RE-INVENTING CRIMINAL JUSTICE:

THE NINTH NATIONAL SYMPOSIUM

FINAL REPORT

Fairmont Hotel Vancouver

Vancouver, BC

January 20/ 21, 2017

The Ninth National Reinventing Criminal Justice Symposium

Re-Thinking Sentencing

Vancouver, January 20th-21st, 2017

Symposium Chair:	*The Honourable Raymond Wyant, Manitoba Provincial Court*
Symposium Facilitator:	*Mr. George M. Thomson, Senior Director, International Programs, National Judicial Institute*

Background to the Symposium

On 20 and 21 January 2017, almost one hundred leaders of the criminal justice system met in Vancouver for the ninth in a series of unique opportunities for police, corrections, defence counsel, prosecutors, judges, and government officials from across the country to meet and discuss issues relating to the criminal justice system. The primary purpose of these Symposia is to 'reinvent' the system by bringing together influential justice system participants and informed outside observers to share, off the record, candid perspectives on and solutions to the challenges of fashioning a responsive, accessible and accountable criminal justice system.

Every year, the Symposium focuses on a different aspect of reinventing and improving the criminal justice system. This year, the Ninth Symposium examined the current state of Canada's sentencing legislation and practices, and addressed the fundamental question of how to re-think sentencing.

In identifying this topic, the organizers noted that, more than 20 years after sentencing was last addressed in legislation, a number of the problems which had drawn the attention of Parliament are either unresolved or have in fact worsened. Overrepresentation of Indigenous peoples in the Canadian criminal justice system has increased since the reforms intended to address this imbalance. Provincial systems remain a 'revolving door' for far too many chronic offenders, without much evidence of effectiveness in terms of lowering recidivism. As long as these twin problems of overrepresentation and repeated system contact are unresolved, the safety and security of all Canadians are impacted.

In its Calls to Action, the Truth and Reconciliation Commission made specific reference to sentencing, calling for governments to eliminate the overrepresentation of Indigenous people in custody over the next decade, and support community sanctions that will provide realistic alternatives to imprisonment for Indigenous offenders, and called for amendments to the Criminal Code to allow trial judges to depart from mandatory minimum sentences and restrictions on the use of conditional sentences.

The question of sentencing is also timely, noting that the federal Minister of Justice has been mandated by the Prime Minister to review "sentencing reforms over the past decade to assess the changes to ensure that we are increasing the safety of our communities, getting value for money, addressing gaps and ensuring that current provisions are aligned with the objectives of the criminal justice system."

At the Symposium, presentations and discussions addressed such subjects as the structuring of discretion, restorative justice, alternatives to custody, and sentencing practices regarding Indigenous defendants. Symposium participants examined current sentencing principles and practices and, building on past Symposium deliberations, made

practical and concrete recommendations regarding substantive and procedural reform to the sentencing process.

This year's focus on sentencing followed naturally from issues considered at past Symposia in which participants had considered the complex, overlapping circumstances true of many offenders in Canada's criminal justice system, each of which has clear implications for sentencing. The Eighth Symposium in 2016 considered the challenge of vulnerable persons: information deficits from the Courts' perspective when hearing cases and arriving at an appropriate sentence, coordination and effectiveness of offender interventions pre- or post-sentence, and the promise and effectiveness of specialized Courts. Previously, in 2013 the Fifth Symposium focused on mental health, and developed a series of recommendations around better recognition of mental illness and its effects, the justice system's capacity to identify and refer offenders to needed supports and services prior to or as part of the sentencing process, and the importance of additional supports such as housing, skills, and income stability.

Viewed as an evolving policy dialogue, these past discussions together with this year's Symposium are united in their focus on improving the ability of the criminal justice system to reach the most appropriate and effective outcome in any given case. This year's theme is an acknowledgement that the challenge is most acute at the sentencing stage, given the normally complex histories and circumstances of accused persons, the particular circumstances of Indigenous people, the range of principles and expectations applicable to sentencing, and the central place occupied by questions of judicial discretion in these matters.

