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Don Clairmont* and
Ethan Kim**

Getting Past the Gatekeepers: The
Reception of Restorative Justice in the
Nova Scotian Criminal Justice System

This paper draws upon twelve years of multi-dimensional research and focuses on the reception of restorative justice in the criminal justice system in Nova Scotia. The paper traces the evolution of the restorative justice social movement, examining the launching and take-off phases, the impact on the police gate-keeping role, the receptivity and use of restorative justice by other criminal justice system professionals, its current level of institutionalization in the criminal justice system, and its future prospects.

Cet article s'inspire de douze années de recherche multidimensionnelle et traite plus particulièrement de la réception accordée à la justice réparatrice dans le système de justice pénale en Nouvelle-Écosse. Il suit l'évolution du mouvement social en faveur de la justice réparatrice, examine les phases de son lancement et de son démarrage ainsi que son impact sur le rôle de répression de la police, la réceptivité et l'utilisation de la justice réparatrice par d'autres professionnels du système de justice pénale, son niveau d'institutionnalisation actuel dans le système de justice pénale et ses perspectives pour l'avenir.

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Introduction

The Nova Scotia Restorative Justice Program (NSRJ) came into being in 1999–2000 as a result of effective moral entrepreneurship,¹ stimulated by restorative justice-related initiatives elsewhere, and after almost two years of discussion and planning among provincial leaders in policing, prosecution, judiciary, and corrections.² It is regarded as one of the best criminal justice system-initiated restorative justice programs in Canada. The NSRJ program was set up to be applicable at all levels of the criminal justice system, with restorative justice referrals possible at four entry points, namely: pre-charge, post-charge, post-conviction, and post-sentencing.³ On paper at least, restorative justice could apply to all offences

1. Brian MacDonald, "Restorative Justice: An Interview with Danny Graham QC," *A Human Future* (June 2008) 7:2, online: L'Arche <http://larche.ca/a_human_future/ahf_restorative_justice_an_interview_danny_graham.pdf>.

2. Don Clairmont, "The Nova Scotia Restorative Justice Initiative: Final Evaluation Report" (Ottawa: Department of Justice, 2005); Bruce Archibald & Jennifer J Llewellyn, "The Challenge of Institutionalizing Comprehensive Restorative Justice: Theory and Practice in Nova Scotia" (2006) 29 Dal LJ 297.

3. In the NSRJ there are four levels of offences. Level 1 defines offences where there is also the option of a formal caution. Level 2 deals with criminal code offences that can be referred at all four entry points and are not defined in levels 3 and 4. Level 3 offences can only be referred at the court (post-conviction) or corrections (post-sentencing) entry points (i.e., fraud over \$20k, robbery, minor sexual offences, aggravated assault, manslaughter, spousal/partner violence, impaired driving, criminal negligence and kidnapping, abduction, and confinement). Level 4 offences which can only be referred at corrections entry (post-sentencing) are serious sexual assaults and murder. Since early 2000 there has been a moratorium on any referral whatsoever involving sexual assault or spousal/partner violence, a moratorium that is still in place.

and offenders, beginning with youths and subsequently being expanded to include adults. Its strengths organizationally are many: province-wide programming; secure, substantial, long-term governmental funding generous for a small so-called have-not province; collaboration with local non-profit agencies who deliver the service while the provincial NSRJ management provides coordination, protocols and training; and complete funding for the agencies' full-time staff. It has also partnered with and contributed significantly to the success of the province-wide Aboriginal restorative justice program.⁴ Its impact, measured in terms of conventional criminal justice system evaluation concerns, has been impressive: less recidivism than in similar, court processed cases; high levels of satisfaction among all categories of participants in the restorative justice sessions (offenders, victims, supporters, police attendees and others); and diversion of roughly thirty-three per cent of all cases of youth arrest from the court processing stream.⁵ The NSRJ program has evolved over the past decade—partly as a result of its effective institutionalization in the Nova Scotian criminal justice system and partly as a result of federal legislation and policies (e.g., the *Youth Criminal Justice Act (YCJA)* and subsequent court interpretations). Now restorative justice referrals are as likely to come from crown prosecutors as from the police, where the anticipated extension of restorative justice to adults is underway throughout Nova Scotia, and where its success has stimulated restorative justice/restorative practices initiatives in provincial prisons and beyond the criminal justice system in schools' human rights cases and other areas of social life.⁶

This paper is rooted in the research work of the senior author in the restorative justice programs in mainstream and Aboriginal society in Nova

4. The Aboriginal program established in collaboration with NSRJ has developed into a multi-dimensional justice services program fusing both Mi'kmaq and restorative traditions. Its restorative justice activity is carried out under its Customary Law Program. The umbrella organization, Mi'kmaq Legal Support Network, is considered one of the leading Aboriginal justice service providers in Canada. Don Clairmont & Jane McMillan, "Directions in Mi'kmaq Justice: Notes on the Assessment of the Mi'kmaq Legal Support Network" (Halifax: Tripartite Forum on Native Justice, 2007).

5. Clairmont, *supra* note 2; Policy, Planning and Research, Nova Scotia Department of Justice, "A Review of the Nova Scotia Restorative Justice Program" (Halifax: Department of Justice, 2010).

6. Clearly both concepts, restorative justice and restorative practices, are considered by their advocates and others to be operationalizations of a restorative approach, the former usually with respect to the criminal justice system where a formally-defined offence has occasioned an alternative response to court processing, and the latter usually with respect to matters where no crime has occurred such as disputes and problem behaviour in a non-criminal justice system context. How adequately such operationalizations capture or reflect the underlying principles of the restorative approach is a continuing issue for conceptualization and measurement as is discussed in other papers in this special issue of the *Dalhousie Law Journal*. There is a similar argument applicable with reference to victim-offender mediation which pre-dates the modern version of the restorative approach and which the senior author was engaged in during the 1970s.

Scotia between 1997 and 2012. The work included participant-observation in the establishment of the NSRJ program in its pre-implementation phase, collaborating in the creation of the basic NSRJ administrative data system (i.e., RJIS), subsequent years as a member of the NSRJ Program Management Committee in the period 1999 to 2010, and attending over fifty actual restorative justice sessions throughout the province. The senior author was also the principal evaluator of the NSRJ program for the period 1999 through 2006 and has continued to conduct its major evaluation research up to the present. During the period 1992 through 2012 he has also been a principal researcher with respect to Aboriginal justice programming in all three provinces in the Maritimes (i.e., Nova Scotia, Prince Edward Island, and New Brunswick). That research has yielded thirteen substantial research monographs and a number of academic papers.⁷ A wide range of methodologies has been used including participant-observation, analyses using RJIS data, analyses of 4500 exit surveys collected at restorative justice sessions, 1500 in-depth interviews with restorative justice session participants (offenders, victims, supporters, police officers, and others) conducted by telephone between one and six months after the session, regular, sustained contact with the non-profit agencies delivering the restorative justice program, panel interviews with criminal justice system professionals in both mainstream and Aboriginal milieus, analyses of salient secondary data, and a literature review of restorative justice initiatives elsewhere.

The underlying perspective for the research effort has been a longstanding focus on social movements in the field of social problems and social policy. There have been three central dimensions to the restorative justice research, namely: (a) how has the restorative justice social movement evolved in Nova Scotia and with what impact for session participants, and for basic issues such as social equity, crime levels, and community; (b) how has the restorative justice movement been institutionalized and incorporated in the criminal justice system; and (c) how has the Nova Scotia restorative justice experience compared with criminal justice system trends in other parts of Canada and other societies, and linked up with other kindred movements in justice (e.g., the problem-solving courts, Aboriginal justice, evolution of citizenship rights, and community development). In this paper the focus is on the second dimension, the reception of restorative justice in the criminal justice system. The NSRJ program was initiated as a replacement, a more expansive

7. All the research monographs can be obtained from the Atlantic Institute of Criminology at Dalhousie University.

and flexible program, to the previous alternative justice programming in Nova Scotia. That earlier approach to alternative justice was basically controlled by police referrals, the gate-keepers to criminal justice system processing, and the eligibility criteria were strict and limited. This paper traces the evolution of the restorative justice social movement, examining the launching and take-off phases, the impact on the police gate-keeping role, the receptivity and use of restorative justice by other criminal justice system professionals, its current level of institutionalization in the criminal justice system, and its future prospects.

