department of Justice, *A Report on the Relationship between Restorative Justice and Indigenous Legal Traditions in Canada* (Ottawa: Department of Justice Canada, 2016) at 3-4, citing David Milward, "Making the Circle Stronger: An Effort to Buttress Aboriginal use of Restorative Justice in Canada Against Recent Criticisms" (2008) 4:3 Int J Punishment 124; and Angela Cameron, "Restorative Justice: A Literature Review. Literature Review" (Vancouver: The British Columbia Institute Against Family Violence, 2005).
[31] Canadian Intergovernmental Conference Secretariat "Principles and Guidelines for Restorative Justice Practice in Criminal Matters" (2019) (Paper delivered at the Federal-Provincial Territorial Meeting of Ministers Responsible for Justice and Public Safety, St. John's, 15–16 November 2018), online: <https://scics.ca/en/product-produit/principles-and-guidelines-for-restorative-justice-practice-in-criminal-matters-2018/>.
[32] Canadian Resource Centre for Victims of Crime, *Restorative Justice in Canada* (Ottawa: CRCVC, 2011) at 2, online: <http://www.rjlillooet.ca/documents/restjust.pdf>; published on <https://crcvc.ca/resources/publications/>
[33] Bruce Archibald & Jennifer Llewellyn, "The Challenges of Institutionalizing Comprehensive Restorative Justice: Theory and Practice in Nova Scotia" (2006) 29:2 Dalhousie LJ 297 at 306.
[34] Department of Justice, *supra* note 30 at 4, citing *ibid* at 343.

2. Section 718.2(e): to provide reparations for harm done to victims or the community; and
3. Section 718(f): to promote a sense of responsibility in offenders and acknowledgment of the harm done to victims or the community.[35]

3.2 Indigenous peoples

Section 718.2(e) was created to respond to the over-incarceration of Indigenous peoples in Canada. Therefore, this section should be given particular emphasis when considering restorative justice processes for Indigenous offenders. It requires the sentencing judge to "explore reasonable alternatives to incarceration in the case of all aboriginal offenders."[36]

The Supreme Court of Canada in *Gladue* influenced restorative justice applications. It emphasized the need to use restorative justice in the context of sentencing for both Indigenous and non-Indigenous offenders by encouraging courts to apply its principles. *Gladue* was a paradigm shift, because it imposed an obligation on courts to consider what interventions they could offer offenders outside of incarceration. The Supreme Court of Canada emphasized that a sentence focused on restorative justice should not be viewed as a "lighter" punishment but can at times "impose a greater burden" on the offender when combined with probationary conditions, because the offender needs to accept responsibility for their actions, unlike where custodial sentences are imposed.[37]

Restorative justice measures are supported through federal legislation, policy, and program responses. The measures are enabled by provisions in the *Criminal Code*, the

[35] *Criminal Code,* s 718.2(d)-(f).
[36] Zachary T Courtemanche, "The Restorative Justice Act: An Enhancement to Justice in Manitoba?" (2015) 38:2 Manitoba LJ 1; and ***R v Gladue***, 1999 CanLII 679 (SCC) at para 92.
[37] *Gladue, supra* note 36.

Youth Criminal Justice Act,[38] the *Canadian Victims Bill of Rights*,[39] and the *Corrections and Conditional Release Act*.[40]

Section 6(b) of the Victims Bill of Rights Act and section 26.1(1) of the Corrections and Conditional Release Act expressly provide that victims have the right to receive information about restorative justice programs.

Manitoba is the only province that has enacted legislation specifically on restorative justice, the *Restorative Justice Act*.[41]

3.3 When can restorative justice be used?

Federal, provincial, and territorial governments have their own restorative justice policies and have the authority to decide how to apply the principles of restorative justice to the programs in their jurisdiction. Restorative justice processes can be used during the criminal justice process or as an alternative measure. An offender can be referred to a restorative justice program at any stage of the criminal process, such as by police before a charge is laid, by the Crown after a charge is laid, by the courts before sentencing, by corrections post-sentence, or by parole pre-revocation.[42]

Although it is required that the offender accept responsibility for their act, a guilty plea is not required. Accepting responsibility should not be used as evidence in further legal proceedings. Additionally, there must be sufficient evidence to prosecute the offence, and the restorative justice program must be authorized by the provincial Attorney General.[43]

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[38] *Youth Criminal Justice Act*, SC 2002, c 1.
[39] *Canadian Victims Bill of Rights*, SC 2015, c 13.
[40] *Corrections and Conditional Release Act*, SC 1992, c 20; *Gladue*, supra note 36 at para 72.
[41] *The Restorative Justice Act*, SM 2015, c 26.
[42] The Canadian Intergovernmental Conference Secretariat, *supra* note 31 at 3; Canada, Office of the Federal Ombudsman for Victims of Crime, *Restorative Justice: Getting Fair Outcomes for Victims in Canada's Criminal Justice System* (Canada: Office of the Federal Ombudsman for Victims of Crime, 2017) at 1 [Federal Ombudsman].
[43] Federal Ombudsman at 1.

The safety and best interests of the victims, offenders, and communities must be considered when making a referral to a restorative justice program. Participation in these programs must be voluntary. Restorative justice programs are typically not used for serious offences. Although their approaches can be used in situations of intimate partner violence, proponents are usually concerned about the power imbalance between the victim and offender.[44]

Restorative justice initiatives are case and community specific to account for the needs of every victim. Typically, parties are brought together in a non-hierarchical setting and dialogue is guided by trained facilitators. Common forms of restorative justice in Canada include the following:

- Victim–offender reconciliation or mediation programs, where parties address the crime and the impact it has had on their lives;
- Victim-impact panels, where victims speak to the offender;
- Victim–offender panels, where an unrelated victims and offenders can speak to each other about the similar crime they've experienced;
- Conferencing between all parties, with a focus on reparation; and
- Circles (e.g., sentencing, healing, releasing), which can involve the offender, victims, and Elders to both discuss the crime and its impact on the greater community, with the goal of forging a path forward.[45]

[44] Melanie Randall, "Restorative Justice and Gendered Violence? From Vaguely Hostile Skeptic to Cautious Convert: Why Feminists Should Critically Engage with Restorative Approaches to Law" (2013) 36:2 Dalhousie LJ 461.
[45] Federal Ombudsman.