Purpose and structure of the Symposium

As in the past, the Symposium was designed by the Steering Committee to generate specific recommendations to be forwarded to leaders in

the criminal justice system, particularly the Minister of Justice and Attorney General of Canada. The Symposium's recommendations are also brought to the attention of other federal, provincial and territorial Ministers and Deputy Ministers, senior policy makers, judges, police chiefs, the criminal bar and others, with a view to promote and encourage timely implementation.

Continuing the tradition of preserving the maximum amount of time for frank and open discussion on the topic at hand, which was a key to the success of the previous eight Symposia, the Vancouver meeting was organized around brief panel presentations on a series of topics, each of which were followed by in-depth discussion in small, professionally diverse groups. As at past events, individual contributions were not for attribution.

Friday, January 20

Introduction

The Ninth Symposium was opened by the Chair, the Honourable Raymond Wyant, and the Facilitator, Mr. George Thomson. The opening was followed by introductory remarks of welcome from the Honourable Sean Casey, MP, Parliamentary Secretary to the Minister of Justice, the Honourable Jody Wilson-Raybould.

To provide context for the discussions to come, participants were provided with a summary of the recent work by Justice Canada to assess the views of the Canadian public on sentencing.

Based on results from the 2016 National Justice Survey, Canadians place a high value on a criminal justice system that is fair and takes an individualized approach. There is support for a more therapeutic approach to sentencing, provided that public safety and accountability are protected. There is strong support for a better balancing of four objectives (safety, accountability, rehabilitation, restorative response) and increasing fairness and individual approaches/discretion. Use of least restrictive measures, including community-based sentences where appropriate, was also supported.

Although Canadians have little knowledge of what community-based options are available, many are supportive of their use. Further, many believe that greater use of community-based sentences would have a very positive impact on crime reduction and greater efficiency in the CJS. Results also showed that once respondents were more informed, greater importance was placed on both rehabilitation and community sentences.

Sentencing reform: structuring discretion[1]

The background to a discussion on Canadian sentencing includes a number of problems on which consensus exists. These include low public confidence, a lack of transparency in relation to the reasons for a particular sentence, higher use of incarceration relative to other western jurisdictions except the US; the over-representation of Indigenous people in prison (a problem which is getting worse rather than better); significant use of short custodial sentences, which cannot achieve benefits such as protection of the public or rehabilitation (or may be counterproductive in terms of disrupting people's lives – housing, employment, family relationships, etc.); sentencing variation in the absence of guidelines; limited guidance on, and application of, existing sentencing options such as the conditional sentence; an outdated maximum penalty structure; tension between the legislature and the judiciary related to mandatory sentencing provisions and other restrictions on discretion; a lack of gender-specific sentencing considerations; and insufficient attention to mental health and substance dependency and other questions of rehabilitation.

Guidelines

One way forward from our current circumstance may be the adoption of sentencing guidelines. Participants learned that other jurisdictions have successfully structured judicial discretion to a greater extent than Canada. Some of the earlier approaches to guidelines (e.g. Minnesota) adopted a 'grid' approach using the two dimensions of crime seriousness and criminal history. By contrast, the grid approach has been explicitly rejected by many other jurisdictions in the Commonwealth. In England and Wales, Sentencing Council guidelines are offence-specific: all major crime categories have their own

[1] The background paper provided for this session -- "Sentencing Reform: Lessons from Foreign Jurisdictions and Options for Canada," Julian V. Roberts, University of Oxford, 2017 – along with a corresponding presentation, forms the basis of the description on this and the following pages.

guideline. In addition, the Sentencing Council has issued a number of generic guidelines applicable across all cases regarding e.g. reductions for guilty pleas, sentencing of multiple convictions, and sentencing of young offenders. Research on the effectiveness of this approach has been positive, in particular the reduction or elimination of racial disparity in sentences, an increase in transparency, consistency and proportionality, and an increase in public acceptance of sentences.