I. *The gatekeeper role*

Prior to the NSRJ program, the alternative justice trajectory in Nova Scotia essentially started and ended with the police service. There was an Alternative Measures program for youth which began as a police initiative and was subsequently administered by Nova Scotia Corrections. All referrals to the program were made by the police (i.e., pre-charge). Adult diversion began in the mid-1990s as a post-charge service provided by probation officers acting on recommendations by police officers which had been vetted by designated crown prosecutors. The police service was, in effect, the principal gatekeeper determining what cases went forward into the formal court system and which were diverted. In that regard Nova Scotia adhered to the format for alternative justice followed in Britain, U.S.A., New Zealand, and Australia—countries rooted in common law—in contradistinction to the system prevalent still in continental Europe. In the latter, prosecutors and magistrates, not the police, are the coordinators of mediation programs diverted from formal court processing.⁸ In Italy and Spain, for example, prosecutors and judges are the only professionals who can refer for victim-offender mediation and there, despite expressed support for the principle, mediation is marginal to the criminal justice system and rarely used if there is no pre-existing relationship—deemed to constitute “a small relational distance”—between the offender and the victim.⁹ The low usage of alternative justice strategies presumably reflects the officials’ focus on case presentation, and quite limited restorative

8. Gordon Petterson, “How to Enable Prosecutors and Judges To Make Use of RJ Practice in Their Work” (Paper delivered at the conference Restorative Justice in Europe: Where are We Heading, Budapest, Hungary, October 2004).

9. Simona Ghetti & Anna Mestitz, “What Do Prosecutors and Judges Think About Victim-Offender Mediation With Juvenile Offenders” (Paper delivered at the conference Restorative Justice in Europe: Where are We Heading, Budapest, Hungary, October 2004); Marianne Loschnig-Gspandl, ed, *Restorative Justice and its Relation to the Criminal Justice System* (Papers from the 2nd Annual European Forum for Victim-Offender Mediation and Restorative Justice, Oostende, Belgium, October, 2002).

approach. There is very little discretion given to the police with respect to processing arrests.¹⁰ There is, however, some evidence of increased police engagement in countries such as Norway and Belgium¹¹ and some use of the restorative justice approach in European prison systems.¹²

In common law countries such as Canada, there has been a tradition of decentralization and compartmentalization in criminal justice system decision-making, allowing for local moral entrepreneurs (i.e., rule creators crusading for the passage of certain rules, laws, and policies), police discretion, and space for restorative approaches to develop.¹³ A long tradition in Canadian criminology has been to emphasize the crucial role of police discretion in determining whether incidents are labeled such that they are eligible to be processed in the criminal courts.¹⁴ The community-based policing movement in the 1970s and 1980s, centred in the same common law countries, enhanced that police discretion and use of alternative justice strategies. As Pollard comments on this development, in their role as problem-solvers, police now have “a whole toolbox of ideas and processes...and huge discretion in dealing with crime and incidents.”¹⁵ In Nova Scotia, the Royal Commission on the Donald Marshall Jr. Prosecution led to strict policy directives that furthered the decentralization and compartmentalization noted above, underlining that, in normal circumstances, it has to be the police responsibility to decide whether or not to lay a charge, and, once laid, the decision to prosecute or not lies with the “independent” prosecution service not government bureaucrats.¹⁶

The actual police-driven initiatives using the restorative approach in Britain, Ireland, Canada, and other common law countries have primarily, though not always, involved youth and minor types of offending (often the referral is defined as “a second chance”). If one expects or hopes for

10. Christa Pelikan, “Restorative Justice and its Relation to the Criminal Justice System” in Marianne Loschnig-Gspandl, *ibid*.

11. *Ibid*; Kelly Richards, “Rewriting and Reclaiming History: An Analysis of the Emergence of Restorative Justice in Western Criminal Justice Systems” (2004), online: <www.crjs.org>.

12. Tunde Barabas, Borbala Fellegi & Szandra Windt, “Responsibility-Taking, Relationship Building and Restoration in Prisons” (Budapest: OKRI, 2012); Liz Elliott, “Security, Without Care: Challenges for Restorative Values in Prison” (2007) 10:2 *Contemp Just Rev* 193.

13. Bruce Archibald, “Democracy and Restorative Justice: Comparative Reflections on Criminal Prosecutions, the Role of Law and Reflexive Law” (Paper delivered at fifth International Conference on Restorative Justice, Leuven, Belgium, 2005).

14. Richard Ericson, *Making Crime: A Study of Detective Work* (Toronto: Butterworths, 1981).

15. Charles Pollard, “Restorative Justice, Problem-Solving and Community Policing,” cited in Loschnig-Gspandl, *supra* note 9 at 33.

16. See Bruce P Archibald, “The Politics of Prosecutorial Discretion: Institutional Structures and Tensions Between Punitive and Restorative Paradigms of Justice” (1998) 3 *Can Crim L Rev* 69.

a robust restorative justice program it is important to elaborate further on the police role and the relationship to other criminal justice system role players. The literature on policing has generally established that police officers are more similar to the general public, and to local elected leaders and businessmen in their views on justice issues, than other criminal justice system officials such as crown prosecutors and judges.¹⁷ They are also much more involved in the actual alternative justice programs to which they refer cases, interacting with offenders, victims and their supporters, and at least occasionally attending the actual sessions (a rarity for crown prosecutors and judges in this extra-judicial measure). The *YCJA* promulgated in 2003–2004 has further reinforced and structured the traditional police discretionary approach to youthful lawbreaking,¹⁸ stretching the possibilities of their discretion to charge or to divert repeat offenders and, up to a point, more serious offences.

It was noted above that in continental Europe, judges and crowns in practice have not been as supportive of alternative justice as their public views might have suggested. In the common law countries, scholars have suggested that the role of these types of officials in restorative justice may be structurally limited in specific ways. With respect to judges, their neutral role may limit engagement. As Ratushny notes:

in our adversarial system, judges play a passive role. It is the parties who frame the issues and present the evidence. Judges do not take the initiative to call witnesses. Nor do they explain to the public what happened and why. They simply decide the issues placed before them.¹⁹

Crowns may be reluctant to engage on the premise that if a case was appropriate for extrajudicial measures, the police would have done so. Braithwaite has argued that “the strongest opposition (to restorative justice) has come from lawyers, including some judges, under the influence

17. Don Clairmont, “Violence and Public Safety in Halifax Regional Municipality” (Halifax: Halifax Regional Municipality, 2008).

18. PJ Carrington & JL Schulenberg, “Structuring Police Discretion: The Effect of Referrals to Youth Court” (2008) 19 *Crim Just Pol Rev* 347.

19. E Ratushny, *The Conduct of Public Inquiries* (Toronto: Irwin Law, 2009); but *contra*, see the work of Barry Stuart & Heino Lilles who, as judges, spear-headed restorative justice in the Yukon through sentencing circles: H Lilles, “Circle Sentencing: Part of the Restorative Justice Continuum” in A Morris & G Macwell, *Restorative Justice for Juveniles: Conferencing, Mediation and Circles* (Portland: Hart, 2001); and B Stuart, “Circle Sentencing in Canada: A Partnership of the Community and the Criminal Justice System” (1996) 20 *Int J Comp & Applied Crim J* 29; and also C Griffiths, “Sanctioning and Healing: Restorative Justice in Canadian Aboriginal Communities” (1996) 20 *Int J Comp & Applied Crim J* 197.

of well-known critiques of the justice of informal crime processing.”²⁰ Bazemore, in a paper discussing “Judges as Obstacle or Leader,” reported much variation in judges’ positions on restorative justice, but concluded that there was, overall, a wariness of restorative justice penetrating to the court processing phase itself, judges seeing this as potentially restricting or limiting their formal role and responsibilities.²¹ Stephens, in a study of Toronto-area crowns and judges, cited commonly held views about its limitations (especially apart from Aboriginals and youths) and the widespread claim that there was little support among political leaders and little awareness there of restorative justice.²² Olsen and Dzur in their research on criminal justice system professionals (prosecutors, defence counsel, and probation officers) attending actual restorative justice sessions found that such an arrangement—as opposed to sessions where no professionals were involved—was unstable and, being uncomfortable and uncertain about their role there, the professionals backed off and eventually dropped out.²³ Such a pattern has often been found among judges, crowns, and defence counsel with respect to Aboriginal sentencing circles in Canada.²⁴

An argument can be made, and will be below, that for a variety of reasons the model of decision-making behind the exercise of police discretion will usually limit their use of the restorative justice approach (i.e., they will be unlikely to use the enhanced discretion they have). Also, despite the fact that judges and crowns have often been moral entrepreneurs in the criminal justice system with respect to sentencing circles among Aboriginals and problem-solving courts throughout North

20. Cited in Andrew Hund, “Participatory Reintegrative Shaming Conferences” (1999) 8 *The Red Feather Journal of Postmodern Criminology* 33; John Braithwaite, *Restorative Justice and Responsive Regulation* (New York: Oxford University Press, 2002).

21. Gordon Bazemore, “Crime Victims and Restorative Justice in Juvenile Courts: Judges as Obstacle or Leader” (1998) 1 *Western Criminology Rev* 295.

22. Megan Stephens, “Lessons From the Front Lines in Canada’s Restorative Justice Experiment: The Experience of Sentencing Judges” (2007) 33 *Queen’s LJ* 19.

23. Susan Olsen & Albert Dzur, “Reconstructing Professional Roles in Restorative Justice Programs” (2003) 1 *Utah L Rev* 57.