In Israel, the law requires a sentencing court to create its own proportionate sentence range, and then either (a) to depart consciously from the range in order to pursue the rehabilitation of the offender, or (b) consider factors defined in statute to be considered in determining the final sentence within the range. This statutory approach is similar to Scandinavian approaches.

There are three main options in adopting sentencing guidelines:

1. A national sentencing guidelines scheme, in which a national Sentencing Commission modelled on international examples would issue statutorily-binding guidelines applicable across the country with some variability allowed. Such an approach would promote consistency and proportionality, and offer promise in addressing the disproportionate numbers of Indigenous offenders in custody.
2. Judicially-derived and administered guidelines, which would address concerns related to the previous option regarding independence, separation of powers, and the need for guidelines to have judicial authority. Judicially-derived set of guidelines may adopt a 'starting point' sentence as a common point of departure for a court to commence the sentencing exercise.
3. A Sentencing Commission without guidelines or statutory authority, but mandated to promote more consistent sentencing. Such an approach, as employed in Australia, would create one or

more bodies mandated to inform, educate, and advise the judiciary and other interested persons on sentencing issues. Tools of this approach include statistical information and research on sentencing practices; gauging public opinion on sentencing; and consultation and advisory services to government, Attorneys General, and the courts.

Other approaches

Another alternative, reform of sentencing practices by statute, has been adopted in Scandinavia and in Israel. Such an approach might be applied in Canada to amend Part XXIII of the *Criminal Code* to provide greater guidance on sentence reductions for a guilty plea, create criteria concerning the use of custody, restructure the objectives of sentencing in section 718 by (e.g.) assigning deterrence and denunciation to a subordinate role, include mitigating factors, and/or strengthen the restraint provision.

A further alternative to guidelines, intended to created harmonized and better-informed sentencing, would be a sentencing database for the judiciary to refer to in order to craft proportionate sentences. Available data might include comparable sentences imposed for similar crimes locally and nationally, information about local sentencing alternatives, relevant decisions from appellate courts, and contextual information about sentencing certain categories of offender.

A final option, which could be implemented in addition to or as an alternative to guidelines, would see existing statutes which constrain discretion repealed or amended. Many of the Canadian mandatory sentences are unique in the sense that they do not permit the degree of judicial discretion necessary to impose a lesser sentence when this is appropriate. Almost all other common law mandatory sentences allow this discretion. Relaxing the mandatory sentencing provisions may well

promote public confidence, opinion surveys having shown greater support for judicial discretion than legislated penalties.

As a caveat to the above, serious consideration should be given to complexity and desirability of creating sentencing guidelines in the context of Indigenous people, because such guidelines could be understood to contradict the Supreme Court of Canada's direction in Gladue and Ipeelee that sentences need to be reflective of the particular circumstances and moral culpability of the offender.

Sentencing of Indigenous offenders

The pressing problem of Indigenous over-incarceration merits particular consideration. Indigenous Canadians make up 4% of the general population, but accounted in 2014-15 for almost 30% of all sentenced admissions to federal, provincial and territorial custody. This is a situation which has only worsened over time. A number of options are worth considering in response. These include:

- A more detailed and prescriptive amendment to s. 718.2(e), which might draw on the statutory provision in New Zealand pertaining to Maori offenders;[2]
- A separate sentencing code for Aboriginal offenders, as has been done under the YCJA for young offenders. Such an approach might be generated via a national consultation with Indigenous peoples, and could contribute to reducing the use of custody for Aboriginal offenders and enhancing the legitimacy of sentencing in Aboriginal communities.
- In the event that a sentencing guideline system were introduced, a Canadian Sentencing Commission could issue a separate

[2] Sentencing Act of 2002, § 8(i), § 26(2), § 27, § 51 (N.Z.). The Act in S. 27 provides that the offender may request the court to hear from persons identified by the offender on the personal, family, whanau, community, and cultural background of offender. See http://legislation.govt.nz/act/public/2002/0009/latest/DLM135583.html

guideline or guidelines for courts to apply when sentencing an Aboriginal offender.

Re-inventing community sentences

This session considered options Canada might consider in re-thinking the role of community sentences as well as innovations in other jurisdictions. The presentations offered participants promising strategies to overcome common barriers or impediments and enhance the use of community sentences.

A statutory approach which has been successful in reducing the reliance on incarceration in relation to young offenders in Canada is the requirement in the Youth Criminal Justice Act for strict criteria to be met. A number of strategies were proposed for consideration. These included:

- Create criteria for custody – The Youth Criminal Justice Act has contributed to a significant reduction in youth incarceration in Canada over the last 15 years by providing strict criteria before youth can be detained in custody on arrest, or sentenced to a period of incarceration. However it must be recognized that indigenous youth have not benefited to the same extent as non-indigenous youth.
- Introduce a presumption against imposition of short prison sentences, as is being considered in Scotland.
- Expand the use of the conditional sentence. They currently make up 3% of sentences. The closest equivalent in England accounts for 15% of all sentences.
- Development of 'penal equivalents' – clarify that a 90 day prison sentence might be considered the equivalent of, for example, a 12 month conditional sentence or an 18 month community penalty.

Barriers to greater use of community sentences include:

- Court perceptions of a lack of resources in the community, *i.e.* concerns over the number and location of available placements; doubts about the extent of available programming; and concerns over resource capacity to provide effective supervision for those serving community sentences.
- Limited information sources when considering the context and history of the offender, available support for that person in the community, and/or other mitigating circumstances, including *Gladue* reports.
- The enduring impact of criminal records and application of the 'step-up' principle in sentencing.
- Stigma or negative public opinion with respect to an offender or social group.
- The tendency to err on the side of caution regarding community safety, sometimes to a degree unwarranted by the offender's actual circumstances.
- The perception, based on prior breaches of conditions, that a community sentence is unlikely to be served successfully.
- Lack of time available to the court to explore relevant information, and in doing so to develop credible alternatives to custody.

Restorative justice: strategies and challenges

The final substantive session of the first day addressed the area of restorative justice (RJ).

Earlier in the day, participants had received a summary of recent Department of Justice research into Canadians' attitudes on criminal justice reform, including views on restorative justice. In that research, survey respondents and focus group participants had in general

expressed openness to RJ, expressing a wish to know more. Recognizing that for Symposium participants too experience with RJ was relatively rare, in this session for comparative purposes participants considered the legislative options regarding restorative justice available in New Zealand, and how they are working to produce better outcomes for offenders and victims.

As set out in presentation materials,[3] restorative justice (RJ) in New Zealand is a voluntary process within the criminal justice system that can enable victims to receive apologies, answers and reparation from the offender, normally involving a facilitated face to-face conference between the victim and offender. In New Zealand, RJ usually occurs prior to sentencing and only if an offender pleads guilty. The presiding judge refers the case to a community-based restorative justice provider who determines the suitability of the case and whether the offender and victim wish to participate before the conference can take place.[4]

RJ in New Zealand has its origins in the Māori tradition of *utu*, a practice where wrongs were put right based on the severity of the offence and the relative standing of the victim and offender. In 1989, family group conferences (a practice similar to RJ) were introduced first in the child welfare system and then made mandatory for virtually all cases in the youth justice system. 2002 saw statutory recognition of RJ under the Sentencing Act, Parole Act, and Victims' Rights Act, and in 2014 the Sentencing Act was amended to include the mandatory requirement

[3] New Zealand Ministry of Justice, 2011, "Victim satisfaction with restorative justice: A summary of findings"; New Zealand Ministry of Justice, 2013, "Reoffending Analysis for Restorative Justice Cases 2008-2013: Summary Results"; New Zealand Ministry of Justice, 2016, "Restorative Justice in New Zealand" (graphic).