24. Don Clairmont, “Elsipogtog Restorative Justice: A Decade of Growth” (Ottawa: Aboriginal Justice Directorate, 2012). Despite the decline of the inclusive sentencing circle, there continues to be significant progress toward the development of comprehensive Aboriginal justice systems in some First Nations in Atlantic Canada, facilitated by an encouraging authoritative and policy context, e.g., the cumulative effect of commissions such as Hickman et al, *Report of the Royal Commission on the Donald Marshall Jr. Prosecution* (Halifax: Queen’s Printer, 1990); and the Royal Commission on Aboriginal Peoples, *Royal Commission Report on Aboriginal Peoples* (Ottawa: RCAP, 1996); and Supreme Court decisions in *R v Marshall (No 1)*, [1999] 3 SCR 456; and (No 2), [1999] 3 SCR 533; and *R v Gladue*, [1999] 1 SCR 688; and stimulated by academic research, and movements in the Justice system such as the problem-solving court and restorative justice. These themes are elaborated on in Don Clairmont, “The Development of an Aboriginal Justice System” (2013) 64 *UNB LJ* 160.

America, their conception of their roles and their relationships with other criminal justice system role players may limit their involvement in the restorative alternative.²⁵ Such a combination could well confine restorative justice to a marginal status vis-à-vis the criminal justice system and have negative implications for criminal justice system equity with respect to race and ethnicity, and socio-economic status since research has shown that there are gains in equity when the restorative approach extends beyond the gatekeepers, and potential reinforcement of existing inequity when it does not.²⁶ To avoid such results, some scholars have emphasized the need for an “integrated systemic approach” envisaging a continuum model of restorative justice and the conventional criminal justice system.²⁷ A leading Nova Scotian criminal justice system scholar summed up the situation in these terms:

It would be a shame if such minor cases, like shop-lifting, were the only cases that were getting referred to RJ. I am less worried about the upper limits of RJ, and more concerned about the lower limits of the type of cases being referred to RJ. The vast majority of first time shoplifters are likely to never do it again. Therefore, if all we did with restorative justice is to deal with such cases, to help them avoid having a criminal record, this would be a ridiculously modest goal of RJ. These types of offenders were not a problem in the [criminal justice system]. It is important for RJ to have greater ambition, to be dealing with cases where the result isn't so obvious, with bigger consequences. It is important for restorative justice to push beyond easy cases; otherwise, it would be a waste of opportunity.²⁸

II. *Restorative justice: the launching years*

By 2001 the NSRJ program was established throughout Nova Scotia and by the end of 2003 all the key external elements for its growth, including the *YCJA* directives, agreements with the RCMP to basically handle all

25. See Stuart & Lilles, *supra* note 19.

26. See Don Clairmont, “Restorative Justice in Nova Scotia” (2000) ISUMA 1; Morris Jenkins, “How Do Culture, Class and Gender Affect the Practice of Restorative Justice” in Zehr & Barb, eds, *Critical Issues in Restorative Justice* (New York: Cultural Justice Press, 2004); Jeff Latimer et al., “The Effectiveness of Restorative Justice Practices: A Meta-Analysis” (2005) 85 *The Prison Journal* 127; and Mark Umbreit et al., “Restorative Justice in the Twenty-First Century: A Social Movement Full of Opportunities and Pitfalls” (2005) 89 *Marquette L Rev* 251.

27. Lode Walgrave, “Integrating Criminal Justice and Restorative Justice” and James Dignan, “Juvenile Justice, Criminal Courts and Restorative Justice,” at 269-291 in Gerry Johnstone & Daniel Van Ness, eds, *Handbook of Restorative Justice* (Devon, UK: Willan Publishing, 2007); and Jim Dignan, “Restorative Justice and the Law: The Case for an Integrated, Systemic Approach” cited in Lode Walgrave, ed, *Restorative Justice and the Law* (Devon, UK: Willan Publishing, 2002) at 168-190.

28. Personal communication, 2010 from an informant guaranteed anonymity in the interview process. Records on file with the senior author.

their restorative justice youth referrals, and a unified youth court in the two largest urban areas of Nova Scotia (Halifax Regional Municipality (HRM) and Cape Breton Regional Municipality (CBRM)) were in place. Comparing these three years—the launching years for NSRJ—with the last three full years, 1995 to 1997, of the Alternatives Measures program, which NSRJ replaced, provides a good indication of NSRJ's possible "value-added" for alternative justice in the province. As shown in Table One, the NSRJ program elicited more referrals (i.e., an average of 10% more across the non-profit agencies which serially delivered the programs) and, more importantly, obtained post-charge referrals from the crown prosecutors; at least twenty per cent of the agencies' restorative justice referrals over the three years came from crowns, judges, or corrections, but primarily crowns. In the case of the agency serving metropolitan HRM, some forty-two per cent of the average annual 508 restorative justice referrals came post-charge from the crown level, with a small number from the court post-conviction level. As shown in Table Two there was also a significant change in the type of offences dealt with. There was an increase, by a factor of four in percentage terms, in referrals involving violence against persons and in raw numbers, over the three year period, such cases increased from thirty-nine in alternative measures to 210 in NSRJ. There was also a significant increase in victim engagement in the NSRJ program. Overall, then, by the end of 2003, NSRJ was established as, at the least, a robust alternative measure with referrals coming in greater number, from different criminal justice system entry points, and involving more serious offences. The issue subsequent to the launching years had become: how far is NSRJ going to penetrate into the criminal justice system?

Research in the launching years of NSRJ focused in part on exploring the above question through examination of police and crown models of discretion, namely how did these different role players decide on referring to restorative justice or sending the case along for court processing. Through examining required police comments on checklist forms (police officers were required to complete a formal checklist indicating why the case was not being referred to restorative justice, supplemented by special, more probing, small subprojects among police in HRM and CBRM, it was found that police officers took into account five chief factors in determining whether or not to refer to NSRJ: the seriousness of the offence, the accused's criminal record if any, the views of victims, parents, and guardians, the "swagger" factor, and the possibility of attaching meaningful undertakings on the accuseds prior to their court appearance. These factors were the main lens through which they interpreted the protocols and values of the restorative justice program. The wishes of victims, parents,

and guardians were taken into account especially where the party was seen by the police officer as a responsible person and, if a guardian, in an authority relationship with the youth. The “swagger” factor was the officer’s sense of whether the youth had a “bad attitude,” “really was not taking responsibility for the misdeed,” or represented a challenge to police authority among other youths or the youths’ neighbours. It was clear that legally relevant criteria were salient, but also that their decision to refer or not to refer took in a larger context where the officers navigated through a variety of relationships. These patterns were congruent with those found in other examinations of police discretion; for example, a Terrill and Paoline study found that suspects who treated officers with respect were less likely to be arrested²⁹ and Marinos and Innocente found that “attitude” was taken by police officers as a proxy for remorse and responsibility.³⁰

Crown prosecutors’ decision-making about whether or not to refer a youth case to the restorative justice agencies was examined through interviews with crowns (minimally at least one crown prosecutor dealing with youth cases in seven of the nine restorative justice locations), supplemented by assessing a small subproject featuring police and crown collaboration in pre-charge screening of youth accuseds, aged fifteen and under, in a family court milieu (such youths’ criminal cases were heard in this milieu until 2003 when charges against all youths aged twelve to seventeen were dealt with in a combined Youth Justice Court). It was found that crowns focused on the offence itself. Criminal record was discounted to a significant degree because of the directives of the *YCJA*, and, because the crowns perceived the court caseload to be so daunting, some choices had to be made regarding which cases to proceed with. Compared with police discretion then, crowns focused on the offence itself and the criminal justice system organizational issues while police, with their more detailed knowledge of the youth, his or her social milieu, the criminal context, and the victims, quite reasonably, given their role in the criminal justice system, took all these factors into account in deciding whether to lay charges or divert. The crowns lacked that rich contextual information and, perhaps more importantly, by professional training and sense of what is legally relevant to prosecution, focused on the fact that what were being considered were often “minor offences by young kids.” The views of victims and guardians and the swagger of the youth (usually

29. William Terrill & Eugene A Paoline III, “Nonarrest Decision Making in Police-Citizen Encounters” (2007) 10 *Police Quarterly* 308.