[4] Indigenous Restorative Justice Initiatives in Ontario are generally part of a diversion process. The accused person does not plead guilty, but instead signs a document acknowledging responsibility for the offence. The criminal matter is stayed or withdrawn either once the matter has been approved for RJ or following the completion of RJ. Victims are not always included in RJ programs and in fact many programs specifically exclude victims from Council processes. The push for victim inclusion in NZ therefore is important to understand as a contextual difference between that country and the Canadian context.

for courts to adjourn criminal proceedings to consider RJ. The criteria that need to be met are (a) that the offender appears in district court before sentencing and has pleaded guilty, (b) there is at least one victim, (c) RJ has not previously been applied, and (d) appropriate RJ is available. Suitability for RJ is then assessed by the service provider.

Highlights of findings from New Zealand's experience include:

- Over the following year, a 15% lower reoffending rate, and 26% fewer offences per offender, for those who participated in RJ compared to other offenders, with even lower rates in both measures for Māori offenders and young offenders. In general, these relatively lower reoffending rates persisted, but were less pronounced in comparison, over a three-year follow-up period.
- Restorative justice appeared to help reduce reoffending across certain offence types including violence, property abuse/damage and dishonesty.
- Benefits to victims are an important intended outcome for restorative justice; indeed these benefits are often seen as more important than the impact on reoffending. Analysis of data from a survey of participants revealed that 77% of victims were satisfied with their overall experience of restorative justice, before, during and after the conference.
- The survey also found that 80% of victims would recommend restorative justice to others. The four factors found to best predict overall satisfaction were (a) the victim's concerns and questions being treated seriously at the conference, (b) the facilitator being fair to everyone at the conference, (c) the offender's completion of the plan, and (d) the facilitator contacting the victim after the conference.

Keynote address

At the Symposium dinner, Debra Sparrow of the Musqueam First Nation welcomed participants to the traditional territory of the Musqueam people. The evening keynote address, on the subject of justice reform in the context of the Indigenous relationship to Canada, was offered by Grand Chief Edward John of Tl'azt'en First Nation, special advisor to the British Columbia Ministry of Children and Family Development, and formerly chair of the United Nations Permanent Forum on Indigenous Issues.

Saturday, January 21

Meeting the needs of Indigenous offenders

The topic of the final substantive session focused on sentencing of Indigenous offenders. A multidisciplinary approach to sentencing requires strong linkages between the courts and government and community resources, to ensure that contextual information regarding the accused is current and of good quality, and to ensure that judges have appropriately-resourced alternatives on which to base their decisions. With respect to Indigenous people before the courts, since 1999 the need for such linkages has been made plain by the Supreme Court of Canada in *R. v. Gladue* and related decisions. Panelists addressed the question of how the justice system might reach a reasonable level of compliance with *Gladue*.

In *R.* v. *Gladue,* the Supreme Court[5] addressed the over-representation of Indigenous people in the criminal justice system and, in light of s. 718.2 (e), found that judges should take judicial notice that systemic background factors "figure prominently in the causation of crime by aboriginal offenders," such factors including systemic discrimination and hardships which are social, economic, educational, health, or mental health related. Judges have a duty to "inquire into the causes of the problem and to endeavour to remedy it, to the extent that a remedy is possible through the sentencing process." Thirteen years later, in *R v. Ipeelee*, the Court reiterated its earlier finding, and noted that the incarceration rates of Indigenous offenders had worsened since 1999. Since *Ipeelee*, incarceration of Indigenous people has only continued to grow.

[5] The summary of *Gladue* on these pages draws on the factsheet prepared by Aboriginal Legal Services, Ontario, 2015, "Overview of the *Gladue* Principles in Criminal Proceedings."