30. Voula Marinos & Nathan Innocente, “Factors Influencing Police Attitudes Towards Extrajudicial Measures Under the Youth Criminal Justice Act” (2008) 50 *Can J Criminology & Crim Just* 469.

much less evident in the court setting) were of less significance to crowns than to police, while court processing issues were much more important than among police. Each criminal justice system role then had different holistic, or contextual, perspectives on cases involving young offenders and to a large extent they appreciated the different priorities associated with the other roles, while of course usually emphasizing the particular merits of their own “big picture” perspective. One crown, for example, observed that they have a wider perspective while police “sweat the details.” Police also indicated that they often laid a charge because they wanted to send a message to the youth and others (especially the youths’ friends and families) but with the expectation that the crown would probably refer the case to restorative justice.³¹

Given that swagger and style of relationship between police and youth has been shown to vary by race or ethnicity and socio-economic status, it is clear that, as argued in the report of the Marshall Inquiry,³² unintentional discrimination or “adverse effects” is a factor in criminal justice and, by extrapolation to the concerns here, could affect access to restorative justice, especially for Blacks (given a long legacy of negative Police–Black relationships in Nova Scotia) and repeat offenders at the pre-charge level. Evidence from the metropolitan Halifax area court during the launching years indicated that Black youth were disproportionately prosecuted there, and were especially over-represented among multiple repeat offenders, constituting twenty-six per cent of the female multiple repeaters and thirty-four per cent of the male equivalents, while they were four to six per cent of the youth population.³³ Insofar as crowns discount swagger type factors and criminal record in the case of youths, their contribution to a fair as well as robust restorative justice program could be significant if they were to play a major role in the restorative justice process, and indeed that has happened to a significant extent.

31. Although there was not a detailed examination of whether this inference by police officers was valid, it is reasonable to assume that it was. In the two largest urban courts in Nova Scotia, the Youth Court police and crowns are designated and collaborate closely on each case so the designated police officers would have a good sense of how the crown prosecutor would respond and undoubtedly would communicate their own views; similarly, in the rest of the province, where the court load is modest, the police and crowns have a good understanding of each other’s perspectives.

32. Hickman et al, *supra* note 24.

33. Clairmont, *supra* note 2.

Table 1

Restorative Justice: Referral Comparisons with Alternative Measures Average Annual Referrals, 3 Year Period, by Program and Agency

	Alternative Measures 1995–1997	Restorative Justice 2001–2003
The Annapolis Valley	148 (all police referrals)	162 (80% police referrals)
Cumberland County	52 (all police referrals)	103 (79% police referrals)
Cape Breton	238 (all police referrals)	244 (80% police referrals)
Halifax Metro	508 (all police referrals)	545 (58% police referrals)

Table 2

Average Annual Offences, 3 Year Period, by Program and Agency

Region	Offence Type	Alternative Measures 1995–1997		Restorative Justice 2001–2003	
The Annapolis Valley	Property	101	(69%)	145	(64%)
	Violent	3	(2%)	18	(8%)
Cumberland County	Property	36	(69%)	73	54%)
	Violent	5	(9%)	21	(15%)
Cape Breton	Property	156	(66%)	204	(54%)
	Violent	11	(4%)	47	(13%)
Halifax Metro	Property	406	(80%)	645	(70%)
	Violent	20	(4%)	124	(13%)

III. *Initial critical justice system receptivity: the wall*

The interviews with criminal justice system role players (beyond the police gatekeepers) in the first several years of the NSRJ program highlighted how they were oriented to restorative justice and their participation in and early assessment of the initiative.³⁴ As argued above, it was considered crucial if restorative justice was not simply to be what one police officer described as “Alternative Measures on steroids” and fail to meet its general objective of “RJ in some manner for all offenders and offenses throughout Nova Scotia,” that the program penetrate to the referral agents beyond the police, and that it have some salience for serious crime (harm) and repeat offenders, both youth and adult.³⁵ The interviews revealed a high level of consensus by criminal justice system role players and found that there was indeed a formidable “wall” that would have to be breached if those outcomes were to be realized. Continuing with the wall imagery, six constituent “bricks” or criminal justice system views were identified as obstacles to an expansive role in restorative justice:

1. Limited vision of the applicability of restorative justice for their own criminal justice system roles and how they see their role vis-à-vis other criminal justice system roles. This was common among judges (they highlighted the neutrality of their role), defence counsel (they noted that they cannot directly refer cases but only recommend restorative justice to the crowns), and probation officers (they did not envision recommending breaches of probation and did not think there would be any enthusiasm among offenders or victims for post-sentence referrals). Crowns acknowledged a possibly significant role for themselves in making post-charge referrals to restorative justice, but usually did not consider such activity to be central to their criminal justice system work.
2. Wariness concerning the effectiveness of the restorative justice intervention, as being implemented, for dealing with anything but quite minor offences or offenders. Judges, crowns, and probation officers were especially likely to express this view.

34. Interviews with criminal justice system officials were conducted several times between 2000 and 2003 and are reported in the following documents: Don Clairmont, *The Nova Scotia Restorative Justice Initiative: Year One Evaluation* (Ottawa: Department of Justice, 2001); Don Clairmont et al, *Restorative Justice Process and Outcome Analyses Reports, Year Three Evaluation* (Ottawa: Department of Justice, 2003); Don Clairmont, “Penetrating the Walls: Implementing a System-Wide Restorative Justice Approach in the Justice System” in E Elliot & RM Gordon, eds, *New Directions in Restorative Justice* (Portland: Willan Publishing, 2005).

35. Clairmont, *supra* note 2.

3. Disappointment that their major criminal justice system concerns (especially “minor” domestic violence, sexual assault, and multiple repeat offenders) were not within the restorative justice purview. Judges, crowns, and defence counsel shared this view.
4. Skepticism concerning the government’s agenda in launching the NSRJ program. It was deemed to be a top-down initiative driven by economic motives and with prospects of only minor gains. This view was pervasive among crowns and probation officers.
5. Perception that the rhetoric accompanying the NSRJ initiative undervalued the strengths of conventional criminal justice system practices and processing. This view was especially common among crowns and probation officers.
6. Position that there had been very limited orientation and exposure to restorative justice principles and practices and to the NSRJ initiative for both criminal justice system role players and the public at large. The majority in all criminal justice system role groupings shared this view.

There was variation in these 2000–2004 initial viewpoints, especially among crowns, but, overall, in all roles, there was a consistency in the position that restorative justice referrals should basically come from the police entry point, not post-charge, post-conviction, or post-sentencing. Most crowns, whether in metropolitan HRM or not, held that their role in making referrals should be minor. One HRM crown, a supporter of restorative justice, contended:

The referrals should be coming from the police. Only if there is a mistake or something has changed in the meantime, such as the attitude of the offender [maybe after he talks to a legal aid lawyer], should the crown refer...but [even here] it doesn’t have to be [a crown referral] if the police follow it through before laying an information.

A small town prosecutor expressed concern that if police get used to the crown prosecutors doing the referring, “they will simply pass the buck and leave it to the crown.” Citing examples, he argued that in a small town context police might often be unwilling to refer in the face of intransigent victims, thereby putting the burden on the shoulders of the crowns, even while acknowledging that the case was suitable for restorative justice. Interestingly, in Halifax and Sydney, the two larger urban centres in Nova Scotia, some crown prosecutors also reported that they, too, were very sensitive about being perceived as “over-ruling” the police. One such prosecutor commented:

I don't know how common it is for other prosecutors but I have only one memory of over-riding a police officer, and I don't think other prosecutors have diverted more than a few that the police have missed.

It's the defence attorney's suggestion that usually triggers [crown] referrals to restorative justice. Prosecutors generally held that like the police they had a high threshold for what is appropriate to refer to restorative justice:

We are mostly agreeing with the police. That may be contrary to what the NSRJ program wants, but we need more proof to be more confident in restorative justice. We don't see restorative justice as punishment. It's restoration. There will always be a role in punishment in the criminal justice system.

Judges, while supportive of restorative justice and even wishing it would extend to adults and include more serious offenders and offences, expressed the view that their proactivity with restorative justice would be very limited because of their role in the criminal justice system. One provincial court judge articulated a common view, noting that he saw no particular judges' mandate in the restorative justice program and indicated "we were not going to be potent gatekeepers"; he added that he would not normally ask in open court whether restorative justice had been considered since, "I would not want to second-guess," but he might do so if the defendant was unrepresented and perhaps too quick to make a plea of guilty.

IV. Criminal justice system receptivity at the restorative justice take-off stage

By the end of 2004 the NSRJ program could be said to have been at a take-off stage. The program was well-known in the criminal justice system and had established its difference from alternative measures. The implementation of the *YCJA* in 2003–2004 set the stage for a significant acceleration of restorative justice penetration in the criminal justice system by encouraging, if not mandating, the use of extra-judicial measures for young repeat offenders and more serious offences. The unified youth courts established in Nova Scotia in December 2003 initiated more of a team approach among crowns, defence counsel, and restorative justice agencies, facilitating a possible reconstruction of criminal justice system roles in a way favorable to the growth of restorative justice. Table Three provides an overview of the panel interviews conducted with criminal justice system role players, namely judges, crown prosecutors, defence counsel, and probation officers, representing the three referral levels beyond pre-charge. It shows significant improvement in knowledge and awareness of the restorative justice program and, fuelled in significant

part by the *YCJA*, a more positive assessment of it in the three pivotal court processing roles. Clearly, too, the interviews indicated, up to the end of 2004, little referral activity by judges and probation officers, but much variation in such activity by the crowns. The impact of the unified youth courts in HRM and CBRM was already significant by that date. The chief criticism directed at restorative justice by judges, crowns, and probation officers was that it spawns “inadequate denunciation” of offending (although virtually none of the role players had ever attended an restorative justice session). The restorative justice initiative, outside the sphere of probation at least, had become more accepted by the criminal justice system role players who, despite some reservations, encouraged its expansion to adult offenders and to “low-end” moratorium offences (i.e., spousal violence and sexual assault of all types, which were formally excluded from restorative justice processing within a few months of the NSRJ program being launched in 1999).