Gladue requires judges to consider the unique individual background factors of the person, in the context of the legacy of colonialism and systemic discrimination, that may have played a part in bringing the Indigenous offender before the court; and culturally relevant sentencing procedures and sanctions, with particular focus given to alternatives to incarceration, such as restorative justice models. As such, the ruling aligns with the principle of proportionality in sentencing. As an Indigenous offender's background factors in the context of systemic discrimination and the legacy of colonialism may reduce their degree of responsibility; failing to consider *Gladue* principles in sentencing an Indigenous offender may result in a disproportionate sentence. *Gladue* also implies that greater weight be placed on principles of restorative justice and rehabilitation.

It is an error of law when *Gladue* is not considered by the court. In some jurisdictions, *Gladue* reports may be requested and submitted to the court to provide information about the accused and relevant *Gladue* factors. These reports summarize the Indigenous accused person's background and unique circumstances in the context of the legacy of colonialism and systemic discrimination, as well as needs, risks, barriers and community options. Significant expertise is required to prepare such reports accurately and consistently. In addition, resource requirements and the sheer volume of Indigenous persons before the courts make the comprehensive provision of *Gladue* reports a significant challenge, if not impossible. *Gladue* reports in Ontario may take as much as two months to prepare and are normally available only where the Crown is seeking a custodial sentence of 90 days or more. Thus, alternative methods are often required to bring relevant *Gladue* information before the courts.

The situation with respect to Canada's Indigenous peoples and criminal process, whether in terms of specialized courts designed to deal specifically with Indigenous offenders, or the availability of resources to

prepare Gladue reports of consistent quality, is highly variable across the country. In Ontario, significant new investments have been made in specialized courts, *Gladue* writing resources, and 'aftercare' court workers. In addition, the government has established the Indigenous Justice Division, which is currently staffed with over 85% Indigenous staff members who provide significant expertise in the application of Gladue and the impact of criminal law on Indigenous peoples. Due to these factors, Ontario is arguably the leading jurisdiction in Canada with respect to compliance with the Court's related rulings. However, *Gladue* reports are not available for Indigenous persons involved in the criminal justice system in all judicial districts in Ontario, and the situation is worse across the remainder of the country, including British Columbia which was of course the original province of the Gladue case.

Recommendations

Participants, through small group discussions and plenary dialogue, arrived at the following set of recommendations.

1. Recognizing the growth in Indigenous over-representation since 1999, Canada's criminal justice system must act decisively to comply with the Supreme Court's rulings on sentencing of Indigenous offenders, including new funds, national standards, and meaningful Indigenous leadership and involvement in all aspects of implementation.

   In every step listed below, there must be an emphasis that Indigenous people, methodologies and laws need to inform the development and implementation of any guidelines, policies and procedures. To comply with the *Gladue* decision, steps and initiatives to achieve this goal should include:

   a. A mechanism to enable and encourage people to **self-identify as Indigenous to the courts** should be developed.

   b. The requirement that *Gladue* reports be **created by Indigenous organizations and staff members**.

   c. Federal government **funding to ensure national accessibility** of *Gladue* reports, training for those who prepare reports and those who use them, and creation of a knowledge-base about communities that will be the basis for *Gladue* reports relating to persons from that community.

   d. **National standards**, accreditation, definitions and framework for developing *Gladue* reports, including the

flexibility to enable Indigenous principles and systems, including oral traditions to be respected in the creation of these reports.

e. Development and implementation of **guidelines for the sentencing process** when an Indigenous offender is involved, including use of *Gladue* reports, and guidelines for corrections and other criminal justice system participants regarding the implementation of the recommendations included in the *Gladue* report.

f. In situations where adequate Gladue reports are not available, courts should have the **remedy of a stay of proceedings** in appropriate circumstances.

g. A **national evaluation framework** to track the success of this approach to the use of *Gladue* reports, including reporting on preferred outcomes (*e.g.* individual satisfaction, reduced incarceration, access to reports, etc.)

h. Community **resourcing of support plans** that come from *Gladue* reports, including first contact with the justice system right through to the end of the administration of sentence, as well as tools to support implementation.