Special small-scale initiatives in the judicial and probationary spheres to secure more restorative justice referrals at those entry levels were unsuccessful but clearly, by the end of 2004, the wall noted above had been breached at the post-charge level. Thanks especially to the combination of the *YCJA* and the unified Youth Court, there was also a discernible pattern for restorative justice to be utilized for more serious offenders and offences. The issue remained: just how far restorative justice is going to evolve in the criminal justice system along these lines?

Table 3
CJS Panel Interviews 2001–2004*
Follow-Up Wave Highlights By Role

Theme	Judges N=7	Crowns N=19	Defence N=12	Corrections N=19
Level of Participation Now	<ul style="list-style-type: none"> · Little · Reactive Stance 	<ul style="list-style-type: none"> · Much Variation, Especially High in Halifax, Then Sydney 	<ul style="list-style-type: none"> · More Than Judges, Much Less Than Crowns 	<ul style="list-style-type: none"> · Little in Metro, More in Amherst, Truro, Sydney
Change Since 2002	<ul style="list-style-type: none"> · Disposition Improving · YCJA a Factor Now 	<ul style="list-style-type: none"> · Disposition Improving · YCJA a Factor Now 	<ul style="list-style-type: none"> · More Awareness of RJ 	<ul style="list-style-type: none"> · Little in Metro, Modest Elsewhere
Views of RJ	<ul style="list-style-type: none"> · Knowledgeable About It · Generally Positive · Praise RJ Vis-à-Vis Court Processing 	<ul style="list-style-type: none"> · Knowledgeable About It · RJ has Image Issues · RJ Has a Place in the Criminal Justice System 	<ul style="list-style-type: none"> · Positive · RJ program “Neglects Us” 	<ul style="list-style-type: none"> · Poor in Metro, Better Elsewhere · RJ as a “Limited Tool.”
Concern Expressed	<ul style="list-style-type: none"> · Want Denunciation Not a Neutral Mediator · Sentencing Circles Seen as Problematic · Time it Takes 	<ul style="list-style-type: none"> · Inadequate Denunciation · Agencies’ Resources May Be Inadequate · More Feedback if It’s Working 	<ul style="list-style-type: none"> · Turn-Around Time Problematic · No Feedback · Vision & Resources Questionable 	<ul style="list-style-type: none"> · RJ All Reintegration and No Shame · Little Quality Control in RJ
Extend the RJ Program?	<ul style="list-style-type: none"> · Yes to Adults and to Low-End Spousal Violence (SV) & Sexual Assault (SA) 	<ul style="list-style-type: none"> · Yes to Adults, To More Serious Offending & Low-End SV & SA 	<ul style="list-style-type: none"> · Strongly Yes to Adults, SV, SA and Serious Offending 	<ul style="list-style-type: none"> · Focus on Youth & Let It Take Root First · Do Not Extend to Breaches
Level of Consensus	<ul style="list-style-type: none"> · High 	<ul style="list-style-type: none"> · High 	<ul style="list-style-type: none"> · Very High 	<ul style="list-style-type: none"> · Medium
Other Issues Raised	<ul style="list-style-type: none"> · Professional Conferencing · Prefer Sentencing Circles as a Pre-Sentence Report · Healing Circles Good Use of RJ 	<ul style="list-style-type: none"> · Professional Conferencing · Open to Defence Requests · Police-Crown Relationship Especially Important Outside Metro 	<ul style="list-style-type: none"> · Crowns Vary in Receptivity to Defence Recommendations · Increase Our Influence Regarding Referrals 	<ul style="list-style-type: none"> · Significant Metro-Non-Metro Difference · Probation Has Programs/ Competition with RJ · How Does it Help Us?

· In an ideal panel study persons would be re-interviewed each time. This was not possible here but there was a core of repeat interviewees—roughly two-thirds—in each set.

V. *Restorative justice evolution in the Nova Scotia criminal justice system: referrals and offences referred*

Between 2004 and 2011, the chief trends in the evolution of restorative justice in Nova Scotia were: (a) more referrals proportionately coming from the crown prosecutors; (b) a decline in the total number of referrals received by the non-profit agencies; (c) a modest increase in the referrals that involved violent offences and repeat offenders; (d) the restorative justice program had achieved a niche, greater penetration into the criminal justice system than its predecessor Alternative Measures, but distinct from the typical youth cases being processed through the courts; and (e) little evidence of or support for the restorative justice program providing a more in-depth service, but increasing support for restorative justice being extended to minor adult offending.³⁶

The data on referrals from 2001 to 2011 (Graph One) depicts the major decline in the overall number of referrals since the high of 1736 in 2007; in 2011 there were 500 or almost one-third fewer (i.e., 1235). The pattern of declining referrals holds for all individual agencies, reflecting primarily the decline in the population of youth throughout the province.³⁷ The data also show the penetration of restorative justice in the criminal justice system—the change from 75% of all referrals being police (pre-charge) in 2001–2002 to almost equal number of referrals from police and crowns (post-charge) in 2011 (48% to 45%). The referrals from the court (judges) and corrections—typically, but not always, post-conviction and post-sentencing—varied little, generally well less than 10% of the total throughout the years. Graph Two shows that the metropolitan Halifax area, which has accounted for at least 46% of all provincial yearly restorative justice referrals since 2006, reproduces the overall pattern save that here the crown referrals overtook police referrals as early as 2003, and since then there has been mild fluctuation. As in the overall figure, the number of referrals from court and corrections was usually well under 10% throughout the years. Essentially the same pattern was also found in five of the other eight regional agencies, namely crown referrals growing from low percentages in 2001–2002 to account for between 45% and 55% of all the agency's referrals in 2011, and, in all cases, referrals from courts

36. Don Clairmont, *Moving on to Adults: An Assessment of the Nova Scotia Restorative Justice Program's Adult Pilot Project* (Halifax: Dalhousie University, Atlantic Institute of Criminology, 2012) [Clairmont, *Moving on*].

37. The youth population has declined significantly in Nova Scotia outside the HRM. Youth crime in both absolute and proportional terms has also declined. Perhaps most dramatically the number of youth in the provincial youth custody facility has declined by two-thirds from roughly 120 in 2002 to roughly forty in 2012.

and corrections remained low, for these agencies rarely exceeding 5% of the yearly totals. The three exceptions to the general pattern were true outliers; in one case the percentage of police referrals essentially remained steady at about 80% throughout the years and in some years referrals from the court and corrections rivaled the number coming from the crowns, whereas, in another agency, police referrals declined to a surprising low of 18% in 2011, while the crowns' referrals accounted for 80% of the total. In the third exception, where there was a special collaborative program in place between the restorative justice agency and probation services for a few years, the referrals were almost equally received, percentage-wise, from police, crowns, and corrections. In sum, then, there is little doubt that in a relatively few number of years the restorative justice initiative did penetrate the criminal justice system, predictably, given the interview data obtained in 2001–2004, at the post-charge crown level.

The RJIS data for the period 2002–2010 indicate that in mainland Nova Scotia police were more likely than crowns to make restorative justice referrals if the youth had no “RJ priors,” though that difference in the metropolitan core of Halifax was quite modest.³⁸ Where the youths did have restorative justice priors, crown referrals were more common in the metropolitan core, but surprisingly it was reversed in rural mainland areas (though even there the percentage of crown referrals increased if the youth had restorative justice priors). Special other data sets elaborate on these patterns. Table Four presents data for HRM for the period 2008 through 2010. It shows that police and crowns referrals to restorative justice had roughly the same percentage of Black youths unlike in the earlier years of the NSRJ initiative noted above. Crown referrals were much more likely than those of the police to involve youths with restorative justice priors (i.e., 48% to 16%). Unfortunately, the RJIS data do not permit any analysis of the impact of previous convictions in criminal court. Earlier research for the period 2002 to 2004 directed at that issue did, however, and it found that crown referrals were almost twice as likely among the restorative justice recidivists as among the non-recidivist sub-sample (i.e., 42% to 25%) and

38. Anthony Thomson, “Restorative Justice in Rural and Urban Nova Scotia” (Paper presented at the 14th World Conference, International Institute for Restorative Practices, Halifax, Nova Scotia, 16 June 2012 and presented at the NSRJ-CURA Policy Board Meeting, Lunenburg, Nova Scotia, 3 February 2012).

that referrals of African Nova Scotian youth³⁹ were double the percentage of such police referrals (14% to 8%); overall, the conclusion was that “the most important pattern may be that crown prosecutors’ referrals become much more significant proportionately among the sub-sample of recidivists...and crown referrals to RJ were especially significant where the accused faced multiple charges and was a repeat referral.”⁴⁰ Recent research on the 2010–2012 Adult restorative justice pilot projects in Truro/Shubenacadie and CBRM,⁴¹ replacing the Adult Diversion program there, also indicates (see Table Five) that while police and crown referrals had the same percentage of referrals involving young adults aged 18 to 25 (i.e. 51% to 52%), the crown referrals were much more likely to have been given to adults having a previous conviction (42% to 20%). Salient data analyses, then, show that not only have restorative justice referrals increasingly come from non-police criminal justice system sources, but also that they have been more likely to have involved repeat offenders, whether repeaters within the restorative justice program itself or from court convictions.