Other necessary steps and initiatives should include:

i. Recognition of **Indigenous leadership** and the need for greater engagement of Indigenous communities in justice processes, incorporating Indigenous legal and pedagogical principles; an engagement model based on travel to Indigenous communities to build relationships and ask for their ideas; and support to Indigenous communities to

revitalize Indigenous justice approaches, and to support the creation of implementation plans and structures so that justice issues can be appropriately addressed in Indigenous communities.

j. Direction of resources towards professional **education regarding Indigenous peoples and the criminal justice system**, including training on Indigenous cultural competency/cultural safety.

k. Investment in our ability to **divert people to supportive programming** before the courts are engaged, through expanding police knowledge and capacity to divert, support for health and social services and resources, and building additional community capacity; RJ can support both an investment in supportive programming as well as community coordination models such as the 'Hub' approach.

l. Determining in what circumstances the **YCJA model** is effective for Indigenous youth, or could be adjusted in order to be more effective.

2. The government of Canada should consider the creation of a national Sentencing Commission to develop sentencing guidelines, provide education, evaluation, and research, and build public confidence in the criminal justice system.

Attributes of such a Commission and its products to be considered might include:

a. An approach which **respects the importance of judicial independence** with one possible way of doing so being the

model in England and Wales of a judge-led commission, but retaining the breadth of membership noted in (b) below.

b. **Breadth of representation** as an important element, including judicial, Indigenous, and community representation, and victims' services organizations.

c. The **use of categories** (*i.e.* levels of seriousness), but not a grid; and specific statutory factors such as collateral consequences to be considered when determining sentence, with specific direction on how to use those factors (*e.g.* credit for an early plea).

d. Inclusion of **discretion to depart from guidelines**.

e. The requirement that **guidelines should be evidence-based**.

f. Consideration of the **applicability to the adult system of the YCJA approach** to sentencing.

3. The government of Canada should undertake to amend the fundamental purposes and objectives of sentencing found in the *Criminal Code*.

The amendment(s) should achieve the following recommended changes:

a. Inclusion of the **general principle of restraint**.

b. Endorsement of **restorative justice principles** and processes.

c. Support for **individualized sentencing**.

Further to this work, the government of Canada should conduct research and consult on the utility of retaining **general deterrence** as a sentencing objective within the *Criminal Code*.

4. The government of Canada should enact a set of legislative measures, and introduce related guidelines, to support the reform of sentencing with particular regard to discretion in the use of custody and of conditional sentences.

This recommendation includes the following steps:

a. The **repeal of mandatory minimums** currently in statute, except for murder, or alternatively, if other mandatory minimums are retained, provide for clear discretion to depart from the minimums in appropriate circumstances.

b. Consider the introduction of a presumption **against custodial sentences for certain offences**, such as administration of justice offences.

c. Consider a prohibition of, or a presumption against**, short custodial sentences** (such a step would require consideration of possible unintended consequences such as sentence inflation); alternatively, consider the introduction of strict statutory criteria before short custodial sentences could be imposed.

d. Clarify **how credit should be given for time spent** remanded in pre-trial custody.

e. The review, restoration and **broadened availability of conditional sentences**.

f. Similar to the YCJA legislative approach, the creation in the adult system of a **ladder of alternatives to incarceration** to be considered prior to the use of custody. This might need adaptation to meet the needs of Indigenous communities.

g. The introduction of **legislated mitigating factors**.

h. Broaden the **availability of absolute and conditional discharges**, while ensuring that they are not used inappropriately.

i. Introduction of **controls on conditions that can be attached to community sentences**, to ensure they are realistic, relevant and necessary, and to give judges the power to adjust conditions – applicable at sentencing, bail and probation.

j. Introduction of a requirement for the court to **consider the real impact of a sentence** during sentencing, including the impact on the offender and on others, including the offender's family.

k. Exploration of specifying "**penal equivalents"**, where (for example) a 90-day prison sentence might equal a 12-month conditional sentence, which in turn might equate to an 18-month community penalty.