The data on the type of offences referred to restorative justice did not illustrate such dramatic change over time but did evolve in the predicted direction. Graph Three shows, for the province as a whole, that property offences, especially theft and possession under \$5000, dominated, accounting, with some modest variation, for close to 60% of all the restorative justice referrals. Violent offences (e.g., common or simple assault), hovered at slightly above 10% throughout the years while drug offences (simple possession) averaged a steady 5% of the referrals. Provincial offences (e.g., *Motor Vehicle Act*, *Liquor Control Act*, and *Protection of Property Act*)⁴² usually accounted for less than 10%, while “Other” offences (e.g., mischief, public disturbance, and administration of justice offences) since 2006 have accounted for roughly 19% yearly. The pattern in the metropolitan HRM area was quite similar save there were modestly more violent offences reflected in the referrals (i.e., above 15%, usually). In the other Nova Scotian regions, the most noticeable difference

39. The terms Black and African Nova Scotian are used interchangeably in this paper. There is a distinction between these terms in principle, of course, but the data provided by government sources does not consistently draw that distinction. The size of the immigrant Black population in Nova Scotia has been very modest; see Don Clairmont & Ethan Kim, “Immigrants and the Nova Scotia Justice System: Identifying Issues and Assessing the Feasibility of Further Research” (2011), online: Saint Mary’s University <<http://community.smu.ca/atlantic/documents/ImmigrantsandCrimefinallongVersion.pdf>>.

40. Clairmont, *supra* note 2 at 200.

41. Clairmont, *Moving on*, *supra* note 36.

42. 1989 RSNS, c 293; 1989 RSNS, c 260; 1989 RSNS, c 363.

from the general provincial patterns concerned the “Other” offences, referrals of which varied dramatically on a yearly basis for most agencies, sometimes reaching near 30% of the total referrals and then falling back to 5% or less. With one modest exception, referrals involving violent offences declined to less than 10% in most regions outside HRM during the recent period 2005 to 2010. Property offences generally fluctuated around 60% of the referrals for all agencies.

Just as repeat offenders were more common in crown than in police restorative justice referrals, so too the post-charge referrals involved modestly more serious offences. Tables Four and Five show this pattern for both youths and adults in recent years. In the youth 2008–2010 sample, violent (person) offences were roughly twice as common as in the police sample (i.e., 20% to 9%); essentially the same difference was found in the 2001–2004 province-wide youth referrals (i.e., 24% to 14%). In the adult restorative justice project in the two areas ranked second and third to HRM in population, results show crown referrals were more likely than police referrals to involve violent (23% to 10%) and administration of justice (12% to 4%) offences, and much less likely to be “theft under \$5000” crimes (34% to 62%).

Clearly the evidence shows that the NSRJ program has penetrated the criminal justice system and that evolution has been consistent with the view of a well-informed veteran police officer in HRM’s Youth Court, expressed in late 2009: “there is no doubt that referrals to RJ have over the years become more serious, more multiple charges and more violent.” At the same time, it is important to underline that restorative justice basically deals with minor crimes and low-end offenders, with the more dramatic change from the previous alternative measures program being the eligibility of repeat offenders and youth facing multiple charges. The adult restorative justice patterns, in the preliminary pilot-project stage, point to similar significant but limited penetration. Police pre-charge referrals centered around the offences and offenders that otherwise would have been the typical Adult Diversion referrals while crown referrals modestly went beyond the conventional Adult Diversion referrals primarily in allowing eligibility for repeat offenders and thus illustrated the expansion of eligibility and the acceptance of same by the referral agents. The offences dealt with were essentially still conventional offences such as theft under, mischief and simple assault. As will be seen below, most recently interviewed criminal justice system professionals hold that there has been little significant change in the reach of restorative justice over the past five years. Restorative justice certainly has an established niche in the criminal justice system but there is ambivalence among the criminal

justice system officials interviewed, about the niche’s growth potential and also regarding the significance of the niche for major criminal justice system concerns (i.e., serious offences, intimate partner violence, and repeat offenders).

Figure 1
 Overall Pattern For Referrals: Province-Wide
 Restorative Justice Referrals by Criminal Justice System Roles (2001–2011)

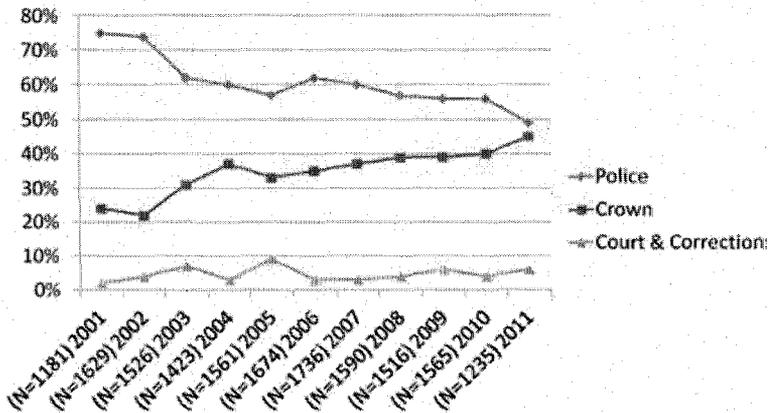


Figure 2
 Overall Pattern For Referrals: Halifax Regional Municipality
 Restorative Justice Referrals by Criminal Justice System Roles (2001–2011)

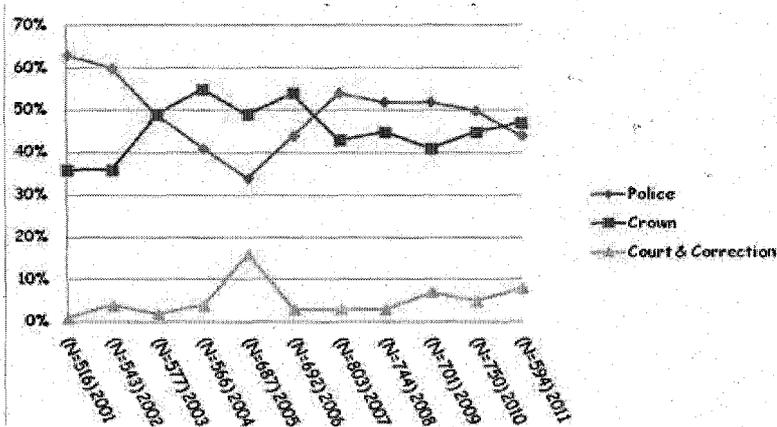


Table 4

Halifax Youth Referrals, 2008–2010
Police and Crown Referrals By Selected Characteristics

Features	Police Referrals (N = 1062)		Crown Referrals (N = 825)	
Black Youth	17%	(178)	21%	(176)
Youth had Prior RJ	16%	(167)	48%	(400)
Person Offences*	9%	(93)	20%	(165)

The offences were cc 264, 266, 267 and 270.