5. The government of Canada, together with provincial and territorial governments, should take legislative and other steps to embed restorative justice into the criminal justice system.[6]

This recommendation includes the following steps:

a. **Legislative support for restorative justice**, embedded in the Principles section of the Criminal Code.

b. Consideration of application of the **New Zealand model**, but as a system with multiple points of entry (pre-charge, post-charge and post-conviction); consideration also of Canadian models such as the Nova Scotia and Manitoba models, and especially of the Ontario model which funds RJ programs that are designed and delivered by Indigenous communities and organizations.[7]

c. Empowering courts to **order a referral** to a restorative justice process if the accused consents, and also allowing victims to request a restorative justice approach.

d. Development of a restorative justice approach which focuses on **the victim, the offender and the community**.

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[6] In considerations of restorative justice, it is important to clarify the difference between government-led restorative justice approaches (which borrow concepts from Indigenous legal systems but implement them within the Canadian criminal justice paradigm) and Indigenous community justice processes that are designed and delivered by Indigenous communities and organizations for Indigenous people in accordance with Indigenous law. The latter is increasingly considered the most effective model for Indigenous people.

[7] It is important to keep in mind that Maori legal systems differ from those of Indigenous communities within Canada, and so although important lesson can be learned from the New Zealand experience, RJ models in Canada, particularly those aimed to be responsive to Indigenous people, need to be reflective of Indigenous Legal Principles and Systems of Indigenous communities within Canada.

e. **Education about the value of restorative justice** processes to build community support for restorative justice, including education on its potential benefits for victims, tailored to justice system professionals and to the public.

f. Establishment of **standards of eligibility** including ways in which the process can still occur where there is no victim, or where the victim is not involved.

g. Creation of a strong **community partnership base**.

h. **Certification** against established standards, and training for those who deliver restorative justice process.

i. Consideration of **processes for special case categories** not normally considered appropriate for restorative justice, such as intimate partner violence.

j. Respect and support for **Indigenous restorative justice approaches** for Indigenous people who are involved in the criminal justice processes.[8]

k. Commitment to **data-gathering and evaluation** regarding the effectiveness of restorative justice approaches.

[8] Some participants noted that such processes are most effective when they are designed and delivered by Indigenous communities and organizations for Indigenous people; and that In addition, it would be inappropriate for non-Indigenous people with expertise in Canadian criminal justice or government based restorative justice approaches to determine standards, procedures and appropriate training for Indigenous community justice processes that are based on Indigenous laws.

6. The government of Canada, together with provincial and territorial governments, should take legislative and other steps to encourage the use of community sentences.

This recommendation includes the following steps:

a. Introduction of a **presumption in favour of community sentences**, or guidelines to encourage their use, or requirement to provide reasons for rejecting a community sentence.

b. Consideration of the **applicability to the adult system of YCJA sentencing** process that supports custody as last resort.

c. Innovation in the system's approach to **administration of justice offences**, such as subjecting violations to administrative rather than criminal process.

d. Timely **access to information** to support community sentences, *e.g.* assistance of system navigators, or sharing of information as is done in problem-solving courts.

e. **Innovative community sentences** such as use of alternatives carrying no criminal record, and longer remands prior to sentencing for rehabilitative purposes.

f. Stronger legislative direction in **support of community sentencing for Indigenous offenders**.
g. Greater **support to communities and community agencies** to develop programs supporting community sentences.

h. Expansion of **access to programs** and plans that require approval under s.720 of the *Criminal Code*.

i. **Greater resourcing** to support community alternatives, access to justice, legal aid, and the litigation of test cases.