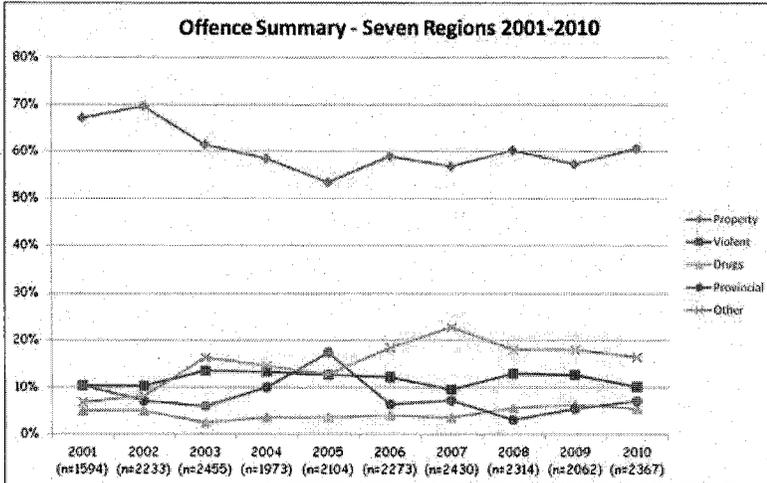
Table 5

Adult Restorative Justice Pilot Project, Truro and Sydney, 2011
Police and Crown Referrals By Selected Characteristics

Features	Police Referrals (N=246)		Crown Referrals (N=248)	
Prior Conviction	20%	(48)	42%	(102)
Level 1 Offence	83%	(205)	62%	(154)
Theft Under	62%	(152)	34%	(81)
Violent Offence	10%	(24)	23%	(56)
Adm of Justice Offence	4%	(9)	12%	(30)
Aged 18-25	52%	(128)	51%	(126)

Figure 3

Referrals Received By Restorative Justice Agencies:
Offence Patterns—Seven Regions 2001–2010



• this table includes offence data from the seven largest Restorative Justice agencies in Nova Scotia

VI. *Restorative justice's evolution in the criminal justice system: institutionalization*

While there may be ambivalence about the impact of restorative justice on major criminal justice system activity such as dealing with serious crimes and multiple repeat offenders, persons and activities that tie up so much criminal justice system interest and resources, there is consensus and the empirical reality that restorative justice reduces the demand for court processing and delivers a cost saving for all the criminal justice system role players from police to probation. Does it add a secure, acknowledged dimension to the criminal justice system, superior to the diversion programs (Alternative Measures for Youth and Adult Diversion) it has replaced? Has it become significantly institutionalized in the criminal justice system? The answer to both questions would appear to be yes, based on the premise that the following five factors define a high degree of institutionalization.

The first factor is, as detailed above, that restorative justice has moved well past the aforementioned “wall” in terms of the patterns of referrals, the widening criteria of offender eligibility, and, to a lesser extent, the flexibility in the type of offences it is authorized to deal with. Secondly, restorative justice has a solid legal basis rooted in the *YCJA* and the social

policy that has emerged as a consequence of court decisions related to the *YCJA*: for example, the “step principle” (i.e., sanctions become more severe with repeat offending) in sentencing youth has been largely jettisoned save in the case of serious and violent offences.⁴³ Also, the interpretation of “violence” has narrowed while the principle of general deterrence in sentencing has become inappropriate under the *YCJA*. While referral to restorative justice may not be compulsory, it is very strongly encouraged, and reportedly, judges, akin to their bringing attention in court to the *Gladue* rule for Aboriginal offenders, in the case of young offenders being prosecuted, often ask of the crown prosecutors, “have you considered all other alternatives?”

The third factor is that restorative justice has become much more incorporated into the core adversarial process of the criminal justice system than previous alternative justice options ever were. While previously there was minimal involvement of the criminal justice system role players beyond the police in diverting accused persons from the court process, and what there was, was largely confined to the relationships between police and crowns. Now, while the latter are still very significant relationships for the restorative justice process, so too is the relationship between crowns and defence counsel. With the increasing significance of the latter relationship, comes the equivalent of negotiations and plea bargaining, the disaggregation of offences such as robbery (involving theft and assault) which are disallowed for restorative justice at the pre-conviction level, and the truncation of other charges. It is clear too that, should the moratorium on spousal and intimate partner violence and sexual assault be abolished as virtually all criminal justice system role players beyond the police appear to want, the negotiations (i.e., plea bargaining) between crown and defence would increase, with many minor cases being referred to restorative justice. A further indicator of the salience of restorative justice at the core of the criminal justice system has been the several instances in Nova Scotia and New Brunswick where, when crown and defence failed to agree on recourse to restorative justice, the director of the pertinent restorative justice agency was summoned to court as an expert witness for the program.⁴⁴

43. Steve Perrott & Margaret Deckman, “The Role of the Police in the Administration of Juvenile Justice in Canada: Balancing Criminal Justice and Social Welfare Concerns in a Risk Society” (2010) [on file with author]; Nicholas Bala, Peter Carrington & Julian Roberts, “Evaluating the Youth Criminal Justice Act after Five Years: A Qualified Success” (2009) 51:2 *Can J Criminology & Crim Just.*

44. Personal communication, 2011 from an informant guaranteed anonymity in the interview process. Records on file with the senior author.

The fourth factor speaks to scale and future of the restorative justice program in the criminal justice system. As the interviews with criminal justice system role players discussed in the next section will show, there may be divergent views concerning the future growth of restorative justice, but there is strong consensus that its current level of penetration—the number of court cases it handles and the types of cases—is such that the already burdened court system could be overwhelmed were restorative justice eliminated or significantly cut back; in other words, restorative justice may already be “too big to fail.”

Along similar lines is the fifth factor, namely the apparently considerable commitment of the provincial government to the restorative justice program as indicated by its substantial funding of NSRJ and its encouragement of and funding for initiatives featuring the restorative approach in custodial milieus and in the school system. The Nova Scotia criminal justice system was described as “racist and two-tiered” by respected judicial authorities in the Marshall Inquiry⁴⁵ but the development of an impressive NSRJ program has earned it a new standing and positive public reputation that provincial authorities appear to cherish.

VII. Current criminal justice system perspectives

During the 2009–2011 period, sixty-nine criminal justice system role players were interviewed, roughly half re-interviewed. Here an overview is provided of their current views, focusing on those of the judges, crowns and defence counsel, the main parties in post-charge case processing.⁴⁶

To put their views in context, police positions on restorative justice should be noted. The sample of police interviews basically included supervisors (both municipal and RCMP police services) and “liaison” officers actively involved in restorative justice (in contact with restorative justice agencies and attending restorative justice sessions), a combined grouping found to be generally more positive about NSRJ than rank-and-file officers. The officers consistently reported that their experiences with restorative justice had been quite positive, that restorative justice had become highly institutionalized in the criminal justice system, and benefited the police role in a variety of ways, from providing officers with more options to deal with youth wrongdoing to generating savings for the police budgets (e.g., less court time required). They also saw themselves as gatekeepers, directly with respect to further criminal justice

45. *Supra* note 24.

46. In the 2009–2011 period, 6 judges, 14 crowns, 15 defence counsel, 15 corrections officers, and 15 police officers were interviewed plus 4 Dalhousie professors. A full length report will be issued on the research.

system activity in the case, and indirectly with respect to the public's understanding of restorative justice. They considered that they were well informed about restorative justice and, with few exceptions, considered that even with youth—not to mention adults, where their standards were tougher—police referrals should be limited to minor offences and not allow for much repeat offending. They emphasized too that frequently they were not opposed to a matter being referred to restorative justice by crowns, but did not refer the case themselves because they wanted to underline its seriousness for offenders and victims or because they wanted to ensure that their suggestions on undertakings would be meaningfully acted upon.

Judges, crowns, and defence counsel generally shared the position that they were well informed about restorative justice, never attended restorative justice sessions, believed that NSRJ had a secure niche now in the criminal justice system, and that, while its penetration into the main concerns of their criminal justice system activity was limited, restorative justice had become very important for the efficient operation of the adversarial court processing since it diverted many cases and “freed up” time and resources. They generally agreed too that NSRJ should expand to include adults, and that the moratorium on spousal and partner violence, and sexual assault was stretched way too far and its severe truncation would enhance the contribution of restorative justice processing, saving considerable court resources. The interviewees exhibited much consensus about their respective roles in restorative justice—the “passive” neutrality of the judge and the emphasis on crown–defence negotiations in the case of post-charge referrals—and, apart somewhat from the Halifax Regional Municipality Youth Court team model, exhibited little evidence of significant role restructuring among the three roles, nor a strong desire for same (unlike, for example, the pattern in the problem-solving courts).

The obligations and protocols concerning the nature of judges' role in the criminal justice system, and with respect to restorative justice, were well agreed upon. Judges emphasized that their role limited their direct engagement in restorative justice, but a few acknowledged “prodding” activity (i.e., asking crowns “have you considered all the alternatives”), especially where the crown was inexperienced. Two judges reported that they were open to initiating (and occasionally did) post-conviction referrals in response to requests from either crowns or defence counsel. The latter two types of role players also held strongly that the judge's direct role in restorative justice should be minimal, but they exhibited some difference regarding judicial post-conviction restorative justice referrals, defence counsel being usually the more enthusiastic here. It was acknowledged by all interviewees that crowns were the main decision-makers with respect

to post-charge restorative justice referrals. The crowns zealously guarded that prerogative and judges and defence counsel acted accordingly. Some crowns went so far as to resent post-conviction judicial restorative justice referrals, and defence counsel discussed prospects for restorative justice with the crowns, but rarely sought post-conviction referrals from judges. The collaborative relationship between crowns and defence counsel in advancing restorative justice referrals varied a great deal, even within the HRM Youth Court, depending on the crown's enthusiasm for using NSRJ.

Judges interviewed in the later years expressed views very similar to those interviewed in the 2001–2004 period. They supported the use of restorative justice for a wide range of offences, and repeat offenders and attributed to it the greater likelihood of a more nuanced approach to justice than might be achieved by the “blunt instrument” (their words) of the conventional criminal justice system. They disliked cut-offs (e.g., three and you're out for restorative justice) for young offenders and appreciated the “Hail Mary” referrals⁴⁷ sometimes made by crowns. Despite this broad support, the judges typically considered that restorative justice worked best for minor offences, and first time offenders, and a few also held that it may not be effective if the youth was without a supportive family background.

Judges considered that restorative justice “is here to stay,” and those in Youth Court echoed the view of one judge who stated that “RJ is absolutely part of Youth Court and [we] never sat down in the youth court on arraignment day without RJ staff.” Though the majority of judges reported little change over the past five years in the offenders and offences being channeled through restorative justice, they generally expected that restorative justice would continue to evolve in its penetration and value for the criminal justice system and they also deemed it to be a part of the more general therapeutic jurisprudence movement in the criminal justice system. Still, the central theme of their interviews focused on their limited role in restorative justice, even to the point of not intervening where they perceived different crowns in their court creating an uneven playing field in youths' access to restorative justice by their quite different views on using restorative justice. There was much adherence to the view expressed by a professorial expert:

Due to the way the [criminal justice system] operates, and considering the role of judges within it, judges should not refer cases to RJ. The system says that judges do not get to decide what case gets prosecuted

47. This term was used by some interviewees to characterize crown referrals where the youth was a multiple repeat restorative justice user, the term reflecting the hope that something may happen at the session that could dramatically and positively impact on the youth.

and which do not. The prosecutors do, and prosecutorial discretion is very important. Judges are there to apply the rules and see if an accused is guilty or not in law. They do not get to decide to let a case go. To have a judge refer cases to RJ would override prosecutorial discretion. Let's say a judge refers certain cases to RJ. What does that say about cases that he does not refer to RJ? That would imply that the accused that did not get their case referred to RJ are more likely to be guilty in the judge's eye—contrary to the principle of judicial impartiality.⁴⁸

There was a high level of consensus in the views of defence counsel, all of whom in these later interviews were Legal Aid lawyers. Any reservations they expressed on restorative justice in the 2001–2004 interviews were not reiterated, save a concern among some for those youths who might have panic attacks or other problems facing others (adults, victims, police officers) in a restorative justice session. All emphasized that restorative justice has had a very favorable impact on their workload (e.g., “a third to half of my caseload, a huge proportion, goes to restorative justice”), and they emphasized that restorative justice provides youth with meaningful accountability and “deals with kids whose behaviour and circumstances do not need to be criminalized.” The defence counsel indicated that “everyone in this office is very familiar with RJ and would consider it every time for everyone walking in their door.” Another respondent added, “[i]f there is likelihood of conviction, then we're more likely to go to RJ; if there is no likelihood of conviction, there is no application for RJ.” The defence counsel had minimal contact with the police since, being Legal Aid, they typically do not see the youth until first appearance which is subsequent to police laying a charge. There was some variation between HRM defence counsel and those outside the metropolitan area with respect to how comfortable they were with restorative justice referrals being recommended for major crimes or multiple repeat offenders. While sharing the crown viewpoint about the limited role for judges in referring restorative justice, they did sometimes direct requests to the judge for a post-conviction restorative justice referral; the benefit for the offender here presumably is not avoiding a criminal record, but seeking a reduced sentence with emphasis on rehabilitation and, perhaps, redress to victims. In addition to supporting the extension of restorative justice in virtually all respects (e.g., making its consideration mandatory, including adults, lifting the moratorium so minor sexual assaults and intimate partner violence could be referred, etc.), the defence counsel expressed concern

48. Personal communication, 2010 from an informant guaranteed anonymity in the interview process. Records on file with the senior author.

about it being funded properly, suggesting that otherwise the restorative justice intervention would not be able to effectively deal with complex cases, and might wither.

Of the three professional groupings, the crowns, in their views and behaviours concerning restorative justice, exhibited the most significant change from the 2001–2004 interviews and also the greatest internal variation. In general, they were much more receptive to it, made more referrals for repeat offenders, and acknowledged that restorative justice had established a niche in the criminal justice system and had considerable benefits for the crowns' workload. There was, however, significant difference in self-assessed knowledge of restorative justice, and support for wide-ranging post-charge restorative justice referrals, between federal crowns basically dealing with drug offences (usually simple possession) and their provincial counterparts at the HRM Youth Court. The federal crowns, whose caseload was no more than about 10% focused on young offenders, frequently stated that they did not have a good understanding of restorative justice and its protocols. They generally imposed tough standards for their referrals (looking askance at referring cases involving crimes of profit, multiple charges, and repeat offenders) and emphasized "there needs to be a significant deterrent." The variation within the provincial crowns with regard to referring youths to restorative justice and emphasizing its salience for the criminal justice system was often quite sharp too. Some of it was correlated with the Youth Court—outside metro HRM distinction but there was no apparent dominant cause. The central theme in most crown interviews was the independence of the Public Prosecution Service and crowns in determining whether or not to prosecute when police lay charges. Even outside metropolitan Halifax, perhaps largely as a result of the *YCJA*, there was much less articulation than in 2001–2004 of any crown concern about "second guessing the police." The crowns also generally supported "broad crown discretion" in assessing whether a case should be prosecuted or diverted, one reason they disliked the moratorium imposed by government.

All crowns appreciated the impact of NSRJ for reducing their workload. Youth Court crowns were especially likely to report that without the restorative justice option, their workload would increase by 30% and be unbearable without new hires. One crown commented, "They won't do away with it anytime soon. From judges on down, it's all about clearing your docket. Everybody is overworked. Anything that gets 20%–30% files off docket is a good thing." Nevertheless, many crowns conveyed a vision of limited restorative justice potential. One HRM Youth Court crown commented, "I deal with more serious files. Quite frankly

I'm more concerned with getting adult sentences on shooting files and murdering files than dealing with RJ." Crowns throughout Nova Scotia echoed the comment of one senior prosecutor that "a small number of youths account for disproportionate amount of court attention and there is little effective [criminal justice system] (or restorative justice) response to this." At the same time, most crowns acknowledged that restorative justice has been effective for minor offences and offenders—a frequent response was "I send the files to RJ and never see the case again"—but there was more controversy about whether restorative justice has been effective in reducing crime, albeit with the rider that jail does not appear to help either. Crowns generally considered that NSRJ should and would extend to adults, but would be unlikely to receive adult referrals involving serious offences.

Probation officers and Victim Services authorities were also authorized to refer cases to restorative justice agencies post-conviction and post-sentencing. In the latter case there has been very little relationship with the restorative justice agencies, since Victim Services has interpreted its mandate essentially as dealing with victims of intimate partner violence and sexual assault, the very offences that the moratorium precluded from restorative justice. Probation officers did occasionally refer cases to restorative justice, but they were reluctant to refer breaches and found no enthusiasm among offenders or victims for post-sentence healing circles. In the case of HRM, there was reportedly not a single restorative justice referral from probation in the twelve year existence of NSRJ. In many ways the relationship between probation and the restorative justice agencies manifested a kind of sibling rivalry, and that contentiousness and close identification did not change much in recent years. The onset of adult restorative justice should produce significant changes in the relationship because, in adult restorative justice, a close working relationship between the two is part of the new protocol.

Conclusion

Clearly, NSRJ has evolved over time and is now, in the views and experience of criminal justice system professionals, and in terms of the sheer number of youth cases handled, "part of the woodwork" of the Nova Scotian criminal justice system. It has attained a stable level of penetration in terms of youth cases and, with the support of most criminal justice system role players, is being expanded to include adult offences. There is, on the whole, a more positive view of the restorative justice options in the criminal justice system and an appreciation of the beneficial implications of NSRJ for facilitating more balanced workloads there. There is,

however, significant ambivalence concerning the extent to which NSRJ has been more than a limited useful tool. Few criminal justice system role players, apart from police officers, have ever attended a restorative justice session and most are uncertain about its impact on youths, though they generally acknowledge that most youths referred to restorative justice do not repeat as accused persons. The strength of the restorative justice option is commonly argued by these professionals in the context of their negative assessments about the effectiveness of conventional criminal justice system responses to youth offending.

There are many issues still to be determined. Can there be developments within the restorative justice service—and appropriate resources made available—that would enable it to deal with more complex cases rather than being limited to the modest interventions now characteristic? Is the restorative approach compatible with the domain of sentiments which shape the criminal justice system? Can the public-at-large and local leaders, whose support may well be crucial to any substantial increment in penetration of restorative justice in the criminal justice system, gain an understanding and appreciation of what has been a top-down justice initiative and encourage further use of restorative justice by criminal justice system professionals in their areas? The “bricks of the wall,” noted above, that limit the scope of restorative justice are still recognizably intact, but they have sagged some, yielding to a significant, successful social initiative in justice.

